

Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations Pursuant to Executive Order 11491, As Amended

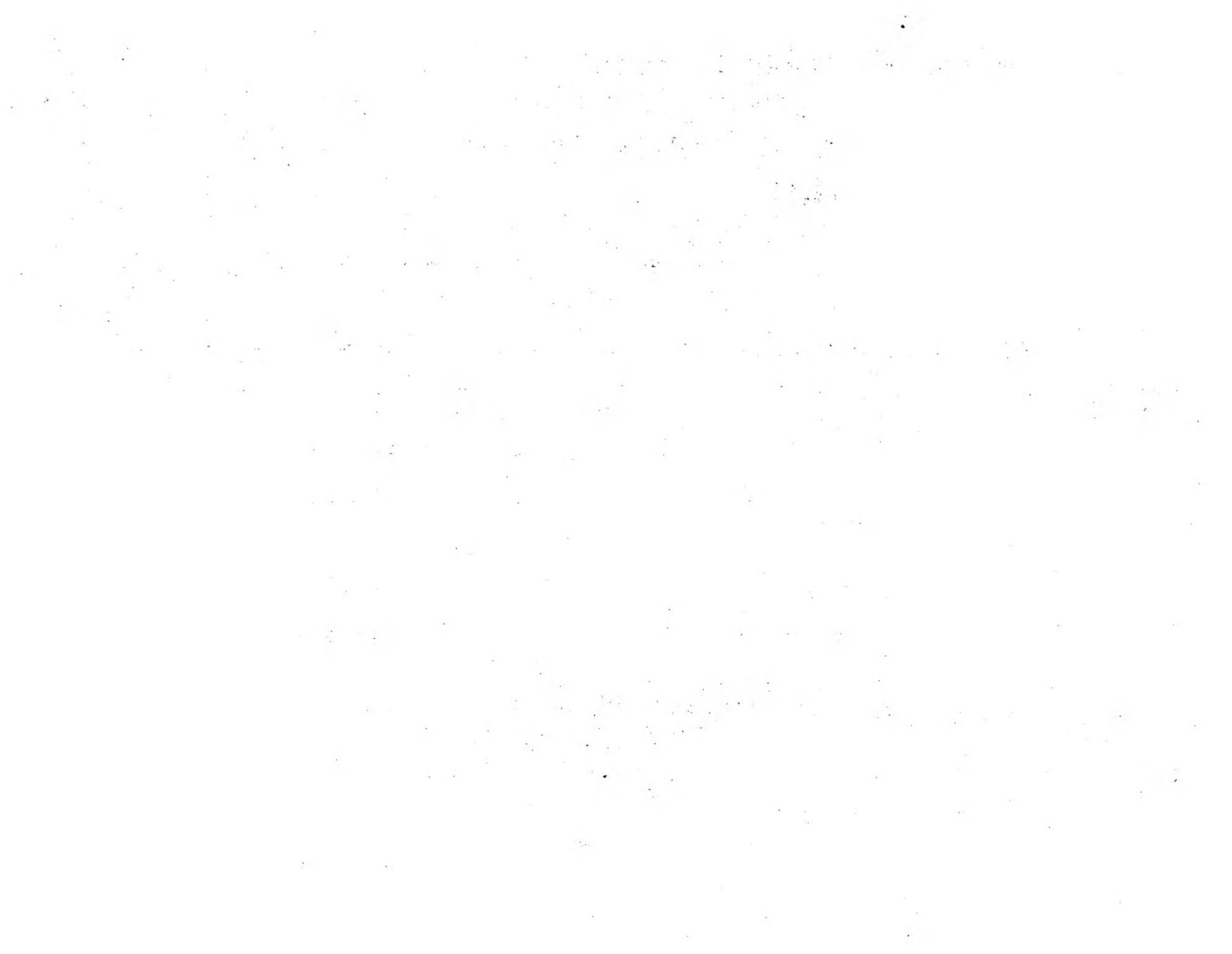


Volume 8
January 1, 1978 through December 31, 1978

This Volume Includes Assistant Secretary Decisions Nos. 960-1179

Federal Labor Relations
Authority

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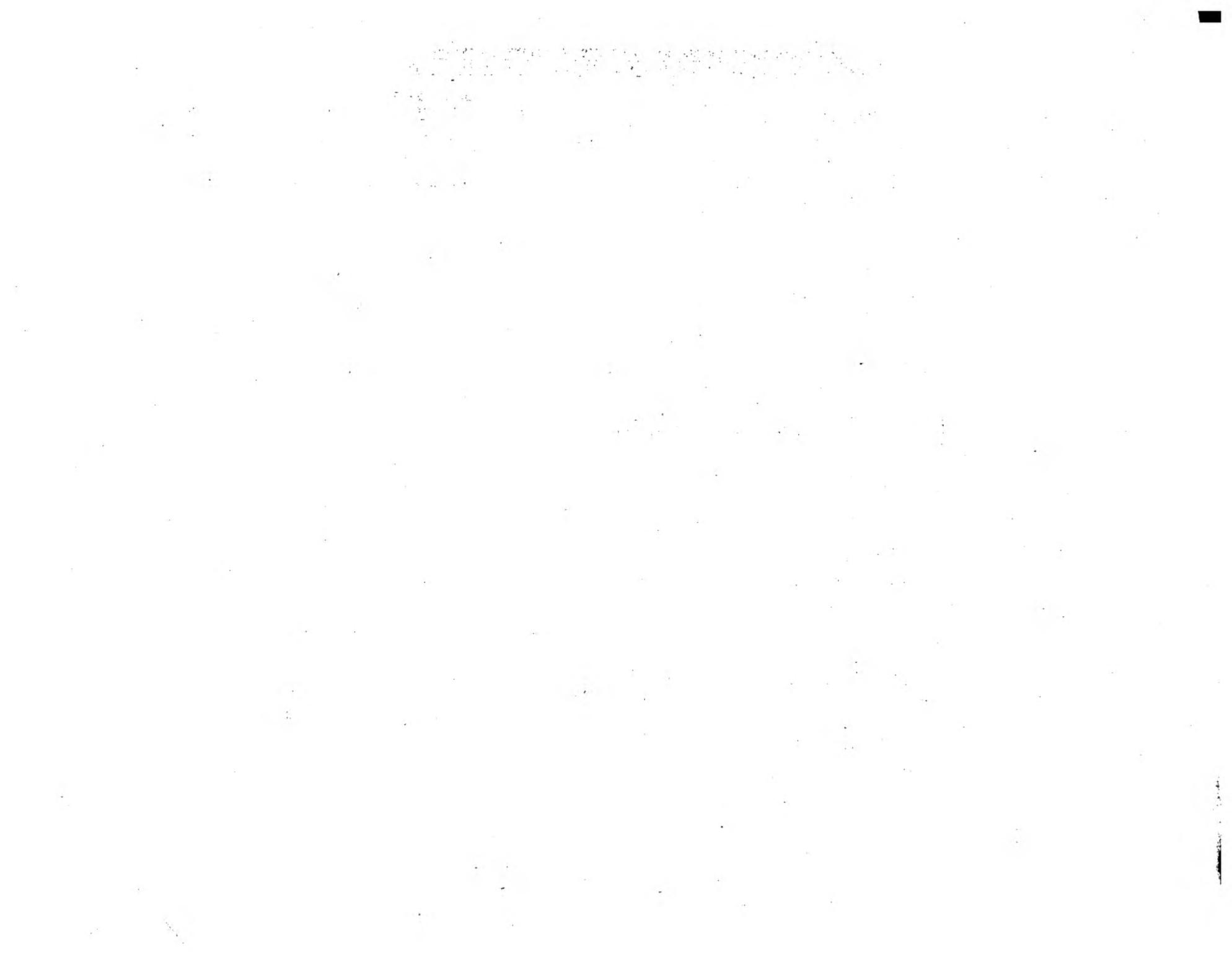


PREFACE

This Volume of Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations Pursuant to Executive Order 11491, As Amended, covers the period from January 1, 1978, through December 31, 1978. It includes: (1) Summaries of Decisions and the full text of Decisions of the Assistant Secretary after formal hearing or stipulated record (A/SLMR Nos. 960-1179); and (2) Reports on Rulings of the Assistant Secretary (originally referred to as Reports on Decisions), which are published summaries of significant or precedent-setting rulings by the Assistant Secretary on requests for review of actions taken at the field level (no Reports on Rulings of Assistant Secretary issued during this period).

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NUMERICAL TABLE OF DECISIONS OF THE ASSISTANT SECRETARY
SHOWING DATE ISSUED, AREA OFFICE CASE NUMBER(S) AND TYPE OF CASE

<u>A/SLMR NO.</u>	<u>CASE NAME</u>	<u>DATE ISSUED</u>	<u>AREA OFFICE CASE NO(S).</u>	<u>TYPE OF CASE*/</u>	<u>PAGE</u>
960	Social Security Administration, Bureau of Hearings and Appeals	1-6-78	22-7903	CA	33
961	Department of the Treasury, Internal Revenue Service, St. Louis District Office, St. Louis, Missouri	1-6-78	60-4945	CA	36
962	Department of the Treasury, Internal Revenue Service, Chicago District Office, Chicago, Illinois	1-6-78	50-13142	CA	40
963	Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Region V-A, Chicago, Illinois	1-6-78	50-15446	CA	49
964	Defense Mapping Agency, Defense Mapping Agency Hydrographic Center	1-10-78	22-7623	GA	54

<u>*/</u>	<u>TYPE OF CASE</u>
AC	= Amendment of Certification
CU	= Clarification of Unit
DR	= Decertification of Exclusive Representative
NCR	= National Consultation Rights
OBJ	= Objections to Election
RA	= Certification of Representative (Activity Petition)
RO	= Certification of Representative (Labor Organization Petition)
S	= Standards of Conduct
GA	= Grievability-Arbitrability
UC	= Unit Consolidation
CA	= Complaint Against Agency
CO	= Complaint Against Labor Organization

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965	American Federation of Government Employees, Local 2578, AFL-CIO, and National Archives and Records Service	1-11-78	22-6621 22-6648	CO CA	61
966	Utah Army National Guard, Salt Lake City, Utah	1-11-78	61-3236	CA	69
967	Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia	1-11-78	22-07352	CA	79
968	Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia	1-11-78	22-06884	CA	83
969	Pennsylvania Army and Air National Guard	1-13-78	20-5945	CA	86
970	Navy Exchange, Naval Air Station Memphis, Millington, Tennessee	1-17-78	41-5386	AC	93
971	Sixth National Bank Region, Office of the Comptroller of the Currency	1-17-78	40-7816	RO	95
972	United States Department of the Treasury, Internal Revenue Service, Cleveland, Ohio	1-19-78	53-09512	CA	98
973	U.S. Army Military District of Washington, Fort Myer, Virginia	1-19-78	22-07956	CU	110
974	Department of the Treasury, Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin	1-27-78	51-3506	CA	112
975	Internal Revenue Service and IRS, Atlanta District Office	1-31-78	40-7843	CA	116

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976	Veterans Administration, Regional Office, Honolulu, Hawaii	2-2-78	73-902	CA	129
977	U.S. Department of Agriculture, Ozark - St. Francis National Forests, Russellville, Arkansas	2-2-78	64-3636	CA	135
978	U.S. Customs Service, Region VIII, Treasury Department, San Francisco, California	2-2-78	71-4179	CA	142
979	Social Security Administration, Bureau of Hearings and Appeals	2-3-78	22-7581	CA	148
980	Veterans Administration Health Care Facility, Montrose, New York	2-3-78	30-7713	RO	153
981	Picatinny Arsenal and the Project Manager for Nuclear Munitions, Dover, New Jersey	2-3-78	32-04793 32-04800 32-4838	CA CA CA	157
982	Social Security Administration Branch Office, Angleton, Texas	2-6-78	63-7128	CA	170
983	Department of the Treasury, Internal Revenue Service, Fresno Service Center	2-6-78	70-5473	CA	177
984	Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center	2-6-78	30-07247	CA	187
985	General Services Administration, Region 10, Auburn, Washington	2-9-78	71-4081	CA	192

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986	U.S. Coast Guard Support Center, Portsmouth, Virginia	2-9-78	22-07895	AC/CU	197
987	Department of the Treasury, Internal Revenue Service and IRS Chicago District, Chicago, Illinois	2-15-78	50-13134	CA	200
988	Naval Training Center, Orlando, Florida	2-22-78	42-3865	CU	202
989	Internal Revenue Service, Memphis Service Center	2-22-78	41-5028	CA	205
990	U.S. Merchant Marine Academy, Ship's Service Organization	2-23-78	30-07468	CU	218
991	U.S. Customs Service, Washington, D.C.	2-23-78	22-06810	UC	220
992	Federal Aviation Administration	3-1-78	22-7440	CA	227
993	Smithsonian Institution, National Zoological Park	3-1-78	22-7450	CA	233
994	Headquarters, U.S. Army Materiel Development and Readiness Command	3-1-78	22-06872	CA	239
995	Department of the Treasury, Internal Revenue Service, New Orleans District	3-2-78	64-3607	CA	243
996	General Services Administration, Region 3, Washington, D.C.	3-2-78	22-7414	CA	249
997	U.S. Environmental Protection Agency, Region III	3-2-78	20-06137	CA	257

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998	Internal Revenue Service	3-3-78	22-7717	CA	264
999	Environmental Protection Agency, Region III	3-3-78	20-06138	CA	273
1000	Sheppard Technical Training Center, 3750th Air Base Group, Sheppard Air Force Base, Texas	3-3-78	63-7369	CU	282
1001	Internal Revenue Service	3-7-78	22-07579	CA	285
1002	Department of the Interior, U.S. Government Comptroller for Guam, Trust Territory of the Pacific Islands	3-8-78	73-938	RO	294
1003	Department of the Navy, Puget Sound Naval Shipyard	3-9-78	71-3805	CA	298
1004	Internal Revenue Service, Chicago District Office	3-9-78	50-15459	CA	308
1005	Department of the Army, Fort McPherson, Georgia	3-9-78	40-6126	CU	313
1006	U.S. Army, Europe and Seventh Army; and Army and Air Force Exchange Service, Europe	3-9-78	22-6599 22-6601	CA CA	315
1007	Department of the Treasury, Internal Revenue Service, Greensboro District Office	3-14-78	40-7829	CA	329
1008	Alabama State Military Department	3-17-78	40-8008	RO	339
1009	American Federation of Government Employees, AFL-CIO, Local 32	3-21-78	22-7567	S	342

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1010	Federal Aviation Administration, Oakland Airway Facilities Sector, Oakland, California	3-21-78	70-5721	RO	355
1011	United States Department of the Air Force, 15th Air Base Wing, Hickam Air Force Base, Hawaii	3-22-78	73-933	CA	359
1012	Department of the Navy, Office of Civilian Personnel	3-22-78	22-07332	CA	364
1013	The Smithsonian Institution	4-11-78	22-07524	RO	367
1014	Internal Revenue Service, Atlanta District Office, Atlanta, Georgia	4-11-78	40-7435	CA	370
1015	National Labor Relations Board, Region 17, and National Labor Relations Board	4-11-78	60-4909	CA	378
1016	Veterans Administration	4-11-78	22-07730	UC	392
1017	Occupational Safety and Health Review Commission	4-12-78	22-7751	CA	398
1018	Occupational Safety and Health Review Commission	4-12-78	22-08069	CU	408
1019	Naval Air Test Center/Naval Air Station, Patuxent River, Maryland	4-13-78	22-08279	RO	410
1020	Department of the Navy, Naval Weapons Station, Concord, California	4-13-78	70-5700 70-5701	CA CA	413
1021	Department of Transportation, Federal Aviation Administration, Aeronautical Center, Oklahoma City, Oklahoma	4-13-78	63-7445	UC	418

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1022	Department of Health, Education and Welfare, Social Security Administration, Bureau of Retirement and Survivor's Insurance	4-13-78	22-07777	CA	421
1023	Department of the Air Force Systems Command, United States Air Force Regional Hospital, Eglin Air Force Base, Florida	4-18-78	42-4030	RO	428
1024	Veterans Administration, North Chicago Veterans Hospital, North Chicago, Illinois	4-21-78	50-15408 50-15412	CA CA	430
1025	Department of the Army, U.S. Army Materiel Development and Readiness Command	4-25-78	22-07400	CA	457
1026	Mare Island Naval Shipyard, Vallejo, California	4-25-78	70-5749	CA	462
1027	Internal Revenue Service and Internal Revenue Service, South Carolina District Office	4-25-78	40-7488	CA	467
1028	Social Security Administration, Bureau of Hearings and Appeals	4-26-78	22-07576	CA	472
1029	Chemical Systems Laboratory and Armament Research and Development Command, Chemical Systems Laboratory Support, Aberdeen Proving Ground, Maryland	4-26-78	22-08530	CU/AC	477
1030	Department of the Navy, Navy Commissary Store Region, Norfolk, Virginia	4-26-78	22-07783	CA	480

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1032	Lake Central Region, Bureau of Outdoor Recreation, Department of the Interior, Federal Building, Ann Arbor, Michigan	4-27-78	52-07336	RO	491
1033	Department of the Navy, Portsmouth Naval Shipyard	5-1-78	31-10903	RO	494
1034	U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, New Orleans, Louisiana	5-5-78	64-3612	CA	497
1035	Department of the Navy, Naval Communication Area, Master Station, Eastpac, Honolulu	5-9-78	73-961	CA	503
1036	Department of Health, Education and Welfare, Social Security Administration, Quality Assurance Field Staff, Northeastern Program Service Center, Flushing, New York	5-10-78	30-7652	CA	508
1037	Consumer Product Safety Commission, Philadelphia Area Office	5-10-78	20-06252	CU	510
1038	United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine	5-11-78	22-08076	CU	512
1039	Department of Transportation, Federal Aviation Administration, William P. Hobby Airport Traffic Control Tower (TRACAB), Houston, Texas	5-11-78	63-7028	CA	514

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1041	United States Court of Military Appeals, Washington, D.C.	5-12-78	22-07952	RO	534
1042	Department of the Treasury, Internal Revenue Service and IRS Chicago District	5-12-78	50-15447	CA	536
1043	Department of the Air Force, HQ 2750th Air Base Wing, Wright-Patterson Air Force Base, Ohio	5-12-78	53-09517	CA	541
1044	Department of the Air Force, Newark Air Force Station, Aerospace Guidance and Metrology Center, Newark, Ohio	5-16-78	53-09734 53-09748 53-09749	GA GA GA	545
1045	Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms	5-16-78	53-09582	CA	550
1046	Federal Aviation Administration, Alaska Region	5-17-78	71-4260	CA	566
1047	Federal Aviation Administration, FAA Aeronautical Center, Oklahoma City, Oklahoma	5-17-78	63-7302	CA	571
1048	U.S. Department of the Treasury, U.S. Customs Service, Region VI, Houston, Texas	5-17-78	63-6892	CA	576
1049	Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms	5-18-78	22-07962 37-01854	CA CA	586

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1050	U.S. Army Mortuary, Oakland Army Base, Oakland, California	5-18-78	70-5223	DR	590
1051	Veterans Administration, Veterans Administration Hospital, Lexington, Kentucky	5-19-78	41-5415	CA	596
1052	Internal Revenue Service, Ogden Service Center, and Internal Revenue Service, et al.	5-22-78	22-6506	CA	603
1053	Department of the Treasury, Internal Revenue Service, Brookhaven Service Center	5-22-78	30-6612	CA	612
1054	Navy Exchange, Naval Training Center, San Diego, California	6-5-78	72-6412	CA	621
1055	General Services Administration, National Archives and Records Service	6-6-78	22-07748	CA	629
1056	General Services Administration, Region IX	6-6-78	70-5624	CA	637
1057	Department of the Air Force, Grissom Air Force Base, Peru, Indiana	6-7-78	50-13120	CA	640
1058	Department of the Army, Headquarters, United States Army Health Services Command, Kenner Army Hospital, DGSC Health Clinic, Richmond, Virginia	6-7-78	22-08021	RO	653
1059	National Association of Government Employees, Local 12-69-R	6-8-78		S	656

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1060	Marshall Space Flight Center, Marshall Space Flight Center, Alabama	6-8-78	40-7474	GA	659
1061	Department of the Treasury, U.S. Customs Service, Region VI, Houston, Texas	6-9-78	63-6902	CA	669
1062	Department of Transportation, Federal Aviation Administration, Metropolitan Washington Airport Service, Dulles International Airport; and Director, Metropolitan Washington Airports, Federal Aviation Administration	6-13-78	22-07517	CA	674
1063	Army and Air Force Exchange Service, Sheppard Air Force Base, Texas	6-21-78	63-7425	RO	689
1064	Pennsylvania Army and Air National Guard	6-21-78	20-06155	CA	692
1065	Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia	6-21-78	22-08051	CA	697
1066	U.S. Customs Service, Region VII, Los Angeles, California	6-23-78	72-6746	CA	703
1067	General Services Administration, Regional Office, Region 4	6-23-78	40-6038	RO	718
1068	Department of Transportation, National Highway Traffic Safety Administration	6-26-78	22-08504	CU	720

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1070	Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, Chicago, Illinois	6-27-78	50-15436	CA	724
1071	Environmental Protection Agency, Environmental Research Laboratory, Narragansett, Rhode Island	6-29-78	31-11018	DR	730
1072	Department of Transportation. Federal Aviation Administration, Federal Aviation Administration Academy, Aeronautical Center, Oklahoma City, Oklahoma	6-29-78	63-7895	RO	734
1073	Department of Transportation, Federal Aviation Administration	7-5-78	22-07949	CA	737
1074	Internal Revenue Service, Kansas City, Ogden, Chamblee, Philadelphia, Austin, Covington, Fresno and Brookhaven Service Centers, Detroit Data Center and Martinsburg National Computer Center	7-5-78	22-07905	CA	741
1075	General Services Administration, National Archives and Records Service	7-10-78	22-07754	CU	746
1076	Federal Election Commission	7-11-78	22-8591	RO	750
1077	Veterans Administration Hospital, Canandaigua, New York	7-12-78	35-4753	RO	756
1078	Texas Air National Guard, 149th TFGP TexANG, Kelly Air Force Base, Texas	7-12-78	63-7440	CA	758

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1079	Internal Revenue Service, National Office, Office of International Operations	7-13-78	22-08509	CA	764
1080	U.S. Department of Health, Education and Welfare, Social Security Administration, Bureau of Data Processing, Albuquerque Data Operations Center, Albuquerque, New Mexico	7-13-78	63-7603	CA	769
1081	Internal Revenue Service and Internal Revenue Service, South Carolina District Office	7-14-78	40-8063	CA	778
1082	Department of Health, Education, and Welfare, Social Security Administration, Region V-B, Chicago, Illinois	7-20-78	52-7445	UC	784
1083	Veterans Administration Hospital, Lincoln, Nebraska	7-21-78	60-5180 60-5404	CA CA	787
1084	Ogden Air Logistics Center, Hill Air Force Base, Utah	7-21-78	61-3771	CA	791
1085	Pennsylvania Army and Air National Guard	7-21-78	20-06232	CA	795
1086	Federal Aviation Administration, Atlanta Airway Facilities Sector, Atlanta, Georgia	7-25-78	40-8442	RO	801
1087	Pennsylvania Army and Air National Guard	7-25-78	20-06214	CA	804
1088	Department of the Air Force, Davis-Monthan Air Force Base, Tucson, Arizona	7-25-78	72-6864	CA	809

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1090	Veterans Administration Hospital, Minneapolis, Minnesota	7-26-78	51-4260	CA	823
1091	Internal Revenue Service	7-26-78	22-7717	CA	828
1092	Internal Revenue Service and Brookhaven Service Center	7-27-78	22-07995	CA	838
1093	Department of the Navy, Naval Weapons Station, Concord, California	7-28-78	70-5722	CA	841
1094	General Services Administration, Region 3	7-31-78	22-08494	CA	847
1095	Ogden Air Logistics Center, Hill Air Force Base, Utah	8-4-78	61-3751	CA	852
1096	Equal Employment Opportunity Commission	8-4-78	22-07808	CA	859
1097	Department of Health, Education and Welfare, Social Security Administration, Region V	8-4-78	50-17023	CU	867
1098	Department of Interior, Bureau of Indian Affairs, Flandreau Indian School, Flandreau, South Dakota	8-15-78	60-5291	CA	870

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1099	Department of the Treasury, Internal Revenue Service, Austin District, Austin, Texas	8-15-78	63-7300	CA	874
1100	United States Department of the Army, Fort Polk, Louisiana	8-16-78	64-3414	CA	880
1101	Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center	8-16-78	30-07725	CA	893
1102	Department of the Air Force, 924th Tactical Air Group Reserve, Bergstrom Air Force Base, Texas	8-21-78	63-8021	RO	903
1103	Department of the Army, Yakima Firing Center, Fort Lewis, Washington	8-21-78	71-4471 71-4475 71-4476	CA CA CA	905
1104	U.S. Department of the Navy, Naval Air Engineering Center, Lakehurst, New Jersey	8-23-78	32-5035	RA	911
1105	General Services Administration, Region 3	8-23-78	22-08080 22-08772	RA CU	918
1106	Department of the Treasury, Internal Revenue Service, Southwest Region, Dallas, Texas	8-29-78	63-6916	CA	921
1107	Department of the Treasury, Internal Revenue Service, Cincinnati District Office	8-30-78	53-09485	CA	936
1108	Department of State, Passport Office, Chicago Passport Agency, Chicago, Illinois	8-30-78	50-13100	RO	945

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1109	Department of Health, Education and Welfare, Region VIII Regional Office	8-31-78	61-3763	CA	949
1110	Army and Air Force Exchange Service, Department of the Army and Air Force	8-31-78	22-08477	CA	961
1111	Equal Employment Opportunity Commission, Boston District Office	8-31-78	31-11034 31-11431	CA CA	965
1112	Bureau of Alcohol, Tobacco and Firearms, Midwest Region, Chicago, Illinois	8-31-78	62-5621	CA	970
1113	General Services Administration, National Archives and Record Service	9-1-78	22-08528	CA	979
1114	Environmental Protection Agency, Robert S. Kerr Environmental Research Laboratory, ADA, Oklahoma	9-1-78	63-7564	CA	990
1115	Department of the Navy, Naval Weapons Station, Concord, California	9-5-78	70-5705 70-5707	CA CA	996
1116	Social Security Administration, Headquarters Bureaus and Offices, Baltimore, Maryland	9-5-78	22-07970	CA	1011
1117	Louisiana Army National Guard, New Orleans, Louisiana	9-6-78	64-3911	CA	1019
1118	U.S. Customs Service, Region IV, Miami, Florida	9-6-78	42-4106	CA	1025
1119	Internal Revenue Service, Fresno Service Center	9-7-78	70-5468	CA	1034

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1120	Department of the Treasury, Internal Revenue Service, Chicago District, Chicago, Illinois	9-8-78	50-15458	CA	1045
1121	Department of the Navy, Naval Training Center, San Diego, California	9-12-78	72-6949	CA	1052
1122	Department of the Air Force, McClellan Air Force Base	9-12-78	70-6098	CA	1058
1123	United States Air Force Commissary Command, Base Commissary, Barksdale Air Force Base, Louisiana	9-13-78	64-3692	CA	1063
1124	Social Security Administration, Cincinnati Downtown District Office, Cincinnati, Ohio	9-13-78	53-10361	CA	1068
1125	Department of the Treasury, Internal Revenue Service and Brookhaven Service Center	9-21-78	30-08141	CA	1077
1126	Department of Interior, Bureau of Indian Affairs, Phoenix Area Office, Phoenix, Arizona	9-22-78	72-7236	CA	1082
1127	Department of Health, Education and Welfare, Social Security Administration, Bureau of Hearings and Appeals, Region II, San Juan, Puerto Rico	9-22-78	37-01914	CA	1091
1128	Department of Health, Education and Welfare, Social Security Administration, Disability Insurance Program Staff, Chicago, Illinois	9-25-78	50-17010	CA	1095

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1129	North-Atlantic Region, Internal Revenue Service, Department of the Treasury	9-26-78	30-07730	CA	1102
1130	Federal Aviation Administration, Airway Facilities Division, Pacific-Asia Region	9-26-78	73-958	RO	1107
1131	Veterans Administration Washington, D.C.	9-27-78	63-7203	CA	1110
1132	Federal Aviation Administration, Oklahoma City Army Facilities Sector, Wiley Post Airport, Bethany, Oklahoma	9-27-78	63-7342	RO	1121
1133	Department of the Treasury, Internal Revenue Service and IRS Milwaukee District	9-28-78	51-4261	CA	1123
1134	Social Security Administration, Bureau of Hearings and Appeals	9-29-78	22-08346	CA	1128
1135	U.S. Customs Service and Houston Region, U.S. Customs Service	10-3-78	63-6852	CA	1138
1136	U.S. Department of Energy	10-13-78	22-08582 22-08583 22-08584	RA RA RA	1149
1137	Veterans Administration Center, San Juan, Puerto Rico	10-17-78	37-01926 37-01952	CA CA	1157
1138	Department of the Army, U.S. Military Academy, West Point, New York	10-17-78	30-07463	CA	1162
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1141	Department of Transportation, Federal Aviation Administration, Alaskan Region, Anchorage, Alaska	10-18-78	71-4515	CA	1180
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**Decisions of the Assistant Secretary
of Labor for Labor-Management
Relations Nos. 960-1179**

January 6, 1978

A/SLMR No. 960

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS
A/SLMR No. 960

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS

Respondent

and

Case No. 22-7903(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3615, AFL-CIO

Complainant

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3615, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to bargain over the impact and implementation of a relocation of certain unit employees.

The Administrative Law Judge found that the Complainant was informed of the proposed relocation at a meeting held between the parties several months prior to its implementation, and that while the Complainant requested bargaining on the impact of the relocation a few days prior to its actual occurrence, this request, coming virtually at the last moment, was not timely made. Based on these findings, the Administrative Law Judge recommended dismissal of the complaint.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation and ordered that the complaint be dismissed.

DECISION AND ORDER

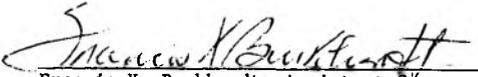
On October 4, 1977, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-7903(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
January 6, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1/ In his Recommended Decision and Order, the Administrative Law Judge referred to certain events occurring in 1977 rather than in 1976. This inadvertence is hereby corrected.

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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In the Matter of :
:
SOCIAL SECURITY ADMINISTRATION :
BUREAU OF HEARINGS AND APPEALS :
:
Respondent :
:
and :
:
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, LOCAL 3615, AFL-CIO :
:
Complainant :
.....

Case No. 22-07903(CA)

ALBERT CARROZZA, Esquire
Mr. JAMES MARSHALL, Vice-President
AFGE, Local 3615
P.O. Box 147
Arlington, Virginia 22210
For the Complainant

JULIAN BROWNSTEIN, Esquire
14125 Beach View Lane
Wheaton, Maryland
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on April 12, 1977, under Executive Order 11491, as amended, by Local 3615, American Federation of Government Employees, (hereinafter called the Union or AFGE) against the Bureau of Hearings and Appeals (hereinafter called the Respondent or Activity), a Notice of Hearing on complaint was issued by the Regional Administrator for the Philadelphia, Pennsylvania Region on July 19, 1977.

The complaint alleges in substance that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in relocating a part of the bargaining unit without affording the Union an opportunity to bargain concerning the impact of such relocation on unit personnel.

A hearing was held in the captioned matter on September 15, 1977, in Washington, D.C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved herein. At the close of the hearing, both parties waived the right to file post-hearing briefs.

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

The Union is the exclusive representative of Respondent's Medical Advisory Staff (MAS) which is composed of both professionals and non-professionals. Prior to January 8, 1977, a number of the MAS employees were stationed or located on the sixth floor of a building known as Balston Tower 2. On January 8, 1977, approximately 30 employees of MAS were relocated to the fifth floor of Balston Tower 2. ^{1/}

In late 1976 or early 1977, the Respondent secured additional office space for its operations and proceeded to develop several alternate plans for the expansion and/or relocation of its various components or departments. In late March or early April, 1977, Respondent met with the Union and exhibited a number of charts indicating possible changes in the office locations of Respondent's various components, including MAS.

On September 2, 1977, representatives of Respondent called a meeting which was attended by Union Steward Larkin and Union Vice-President Cuthbertson. During the course of the meeting Respondent's representatives showed the Union representatives, among other things, the layout on the Medical Advisory Staff which indicated that part of

^{1/} It is this January 8, 1977 relocation which is the basis of the instant complaint.

MAS would be transferred from the sixth to the fifth floor. During the course of the meeting, Respondent estimated that the move or transfer would occur in November. When Mr. Cuthbertson inquired as to the possibility of moving MAS to another location rather than the one indicated on the plans, he was informed that the location was final.

During December 1977, various employees of the MAS unit were individually shown the plans of the fifth floor for purposes of allowing them to make individual office selections.

On or about January 6, 1977, about two days before the relocation, various employees approached the Union Steward concerning the upcoming move. In response to their inquiries the Union contacted Respondent for purposes of "meeting and conferring" about the move. Management, after checking with Mr. Toner, Chief, Labor Management Relations Section, refused to meet with the Union. According to Mr. Toner, prior to authorizing the refusal to meet with the Union, he checked out the situation and ascertained that the Union had been informed of the relocation in September. In view of this and since there were only two days remaining before the move he concluded that Respondent was not obligated to bargain at that time. Further according to Mr. Toner, whose testimony stands uncontradicted, the Union never, in response to his inquiry, stated specifically what they wanted to bargain over, other than stating "impact."

According to the record, during the period September 1976 when the plans for the relocation were shown to the Union representatives and January 6, 1977, two days prior to the planned move, the Union made no request whatsoever to bargain about any aspect of the MAS relocation.

Discussion and Conclusions

The decision to transfer part of the MAS unit from the sixth to the fifth floor of the Balston Tower building falls within the exclusionary language contained in Sections 11(b) and (12)(b) of the Executive Order. 2/ Accordingly,

2/ Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 828; U.S. Department of Transportation, Federal Highway Administration, Vancouver, Washington, A/SLMR 612; Veterans Administration, Wadsworth Hospital Center, Los Angeles, California; A/SLMR 388.

I find that Respondent was not obligated to bargain with the Union with respect to its initial decision to relocate part of the MAS.

I further find that the Respondent fulfilled its obligation to give the Union ample prior notification of its decision to relocate MAS so that the Union could be afforded the opportunity to timely request bargaining, to the extent consonant with law and regulations, as to the procedures management intended to observe in effectuating its decision to relocate and as to the impact of such decision on those employees adversely affected. In this latter respect, I note that Respondent informed the Union of the contemplated action in September 1976, some five months prior to the actual relocation. Despite such advance notice and the fact that unit employees were approached in December to make office selections from the blueprints of the fifth floor, no request for bargaining over impact occurred until two days before the move was scheduled to begin. In these circumstances, I find that the Union's request was not timely made and that the Respondent did not violate Sections 19(a)(1) and (6) of the Executive Order when it refused on or about January 6, 1977, to bargain over the impact of the relocation scheduled for two days later. 3/

Recommendation

In view of the above findings and conclusions, it is hereby recommended to the Assistant Secretary that the complaint be dismissed in its entirety.


BURTON S. STERNBURG
Administrative Law Judge

Dated: 4 OCT 1977
Washington, D.C.

3/ Headquarters, 63d, Air Base Group, U.S. Air Force; Norton A.F.B., A/SLMR No. 761.

BSS:yw

January 6, 1978

A/SLMR No. 961

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
ST. LOUIS DISTRICT OFFICE,
ST. LOUIS, MISSOURI
A/SLMR No. 961

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
ST. LOUIS DISTRICT OFFICE,
ST. LOUIS, MISSOURI

Respondent

and

Case No. 60-4945(CA)

CHAPTER NO. 36, NATIONAL
TREASURY EMPLOYEES UNION and
NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by Chapter No. 36 of the National Treasury Employees Union (NTEU) and the NTEU alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by issuing a memorandum which unilaterally altered a past practice of granting administrative time to unit employees for the purpose of preparing rebuttals to performance evaluations and by communicating this policy directly to unit employees by way of the memorandum, thereby bypassing the exclusive representative. The Respondent contended that the memorandum did not reflect a change in past practice and that it was standard operating procedure to communicate with employees by way of written memoranda.

On September 2, 1977, Administrative Law Judge John W. Earman issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Report and Recommendation.

The Administrative Law Judge recommended dismissal of the complaint. In this regard, he found that the negotiated agreement which permitted employees to prepare rebuttals was silent as to the method of reporting time for such preparation. He further found there existed a past practice of charging leave for preparation time amounting to more than one hour and that, therefore, the memorandum did not reflect a change in the existing practice. The Administrative Law Judge also determined that the memorandum was not an improper attempt to deal directly with unit employees.

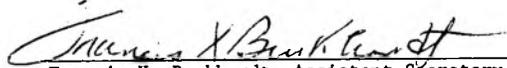
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

The Assistant Secretary, noting particularly the absence of exceptions, adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered that the complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 60-4945(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
January 6, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

Motion to Dismiss

The Respondent moved that the complaint be dismissed since the Complainant is not the exclusive representative under the Multi-District Agreement. It was argued that Complainant is Chapter 36 of the NTEU, which is only one half of the exclusive representative, the NTEU Joint Council, composed of Chapters 14 and 36. The motion was denied with the parties given leave to brief the point, if they so desired. Respondent chose not to question the ruling on the motion.

Findings and Conclusions

The Article 9 of the Multi-District Agreement provides that evaluations made by the employee's immediate supervisor be furnished to the employee and discussed with him at least two workdays prior to its filing. The employee may make written rebuttal concerning any disagreement with the evaluation and these comments become a part of the evaluation. The MDA is silent as to the method of accounting for time used in writing a rebuttal. The evidence indicates that much confusion as to policy existed in other districts in mid and late 1975 and the arbitration of a grievance in Los Angeles on March 22, 1977 found that the right to make written rebuttals during duty time does not exist in the MDA. What then of the practice in the St. Louis District?

The Regional Personnel Officer on January 8, 1975 advised the St. Louis District that an employee was not entitled to administrative leave to rebut an unfavorable performance appraisal. This was noted as recending an interpretation sent on August 1, 1974 wherein it was stated that official time would be allowed.

On July 7, 1976 the Acting District Director issued a memo to the Division Chiefs in which he said it has been, and will continue to be, the District policy that the contract does not allow work or administrative time for rebuttals, but where the time would be minimal there was no need to charge

annual leave. The managers were told to use their judgment in handling such cases. This memorandum was issued pursuant to a request by the group manager for Group 222, Kenneth R. Landers. Mr. Landers noticed that in his report for June 1976 agent Robert L. Baker charged preparing rebuttals to administrative leave. Mr. Landers, in turn, communicated the Director's information to Mr. Baker and the other employees in Group 222 by the memorandum of July 14, 1976 which gave rise to the present complaint. The language used by Mr. Landers was almost identical to that used by the Acting District Director, to wit:

"It is the District policy that the contract does not allow work or administrative time for employees to make written comments to evaluations. Where the time involved would be minimal, i.e. measured in minutes, there would be no need to charge leave. If the time is longer, a charge to leave will be made."

After informal settlement failed the complaint was filed alleging that the Landers' memorandum was issued only a few days after Mr. Baker, a shop steward, had requested and been granted 14 hours of administrative time under Article 9(1)(c) of the MDA. The complaint is in error as to the events that took place.

Mr. Baker, who has had an unusually large number of evaluations in his personnel file, listed on the back of his time sheet 4 hours administrative time for preparing responses on June 23, 1976 and 6 hours preparing reply to case file review on June 7, 1976. He did not obtain prior approval for using administrative time in that manner and it was not discovered by Mr. Landers until after July 1. Mr. Baker was not required to take annual leave for the time in question because he was at the time involved in a grievance procedure over an in-grade promotion.

Records were available only back to January 1976. They show that between January and June 1976 Mr. Baker made 7 rebuttals of which only one, in addition to the two above, was made on working time. On February 4, 1977 Mr. Baker listed 4 hours indirect time for preparing a rough draft to a work survey and 3 hours on February 5 for typing it. Mr. Landers was not aware of this use of time until 2 weeks before the hearing because he did not monitor indirect time as closely as administrative time since indirect time is usually charged back to the case.

After testifying that he took administrative time to prepare the rebuttals, Mr. Baker said that on 2 occasions he listed the time as union work. His testimony is also in question because the records show that he took 4 hours annual leave to prepare a rebuttal on June 29, 1976. This was in the period between his claim of administrative time and the issuance of the memorandum in question on July 14 and shows that he did not believe it to be the District's policy to allow administrative time for rebuttals.

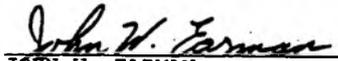
Other than Mr. Baker's case the evidence is sparse as to the use of administrative time for rebuttals. Mr. Klaassen, the Chairman of the Joint Council has had little or no personal need for such time use and his knowledge of such use by other District employees is limited to one employee involved in an adverse action.

On the basis of the record it is found that the Article 9 of the Multi-District Agreement between the Internal Revenue Service and the National Treasury Employees Union provides that evaluations of performance may be commented on in writing by the employee, but no provision is made for the employee to use work time for this purpose. It is further found that in the St. Louis District it has been the policy and practice to charge leave whenever the comments cannot be made in an hour or less, although a manager is expected to use his judgment in each case. The memoranda issued by the District and by Mr. Landers did not constitute a change in employee working conditions. Therefore, there was no duty to meet and confer with the Complainant regarding the policy or its impact. Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, A/SLMR No. 736 (1976).

Complainant urges that even if an improper change of policy or practice is not found, the Landers' memorandum was a communication in violation of the Executive Order, citing Department of the Navy, Naval Air Station, Fallon, Nevada, FLRC No. 74A-80. The Federal Labor Relations Council held in that case that in determining whether a specific communication is violative of the Order, that communication must be judged independently and a determination made as to whether it constitutes an attempt to deal or negotiate directly with employees, or to threaten or promise benefits to the employees. The Landers' memorandum was certainly not an attempt to deal or negotiate directly with employees and it could not be interpreted as a threat or promise of a benefit. It was simply a reaffirmation of existing District policy and was not an improper communication from management to employees.

RECOMMENDATION

Based upon the foregoing findings and conclusions it is recommended to the Assistant Secretary that the complaint against Respondents be dismissed in its entirety.


 JOHN W. EARMAN
 Administrative Law Judge

Dated: September 2, 1977
 Washington, D. C.

January 6, 1978

A/SLMR No. 962

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
CHICAGO DISTRICT OFFICE,
CHICAGO, ILLINOIS
A/SLMR No. 962

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
CHICAGO DISTRICT OFFICE,
CHICAGO, ILLINOIS

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and National Treasury Employees Union, Chapter 10 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by implementing a unilateral change in working hours without having negotiated the change with the Complainant.

The Administrative Law Judge found that the Respondent had met its obligation to negotiate over the impact and implementation of its decision to change working hours, but that it violated Section 19(a)(1) and (6) of the Order by failing to meet and confer with the Complainant over the decision. In reaching this conclusion, he noted that where, as here, a change in working hours is not integrally related to and determinative of the agency staffing pattern, it is a negotiable item under Section 11(a) of the Order. He further found that an agreement between the parties did not constitute a waiver of the Complainant's right to negotiate changes in working hours.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered the Respondent to cease and desist from the conduct found violative of the Order and to take certain affirmative actions.

Respondent

and

Case No. 50-13142(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 10

Complainant

DECISION AND ORDER

On August 17, 1977, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions filed by the Respondent,

I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 1/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Chicago District Office, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Instituting a change in working hours of employees represented exclusively by the National Treasury Employees Union, Chapter 10, without notifying the National Treasury Employees Union, Chapter 10, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such a change.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Rescind the memoranda of July 8, 10, and 11, 1975, pertaining to changes in working hours and restore the work hours schedule in effect prior to July 29, 1975, in the Audit Division.

1/ In its exceptions, the Respondent argued that the allegation with respect to the refusal to negotiate over the decision to change working hours was not properly before the Administrative Law Judge because it was not contained in the pre-complaint charge as required by Section 203.2(a) of the Assistant Secretary's Regulations. It appears that this contention by the Respondent was made for the first time at the hearing as the evidence does not establish that the issue was specifically raised prior thereto, either before the Area Administrator or the Regional Administrator. It has been held previously that it would not effectuate the purposes of the Order to permit an issue to be raised for the first time at a hearing or in a post-hearing brief, where a party has had adequate opportunity to raise such matter prior to the hearing. Veterans Administration Hospital, Charleston, South Carolina, 1 A/SLMR 400, 402, A/SLMR No. 87 (1971). Moreover, it appears that the matter was fully litigated by the Respondent at the hearing. Under these circumstances, I conclude that there is no procedural defect which would warrant dismissal of that portion of the complaint alleging an improper failure to negotiate by the Respondent over its decision to change working hours.

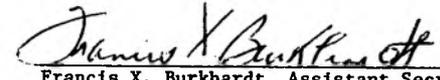
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(b) Notify the National Treasury Employees Union, Chapter 10, of any intended change in the work hours schedule of unit employees, and, upon request, meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such a change.

(c) Post at its facility at the Internal Revenue Service, Chicago District, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
January 6, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change the work hours schedule of employees represented exclusively by the National Treasury Employees Union, Chapter 10, without notifying the National Treasury Employees Union, Chapter 10, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such a change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind the memoranda of July 8, 10, and 11, 1975, pertaining to changes in working hours and restore the work hours schedule in effect prior to July 29, 1975, in the Audit Division.

WE WILL notify the National Treasury Employees Union, Chapter 10, of any intended change in work hours of unit employees and, upon request, meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such a change.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Federal Office Building, Room 1060, 230 S. Dearborn Street, Chicago, Illinois 60604.

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



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In the Matter of

DEPARTMENT OF THE TREASURY :
INTERNAL REVENUE SERVICE :
CHICAGO DISTRICT OFFICE, :
CHICAGO, ILLINOIS :

Respondent : Case No. 50-13142(CA)

and

NATIONAL TREASURY EMPLOYEES :
UNION and NATIONAL TREASURY :
EMPLOYEES UNION, CHAPTER 10 :
Complainant :

.....
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Chicago, Illinois 60604
For Respondent

WILLIAM PERSINA, Esq.
SANDRA BLOOM
National Treasury Employees Union
1730 K Street, N.W.
Washington, D.C. 20006
For Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on December 14, 1976 by the Regional Administrator for Labor-Management Services Administration, Chicago Region, a hearing was held in the above-entitled case on February 15, 1977 at Chicago, Illinois.

This proceeding was initiated under Executive Order 11491, as amended, (herein called the Order), by the filing of a complaint by National Treasury Employees Union and its Chapter 10 (herein called Complainant) against Department of the Treasury, Internal Revenue Service, Chicago District, Chicago, Illinois (herein called Respondent). The complaint, which was filed on April 8, 1976, alleged that Respondent violated Sections 19(a)(1) and (6) of the Order by implementing a unilateral change in working hours on July 29, 1975 without having negotiated the change with Complainant.

Respondent filed a response to the complaint on April 4, 1976 wherein it alleged: (1) The complaint was not timely filed within the 9 month period as required under 203.2(b)(3) of the Regulations; (2) the complaint differs from the charge in respect to alleged unfair labor practices and does not, comply with 203.2(a) of the Regulations; (3) no obligation is imposed upon Respondent under the Order to bargain as to hours of employment; (4) the union waived its right, under Article 22, Section 3 of the contract, to insist upon negotiations over changes in work hours; Respondent has bargained as to impact and implementation of the change, and thus fulfilled its obligation in that regard. 1/

All parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter the parties filed briefs which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings of fact, conclusions and recommendations:

1/ Since the change in work hours was effected on July 29, 1975, I deem the unfair labor practice as occurring on that date. Hence, I am satisfied that the complaint, which was filed on April 8, 1976, was timely under 203.2(b)(6) of the Regulations. Moreover, the variance in dates between the charge and complaint is not viewed as fatal, inasmuch as the recitation of dates is sufficient to apprise Respondent of the claim alleged and the correct date of the unilateral change appears in the complaint. The motions to dismiss on the foregoing procedural grounds is denied.

Findings of Fact

1. On behalf of various district offices, including Chapter 10 at Chicago, Illinois, the National Treasury Employees Union executed a collective bargaining agreement with the Internal Revenue Service on May 3, 1974. The said agreement, which was effective by its terms on August 3, 1974 for two years, contained an automatic renewal clause and covered all professional and non-professional employees 2/ as described therein.

2. The said agreement provided in Article 22, "Hours of Work", as follows:

Section 1.

The normal scheduled work week will consist of five (5) consecutive eight (8) hour days, Monday through Friday.

Section 2.

The Employer may establish special hours of duty not to exceed eight (8) hours a day or forty (40) hours a week to enable employees to take educational courses at their expense.

Section 3.

Prior to implementing a general change in any scheduled work week, the Employer agrees to notify the Union, as far in advance as possible.

3. At all times material herein Respondent and Complainant Chapter 10 held bi-weekly labor management relations (LMR) meetings to discuss types of material interest to both parties. John E. Swan, personnel officer who handled labor relations for management, testified that discussions thereat would not result in changes in the parties' contract, but would affect behavior; that, at least until October, 1975, Respondent differentiated between negotiations, which required ground rules and could lead to contract modifications, from discussions which dealt with broad generalities and amounted to "encouraged participation" at meetings; that, however, if union proposals were made at such meetings, management would consider same, but if the union

2/ Approximately 2,000 employees are employed in the Chicago District and 1,300 at the headquarters office.

demanded further discussion, it would require going into negotiations.

4. At an LMR meeting held on October 18, 1974, which was attended by various representatives of the Employer and the union, management advised the union officials that it planned to change the hours of work for the audit division of the district office. The employees in this division, revenue agents and clerks, worked on two shifts: 8:00 A.M. 4:30 P.M. and 8:15 A.M. - 4:45 P.M. Respondent notified the Union at this meeting it intended to have standard work hours - 8:00 A.M. to 4:30 P.M. - for everyone except the taxpayer service division. Swan explained to Complainant's representative that management wanted to avoid the confusion which resulted where employees who worked together separated and departed at different times, and that the employer felt it was easier to contact employees when they started the work day together. He also stated that the change in work hours was not negotiable; that under Article 22, Section 3 of the collective bargaining agreement the union waived its right to insist upon negotiation thereof.

Union representative Michael L. Peacher informed Swan at the October 18 meeting that the changes were negotiable as to substance, impact and implementation, and that the union wanted to negotiate the contemplated change of hours. He also requested that employees be permitted to work at their own starting time between 8:00 A.M. - 8:30 A.M. Peacher called Swan's attention to the fact that if the change were effected elevators would be crowded, problems re train schedules could arise, some employees might have difficulties arranging for babysitters, and certain employees might be compelled to quit their jobs.

5. The President of NTEU Chapter 10, Edward E. McCarthy, wrote a letter to Swan, dated October 19, 1974, wherein the union requested that Respondent negotiate the proposed changes in working hours. Further, he reiterated the union's position that the decision to alter the hours, as well as impact and implementation were negotiable, and McCarthy renewed the proposal that starting time be flexible between 8:00 A.M. and 8:30 A.M. and allow employees to decide when to report during that time frame.

6. By letter dated November 6, 1974 Swan replied to McCarthy and repeated its intention re changing to a standard starting time for employees in the headquarters office. He mentioned again the matter was not negotiable and was waived

7. In a letter addressed to Swan dated November 23, 1974 Peacher asked whether management refused to negotiate on impact and implementation of the hourly change because it felt the union waived its right to negotiate thereon. If not, wrote Peacher, the union wished to begin negotiation on November 29, 1974.

8. Swan replied to Peacher's letter on December 4, 1974, stating that management was only obliged under the contract to notify the union of hourly changes, and that such language is a waiver of NTEU's rights to negotiation thereon; that under Section 12 of the Order and FPM Supplement 990-2 it was precluded from negotiating this specific matter; and that the new hours would be effective on January 6, 1975.

9. An ad hoc meeting between Complainant and Respondent was held on December 20, 1974. Management advised the union the implementation date of January 6, 1975 for the change in hours was cancelled; that a study is being conducted of the elevator load capacity to determine the feasibility of the standard hours; that the employer will be looking to NTEU for their input and recommendations; and that flex time is not a District policy. Swan reaffirmed Respondent's position that the matter was not negotiable.

10. Another such ad hoc management-labor meeting was held on April 21, 1975 whereat the union was informed that under Article 22, Section 3 the Respondent was "obligated to discuss with the union prior to making any changes in the work week." Swan told the union representative the elevator survey showed there were no problems handling the load at 8:00 and 4:30.

11. Swan wrote to McCarthy again on July 2, 1975 repeating the intention to change the hours to standard 8:00 A.M. - 4:30 P.M., and asked the union for any feedback re problems it might cause employees. He remarked that the inconveniences referred to by the union were normal; that the change would occur on July 21.

12. A memo from Respondent's headquarter office to employees, dated July 8, 1975, informed them that a study had been completed of the elevator system; that effective July 29, 1975 all employees in headquarters office would observe the new hours of 8:00 A.M. - 4:30 P.M., except for the Taxpayer Service Division. 3/

3/ The Union was also notified of the new date by a letter dated July 10, 1975 and a DIR-CHI Memorandum 19-34 dated July 11, 1975.

13. McCarthy wrote Swan on July 15, 1975, reiterating its position that the changes are negotiable, and renewed its demand to negotiate the impact and implementation of the proposed change in working hours.

14. Swan replied to McCarthy by letter dated July 24, 1975 restating its position on waiver, and the employer's officer commented that management is precluded from negotiating this matter under Section 12 of the Order.

15. During his discussions with the union official Swan stated that any particular problems of an employee could be discussed through a group manager or branch chief; that if anyone had a particular problem, some arrangements could be made to the local group level; that it was not negotiable and management was not prepared to discuss flex time; but that, however, the union was requested to submit any specific data concerning impact upon employees which management would consider.

Conclusions

In denying that it has committed any unfair labor practice herein, Respondent makes three principal contentions: (1) the change in working hours is a non-negotiable matter under the Order, and complainant failed, in any event, to establish a refusal to meet and confer over the change; (2) any right vesting in the union to impose a bargaining obligation upon management was waived under Article 22, Section 3 of the contract herein 4/; (3) management fulfilled its obligation, in any event, to bargain over the impact and implementation of its decision to change the hours of employment.

(1) During the LMR meetings between Respondent and Complainant, which occurred during the period from October 1974 to July 1975, management insisted the change in starting and quitting times was excepted under the Order as a subject for bargaining. Moreover, in the exchange of correspondence between Swan and the union officials, the employer reiterated its position in that respect. Thus, the change

4/ In its brief Respondent asserts, further, that the dispute involves different contract interpretations, and therefore no unfair labor practice can be found in the absence of a flagrant breach of contract. This argument is rejected. An interpretation of Article 22 may be required to resolve the issue of waiver, but that requirement, in itself, does not militate against finding a violation of the Order.

in working hours for the audit division from both 8:00 A.M. - 4:30 P.M. and 8:15 A.M. - 4:45 P.M. to a standard 8:00 A.M. - 4:30 P.M. for all employees in said division was effected at a time when management adhered to said contention.

Despite Respondent's insistence that a change in hours is not bargainable under the Order, I conclude that past decisions in the public sector establish this is a subject for bargaining and not excepted under Section 11(b) of the Order. In its discussion of this issue the Federal Labor Relations Council declared that a proposal relating to the basic workweek and hours of duty is not so excepted unless it is integrally related to and determinative of the staffing pattern of the agency, i.e., the numbers, types, and grades of positions of employees. See Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36. Subsequently the Assistant Secretary in Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, S.C. A/SLMR No. 656, held that a change in work-hours from the scheduled 7:45 A.M. - 4:30 P.M. to 7:15 A.M. - 4:00 P.M. was not integrally related to and determinative of staffing pattern, and that the said change was a negotiable item within the meaning of Section 11(a) of the Order. His decision was sustained by the Federal Labor Relations Council in FLRC 76A-85 (June 2, 1977). The case at bar is thus one which, in respect to the obligation to bargain, over starting and quitting times, is controlled by the Rosewood case, supra. Accordingly, I find that Respondent was obliged to bargain over the change in such working hours. 5/

Moreover, I do not agree that the record establishes a failure on Complainant's part to prove a refusal to bargain over the decision to change the hours. The various letters to Swan, as well as the meetings between the parties, supports a continual demand by the union to negotiate the change. Complainant also proposed a flex time as part of its request, and insisted that the subject was a bargainable one. A review of the discussions and correspondence convinces me that, although time lapses occurred during communications between the parties, the union never abandoned its demand to bargain over the decision by Respondent to change to a standard 8:00 A.M. - 4:30 P.M. workday at the headquarters division. 6/

5/ See also Department of the Treasury, IRS Southwest Region, Dallas, Texas, A/SLMR No. 858.

6/ Complainant's demands to negotiate impact and implementation in its letter of July 15, 1975 to Swan, does not warrant the inference that the union yielded its claim that the decision itself was bargainable.

In respect to the decision by management to adopt uniform hours, I am also persuaded that this was a unilateral one and that Respondent refused to meet and confer with the union thereon. While it is true that discussions ensued between the parties re the effect of such a change upon employees and their attendant problems, the employer never bargained about the decision itself to alter the working hours. Apart from insisting that it was non-negotiable and establishing various dates for its implementation, Respondent categorically refused to consider or discuss flex time which had been proposed by Complainant. Although it stated that input from the union would be considered in making a decision to change the hours, management's continual declaration that it was precluded from negotiating the subject, must necessarily make any input from Complainant a patently futile gesture. Good faith bargaining can scarcely be conducted within the framework of a stated position which asserts that an employer is not obliged to negotiate. No other proposals were advanced by the employer, and I am convinced that Respondent did not fulfill its obligation to bargain over the decision to change the working hours to a standard 8:00 A.M. - 4:30 P.M. Accordingly, I find and conclude that by such conduct it has violated Sections 19(a)(1) and (6) of the Order. 7/

(2) Respondent's contention that Complainant waived its right to negotiate the changes, as a result of Article 22, Section 3 in the contract, is also not persuasive. That provision merely requires that notification be given by the employer to the union when a change in the workweek is implemented. There is no language present in that section which expressly or impliedly reserves to management the sole right to effect changes in working conditions which are otherwise bargainable under the Order. I do not construe the obligation to notify the union of an impending change in the workweek as vesting such a right in the employer. Moreover, it has been pointedly held by the Assistant Secretary in NASA, Kennedy Space Center, Florida, A/SLMR No. 223 that a waiver, under the Order, must be clear and unmistakable. Any intention to waive the right to bargain over a change in hours would require language much more direct and specific than merely obligating an employer to notify a union when a change is to be implemented. Article 22, Section 3 scarcely fulfills that requirement, and does not,

7/ Assuming arguendo, that Respondent provided Complainant with an opportunity to meet and confer re the procedures and impact of its decision, it would not exculpate Respondent from a violation based on its refusal to negotiate the decision to change the hours. See Rosewood case, supra, and Naval Air Rework Facility, Pensacola, Florida, A/SLMR No. 608.

in my opinion, spell out a clear and unmistakable intention to waive the union's rights to bargain over this subject matter. IRS, Southwest Region, supra.

(3) Complainant maintains that Respondent also violated the Order by not bargaining over the impact and procedures involved in the decision to adopt uniform hours for the audit division. It insists there was "no give and take" during the meetings held in 1974 and 1975; that the discussions were limited to "information input" with no good faith negotiations re the effect upon employees as a result of the change.

Although, it is true, that management did unilaterally institute the change in hours, I am not convinced that they did not meet and confer as to the impact and implementation thereof. Thus, Complainant union was afforded ample opportunity to present the employer with particulars concerning the problems relating to babysitters, transportation, and the like which were raised by the union. Not only does the record fail to demonstrate that Respondent would not discuss these matters, but, contrariwise, it reflects continued requests by the employer that the bargaining agent submit specific information bearing on these potential problems. Moreover, management made it clear to the union that if there were adverse effects upon employees, such data would be considered before making a final determination. It was, in my opinion, incumbent upon the Complainant to furnish such information to Respondent before changing the latter with a refusal to bargain thereon. See Rosewood case, supra.

Record facts do not disclose an adamant position by the employer in refusing to confer as to impact and implementation of the change in hours. In truth, it indicated to the union at the LMR meetings that some accommodations could be made for those employees who were seriously inconvenienced by the change. Further, Respondent advised Complainant that particular problems could be resolved, or at least handled, by a group manager or branch chief. I do not agree with Complainant that the employer stood ready to consider only problems which it determined were likely to result from the change. There is no evidence to show that other surveys, in addition to the one involving the elevators, would not have been undertaken if sufficient basis were shown to exist. Further, I do not conclude that the discussions on the potential difficulties, as raised by Complainant, were not in good faith despite the unilateral decision to implement the change itself. The record, as a whole, convinces me that

Respondent was willing to meet and confer with respect to any adverse effects resulting from the uniform hours. Accordingly, I conclude Respondent has not refused to bargain over the impact and procedures involved as a result of its discussions, and has not violated Sections 19(a)(1) and (6) of the Order in that regard. 8/

Recommendation

Having found that Respondent has engaged in conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order hereinafter set forth which is designed to effectuate the policies of the Order.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulation, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Chicago District Office, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Instituting a change in work-hours of employees represented exclusively by National Treasury Employees Union, Chapter 10, without notifying National Treasury Employees Union, Chapter 10 and affording such representation the opportunity to meet and confer on the decision to effectuate such change.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Rescind the memoranda of July 8, 10, and 11, 1975 pertaining to changes in working hours and restore the work-hours schedule in effect prior to July 29, 1975 in the audit division.

8/ Notwithstanding my conclusion in this respect, the Respondent would, in the future, still be obligated to bargain over the procedures and impact of any change in hours which may result after having met and conferred with Complainant as required and recommended herein.

(b) Notify the National Treasury Employees Union, Chapter 10 of any intended change in the work-hours schedule of unit employees, and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the decision to effectuate such a change.

(c) Post at its facility at the Internal Revenue Service, Chicago District, 230 South Dearborn Street, Chicago, Illinois, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary of Labor, in writing, within 30 days from the date of this Order as to what steps have been taken to comply therewith.


WILLIAM NAIMARK
Administrative Law Judge

Dated: 17 AUG 1977
Washington, D.C.

APPENDIX

- 2 -

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change the work-hours schedule without notifying the exclusive bargaining representative, the National Treasury Employees Union, Chapter 10, and affording such representative the opportunity to meet and confer to the extent consonant with the law and regulations on the decisions to effectuate such change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce over employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind the memoranda of July 8, 10 and 11, 1975 pertaining to changes in working hours and restore the work-hours schedule in effect prior to July 29, 1975 in the audit division.

WE WILL notify the National Treasury Employees Union, Chapter 10, of any intended change in work-hours of unit employees and, upon request, meet and confer in good faith on such intended change.

Agency or Activity

Dated: _____ By: _____
(Signature)

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 Administrator, Labor Management Services Administration, U.S. Department of Labor at 230 S. Dearborn Street, Room 1060, Chicago, Illinois.

January 6, 1978

A/SLMR No. 963

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
BUREAU OF FIELD OPERATIONS,
REGION V-A, CHICAGO, ILLINOIS
A/SLMR No. 963

This case involves an unfair labor practice complaint filed by Local 1395, American Federation of Government Employees, AFL-CIO (AFGE) alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to negotiate with respect to a specific personnel policy covering the AFGE's Cook County District Office unit, one of the Social Security Administration (SSA) units in Illinois represented exclusively by the AFGE. The Respondent contended that it was not obligated to negotiate over such matters because of a pending unit consolidation (UC) petition which included the Cook County unit. Additionally, the Respondent contended that the issue presented in the instant proceeding was made res judicata by virtue of the Assistant Secretary's Decision and Order in Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Region V-A, Chicago, Illinois, A/SLMR No. 832 (1977).

In agreement with the Administrative Law Judge, the Assistant Secretary concluded that the Respondent's conduct herein was violative of Section 19(a)(1) and (6) of the Order. He found that the issues involved in A/SLMR No. 832 (1977) and the instant proceeding were distinguishable and warranted separate and distinct findings and remedial orders.

Accordingly, the Assistant Secretary, issued an appropriate remedial order in the instant proceeding.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
BUREAU OF FIELD OPERATIONS,
REGION V-A, CHICAGO, ILLINOIS

Respondent

and

Case No. 50-15446(CA)

LOCAL 1395, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On August 29, 1977, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting briefs filed by the parties, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation, to the extent indicated herein.

In agreement with the Administrative Law Judge, I find that the decision in Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Region V-A, Chicago, Illinois,

A/SLMR No. 832 (1977) 1/ is not res iudicata with respect to the issue presented in the instant proceeding. Thus, in A/SLMR No. 832 the issue presented concerned the general obligation of the Respondent to meet and confer, and enter into, a negotiated agreement during the pendency of a unit consolidation (UC) petition. In the instant proceeding, the matter at issue concerns the failure of the Respondent to negotiate with respect to a change in a current personnel policy of the Respondent concerning the granting of annual leave during the pendency of a UC petition. Under these circumstances, I find that the issues involved in the two proceedings, and the particular rights which flow from findings of violation in both instances, are sufficiently different to warrant separate and distinct findings and remedial orders. Accordingly, I shall issue a remedial order to remedy the violation found herein.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Region V-A, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Refusing to negotiate with representatives of Local 1395, American Federation of Government Employees, AFL-CIO, with respect to specific personnel policies within the ambit of Section 11(a) of the Order for the unit of Social Security Administration District Office employees in Cook County, Illinois, during the pendency of a petition to consolidate exclusively recognized units which includes said unit.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

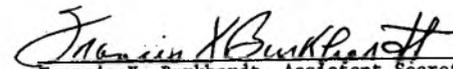
(a) Upon request, meet and confer with Local 1395, American Federation of Government Employees, AFL-CIO, with respect to specific personnel policies within the ambit of Section 11(a) of the Order for the unit of Social Security Administration District Office employees in Cook County, Illinois, during the pendency of a petition to consolidate exclusively recognized units which includes said unit.

1/ It was noted that since issuance of the Administrative Law Judge's Recommended Decision and Order in this case, the Federal Labor Relations Council has denied the Respondent's petition for review and stay with respect to A/SLMR No. 832. See FLRC No. 77A-62.

(b) Post at all of the facilities within the unit of the Social Security Administration District Office employees in Cook County, Illinois, represented exclusively by Local 1395, American Federation of Government Employees, AFL-CIO, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Representative, or other appropriate official in charge of the Bureau of Field Operations, Region V-A office, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Representative, or other appropriate official in charge of the Bureau of Field Operations, Region V-A office, shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order to what steps have been taken to comply herewith.

Dated, Washington, D.C.
January 6, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to negotiate with representatives of Local 1395, American Federation of Government Employees, AFL-CIO, with respect to specific personnel policies within the ambit of Section 11(a) of the Order for the unit of Social Security Administration District Office employees in Cook County, Illinois, during the pendency of a petition to consolidate exclusively recognized units which includes said unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, meet and confer with Local 1395, American Federation of Government Employees, AFL-CIO, with respect to specific personnel policies within the ambit of Section 11(a) of the Order for the unit of Social Security Administration District Office employees in Cook County, Illinois, during the pendency of a petition to consolidate exclusively recognized units which includes said unit.

(Agency or Activity)

Dated _____ By: _____
(Signature)

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

If any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 1060, Federal Building, 230 S. Dearborn Street, Chicago, Illinois 60604.

U.S. DEPARTMENT OF LABOR
 OFFICE OF ADMINISTRATIVE LAW JUDGES
 Suite 700-1111 20th Street, N.W.
 Washington, D.C. 20036



.....
 In the Matter of :
 HEALTH, EDUCATION AND WELFARE :
 SOCIAL SECURITY ADMINISTRATION :
 BUREAU OF FIELD OPERATIONS :
 REGION V-A, CHICAGO, ILLINOIS :
 Respondent :
 and :
 LOCAL 1395, AMERICAN FEDERATION :
 OF GOVERNMENT EMPLOYEES, AFL-CIO :
 Complainant :

Case No. 50-15446(CA)

Appearances:

MARK A. ZALTMAN
 Vice President, Local 1395
 American Federation of Government
 Employees
 600 W. Madison Street
 Chicago, Illinois 60606
 For the Complainant

WILLIAM E. DAY, JR.
 Social Security Administration
 211 West High Rise
 6401 Security Boulevard
 Baltimore, Maryland 21235
 For the Respondent

Before: MILTON KRAMER
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case is governed by the decision of the Assistant Secretary in A/SLMR No. 832, involving the same parties, decided April 27, 1977, adopting in all material respects on the merits the recommended decision of the Administrative Law Judge in Case No. 50-13144(CA). The material facts in that case are set forth below.

The Complainant has been the recognized exclusive representative of a defined unit of Respondent's employees in Cook County, Illinois (basically Chicago) since December 30, 1969. On September 9, 1971 it was certified as the exclusive representative of a unit of Respondent's employees in Champaign, Illinois, about 125 miles south of Chicago. On August 29, 1975 the Complainant filed a petition to consolidate those units. That petition is still pending.

On February 4, 1976 the Complainant proposed that the parties negotiate ground rules for a comprehensive agreement for the Cook County unit. The Respondent refused on the ground that it had a good-faith doubt of the propriety of negotiating an agreement during the pendency of the consolidation petition.

A complaint was filed alleging a violation of Sections 19(a)(1) and (6) of Executive Order 11491 as amended and a hearing held. In the course of that proceeding the Respondent represented to the Administrative Law Judge that it had a good-faith doubt that it would be proper to negotiate while the consolidation petition was pending, that it would comply with the Assistant Secretary's decision on what its obligations were as soon as he made it, and for that reason, and others, if the Assistant Secretary should find a violation no posting should be required. The ALJ recommended on February 10, 1977 that the Assistant Secretary find that the Respondent had violated Sections 19(a)(1) and (6) and that he issue a cease-and-desist order but that no posting be required. On April 27, 1977 the Assistant Secretary issued his decision agreeing with the ALJ that a violation had occurred, issuing a cease-and-desist order, but fortunately disagreeing that posting be dispensed with and ordered the usual posting.

On June 10, 1977 ^{1/}, pursuant to an extension of time granted by the Federal Labor Relations Council, the Respondent filed with the Council a Petition for Review of the Assistant Secretary's decision of April 27 and a Request for Stay of his order. Under the Council's regulations, such a request accompanying a Petition for Review operates as a temporary stay pending the decision of the Council on the request and is effective retroactively to the date of the Assistant Secretary's decision, ^{2/} and in practice the Council does not act on the Request until it acts on the Petition. The Council has not yet acted on that Petition or Request.

^{1/} This date was ascertained administratively from FLRC.

^{2/} 5 C.F.R. § 2411.47(d).

On June 25, 1976 the Respondent refused to negotiate with Complainant on a proposal of the Complainant that it change a particular policy concerning the granting of annual leave. The ground for the refusal was the pending consolidation petition. ^{3/} Again on July 23, 1976 the Respondent refused to negotiate on that subject for the same reason ^{4/} and persists in that position to this day. On April 21, 1977 the Complainant filed a complainant over such refusal alleging it violates Section 19(a)(1), (2), and (6) of Executive Order 11491 as amended. On April 27, 1977 it filed an amended complaint alleging the Respondent's conduct violated Sections 19 (a)(1) and (6).

On May 6, 1977 the Respondent filed a Response to the Complaint. It admitted the essential facts alleged in the complaint. It alleged that it had taken an agency-wide position that it would not negotiate for new benefits during the pendency of a consolidation petition. In effect, it admitted that such position was in violation of the Assistant Secretary's order of April 27, 1977 but justified such violation on the ground that it was "considering a possible appeal and request for stay" with respect to the Assistant Secretary's decision and order in A/SLMR No. 832. It moved that the complaint be dismissed because the issue had already been decided or in the alternative that the Complainant be permitted to amend its complaint in Case No. 50-13155 (already decided in A/SLMR No. 832) to include this additional violation.

On June 17, 1977 the Regional Administrator denied the motion to dismiss and issued a Notice of Hearing to be held in Chicago on July 28, 1977. On July 15, 1977 the Respondent addressed a mailgram to the Chief Administrative Law Judge in which it stated it had appealed the Assistant Secretary's decision in A/SLMR No. 832 to FLRC and had requested a stay. It moved that the complaint therefore be dismissed or the hearing postponed. On July 19, the Chief Judge denied the motion.

At the hearing the Respondent again moved that the complaint be dismissed on the ground that the issue was res judicata by the earlier case! The motion was denied. ^{5/} The Complainant moved for a Request for Appearance of Witnesses. When asked why it had not made its motion in accordance with Section 206. 7(b) of the Regulations, its representative stated that he had just been assigned to present the case. The motion was denied. ^{6/} The Complainant

^{3/} Exh. C 1, p. 3, par. 9.

^{4/} Exh. C 2, p. 5.

^{5/} Tr. 6-8.

^{6/} Tr. 10-14.

introduced evidence. The Respondent did not present any evidence. Both parties made closing arguments. Neither party filed a brief. When asked during its closing argument who could claim he was harmed by the Respondent bargaining with the Complainant during the pendency of the consolidation petition, the Respondent was unable to answer. ^{7/}

This case is on "all fours" with A/SLMR No. 832; only the negotiable subject on which the union wants to negotiate is different. The Social Security Administrative refuses to negotiate with either the Chicago unit or the Champaign unit so long as the consolidation petition is pending. It is the only organization that has ever taken the position that the pendency of a consolidation petition relieves it of the obligation to negotiate with any of the units involved in the petition.

I recommend that the Assistant Secretary summarily issue the same order as was issued in A/SLMR No. 832 except that the posting be ordered for 120 days.



MILTON KRAMER
Administrative Law Judge

Dated: August 29, 1977
Washington, D.C.

^{7/} Tr. 34-38, esp. at page 37.

MK:yw

January 10, 1978

A/SLMR No. 964

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION ON GRIEVABILITY-ARBITRABILITY OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEFENSE MAPPING AGENCY,
DEFENSE MAPPING AGENCY HYDROGRAPHIC
CENTER
A/SLMR No. 964

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE MAPPING AGENCY,
DEFENSE MAPPING AGENCY HYDROGRAPHIC
CENTER

Activity

and

Case No. 22-7623 (AP)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3407, AFL-CIO

Applicant

This case involved an Application for Decision on Grievability or Arbitrability filed by the American Federation of Government Employees, Local 3407, AFL-CIO (AFGE) challenging a determination by the Defense Mapping Agency, Defense Mapping Agency Hydrographic Center (Activity) that a grievance filed by the AFGE was not grievable or arbitrable under the parties' negotiated agreement.

The AFGE contended that the Activity violated certain provisions of the negotiated agreement when it awarded "priority consideration" for first-line supervisory positions to two unit employees. The Activity contended that the provisions alleged to have been violated did not apply to first-line supervisory positions and, thus, were not grievable or arbitrable under the applicable procedures of the negotiated agreement.

The Administrative Law Judge found that certain elements of the AFGE's grievance were subject to the grievance and arbitration provisions of the parties' negotiated agreement. In this regard he concluded, and the Assistant Secretary concurred, that the issue of whether provisions of the negotiated agreement are applicable to first-line supervisory positions involves a question of interpretation and application of the negotiated agreement and, therefore, is grievable and arbitrable under the procedures of the agreement. The Assistant Secretary further found that, should it be determined that the negotiated agreement is applicable to first-line supervisory positions, the extent to which the awarding of "priority consideration" for such positions may be inconsistent with any provision of the negotiated agreement is also a matter involving interpretation and application of the agreement and is grievable and arbitrable under the agreement. Accordingly, he ordered the Activity to take appropriate steps to implement his findings.

DECISION ON GRIEVABILITY-ARBITRABILITY

On July 22, 1977, Administrative Law Judge Milton Kramer issued his Recommended Decision on Grievability in the above-entitled proceeding, finding that certain aspects of the grievance involved herein were subject to the grievance and arbitration procedures of the parties' negotiated procedure. The Activity filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision on Grievability.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision on Grievability and the entire record in the subject case, including the Activity's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation, as indicated herein. 1/

I agree with the Administrative Law Judge that the issue of whether provisions of the negotiated agreement are applicable to first-line supervisory positions involves a question of interpretation and application of the negotiated agreement and, therefore, is grievable and arbitrable under the procedures of the agreement. Moreover, should it be determined that the negotiated agreement is applicable to first-line supervisory positions, the extent to which the awarding of "priority consideration" for such positions may be inconsistent with any provision of the negotiated

1/ In view of the disposition of the instant case, I find it unnecessary to pass upon the Administrative Law Judge's interpretation of the meaning of "priority consideration" on page 4 of his Recommended Decision on Grievability.

agreement is also a matter involving the interpretation and application of the agreement and is grievable and arbitrable under the aforementioned procedures. 2/

FINDING

IT IS HEREBY FOUND that the grievance in Case No. 22-7623(AP) is grievable and arbitrable under the terms of the parties' negotiated agreement.

ORDER

Pursuant to Section 6(a)(5) of Executive Order 11491, as amended, and Section 205.12(a) of the Regulations, it is hereby ordered that the Defense Mapping Agency Hydrographic Center shall notify the Assistant Secretary of Labor for Labor-Management Relations, in writing, within 30 days from the date of this order as to what steps have been taken to comply with the above finding.

Dated, Washington, D. C.
January 10, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of

DEFENSE MAPPING AGENCY :
DEFENSE MAPPING AGENCY HYDROGRAPHIC :
CENTER :

Activity :

and :

AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES LOCAL 3407, AFL-CIO :
Labor Organization :

Case No. 22-7623(AP)

.....
Appearances:

Juel Hansen, Jr.
Vice President Local 3407
American Federation of Government Employees
P. O. Box 16198
Washington, D.C. 20023
For the Applicant
Labor Organization

Joseph D. Fitzgerald
Labor-Management Relations Officer
Defense Mapping Agency Hydrographic Center
Suitland, Maryland
For the Activity

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION ON GRIEVABILITY

Preliminary Statement

This case arises under Section 13(d) of the Executive Order 11491 as amended. It was initiated by an Application filed December 9, 1976 requesting the Assistant Secretary to determine whether a grievance filed October 4, 1976 and amended October 8 was subject to the grievance procedure in the parties'

2/ Community Services Administration, FLRC No. 76A-149, A/SLMR No. 921 (1977).

agreement. Under date of December 16, 1976 the Activity filed a response to the Application. On March 14, 1977 the Acting Regional Administrator issued a Notice of Hearing to be held in Washington, D.C. on April 25, 1977. A hearing was held on that day in that City. The Applicant was represented by the First Vice President of Local 3407 and the Activity was represented by its Labor Relations Officer. Both parties produced witnesses who were examined and cross-examined and both parties offered exhibits which were received in evidence. Both parties made closing arguments and the Applicant filed a timely brief.

Facts

The Applicant is the recognized exclusive representative of a unit of non-supervisory professional and non-professional General Schedule and Wage Grade employees of the Activity. The parties entered into a "Negotiated Agreement" on September 11, 1973 effective October 26, 1973. That is the basic agreement still in effect. It now has three supplements.

Article X, Section 2 of that agreement provides that when a promotion panel is established for the purpose of ranking candidates for vacant positions within the unit, the Union may name one member of the panel. However, the Union nominee (1) may not serve on more than one panel in twelve months, (2) must not be a candidate for the vacant position, and (3) must be at least of equal grade with that of the position to be filled. It provides also that when a promotion panel is established for the purpose of ranking candidates for a vacant first-line supervisory position (not in the unit) for which an employee in the unit is qualified, the Union also may name one member of the panel with one additional restriction. In addition to the restrictions applicable to the Union nominee on a non-supervisory panel, the nominee must not be under the supervision of the vacant supervisory position.

Section 10 of Article X of the original agreement provided that the Activity would develop criteria for ranking candidates for promotions to positions within the unit and that when it did so the parties would negotiate the addition of the criteria to the agreement. On May 6, 1974 the parties executed Supplement 1 to the Negotiated Agreement adding such criteria for non-supervisory positions within the unit to the original Section 10 of Article X. There was no counterpart of Section 10 with respect to ranking candidates for first-line supervisory positions. The Applicant several times suggested that the parties agree on criteria for promotion to first-line supervisor but the Activity refused to negotiate on that subject on the

ground that since the position was not in the unit it was not a subject of mandatory bargaining, and the Union did not pursue the matter. Section 2 of Article X contains the only express reference in the Negotiated Agreement to the filing of Supervisory positions.

Two promotion actions are the subject of this case. They occurred in "promotion actions 14/76 and 24/76." The facts with respect to those two promotion actions are identical in all significant respects.

In each of them a vacancy to a GS 13 first-line supervisory position was announced. A promotion panel to rank the applicants was established and in accordance with Article X, Section 2 of the collective agreement the Union appointed a member. The panel ranked the applicants according to the criteria prescribed by the Activity, and submitted their rankings to the selecting officials who made their selections.

Two employees, Askland and Smart, were displeased with the promotions made and protested to the Activity's Labor Relations Officer that the respective ranking panels had not properly applied the prescribed criteria by not giving them credit for some portions of their higher education. They were told that since the promotions were to supervisory positions for which the criteria were not negotiated they could not file a grievance under the negotiated grievance procedure but could file a grievance under the administrative grievance procedure.

Such a grievance was filed and it was found that the respective promotion panels had not given credits for two years of education completed by Askland at the New York State Maritime Academy and four and a half years completed by Smart, three at the Naval Academy and one and a half at the University of New Hampshire. Other errors were also found. 1/ It was decided that although several efforts had been made by the panels to obtain the necessary information from the applicants, every consideration must be given to seeing that each candidate receives full credit for creditable education regardless of the administrative difficulty involved. 2/

Promotion panels were established to re-evaluate the candidates for the two positions. The Applicant was requested to name its members on the panels. 3/ It declined to do so

1/ Exh. A-3.
2/ Exh. A-4.
3/ Exhs. A-7, A-8.

on the ground that the candidates had been given every opportunity to furnish the information, that the panels had leaned over backwards to help the candidates, that to re-evaluate would probably result in priority consideration being given over "guiltless" members of the unit when the next vacancy occurred, and such would be unfair. 4/ The re-evaluations were made resulting in Askland and Smart being given priority consideration for the next vacancies that should occur as provided in the Federal Personnel Manual, Ch. 335-31, subch. 6, Sec. 6-4(c).

The Applicant filed a grievance under the negotiated grievance procedure over Askland and Smart being awarded priority consideration for the next vacancies. "Priority Consideration" means that when the next similar vacancy occurred they would be non-competitively considered, and if qualified would be appointed, and only if found not qualified would the vacancy be open to other applicants. The grievance asserts that the promotion panels made extraordinary efforts to be fair to Askland and Smart, that they went to special lengths to obtain information from them but they failed to cooperate, and that to give them priority consideration in the future over other equally or better qualified candidates who did cooperate would be inequitable and in violation of certain internal regulations of the Activity and Article X, Section 9b; Article III, Section 2; Article II, Section 2; Article X, Section 1; and Article X, Section 3 of the parties' agreement. 5/

The Activity denied the grievance as follows:

Article X, Section 9b provides (that "to correct promotions deemed erroneous through the grievance and/or arbitration procedures"):

"If the action does not include vacating the position, the employee (or employees) not promoted or given proper consideration will be given priority consideration for the next appropriate vacancy."

The Activity held that since that language was simply copied from the Federal Personnel Manual, and the grievances of Askland and Smart were processed under the administrative grievance procedure, the corrective action taken was not based on the terms of the agreement but on the Federal Personnel Manual.

4/ Exhs. A-9, A-6.
5/ Exhs. A-1, A-2, A-11, A-12.

Article III, Section 2 provides (in part):

".... DMAHC and the Union agree that all provisions of this agreement shall be applied fairly and equitably to all employees without regard to union membership or non-membership."

The Activity held that since in discussions with the Applicant over its grievance the Applicant stated that it was not contending that the Activity's action complained of was based on membership or non-membership in the Union, there could be no violation of that provision.

Article II, Section 2 of the agreement provides:

"In the administration of all matters covered by this agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published DMA policies, and regulations. ..."

The Activity decided that since that provision was taken from Section 12(a) of the Executive Order and as such was required to be expressly stated in all agreements, the agreement did not incorporate all "laws and regulations" as part of the agreement.

Article X, Section 1 provides:

".... It is further agreed that DMAHC will utilize employee skills and potentials to the maximum extent possible by selecting and promoting employees on the basis of merit; without regard to race, creed, color, age, marital status, sex, physical handicap or personal favoritism. ..."

The Activity stated that it did not believe that the Applicant contended that the Activity discriminated on the basis of race, creed, color, age, marital status, sex, physical handicap, or personal favoritism (and hence that provision was not applicable), and that if the Applicant did so contend the Activity would not agree.

Article X, Section 3, which the grievance asserted was also violated, is entirely unrelated to the subject matter of this case. The Activity so stated and added that it believed

that the Applicant may have meant to refer to Article X, Section 2. That Section provides "when promotion panels are established for the purpose of ranking candidates for vacant positions" the Union may nominate one member (with certain limitations). The Activity decided that the key phrase was "when promotion panels are established", that the provision did not require that a promotion panel be established for every promotion action, that when priority consideration is given a promotion panel is not established at least until after such consideration is given, and that therefore that provision had no application to this situation.

The Activity concluded with the statement that it did not find that the allegations of the grievance were upheld and that the grievance and the request for corrective action must be denied.

The parties met subsequently and the Activity took the position that the grievance was not grievable or arbitrable. All steps prior to arbitration were exhausted and the Activity suggested that the Union submit the matter to the Assistant Secretary in accordance with Part 205 of the Regulations. The Union agreed to do so with conditions. 6/ The Activity did not agree to the conditions, taking the position that they could not properly be imposed but stating that if the Assistant Secretary held the grievance to be grievable it would then be subject to arbitration. 7/ The Application then followed.

Discussion

The positions for which the Activity decided Askland and Smart would be given priority consideration should such vacancies occur in their working lifetimes with the Activity, are first-line supervisory positions. There is no obligation under the Executive Order to bargain over procedures for filling vacancies outside the bargaining unit. But there is no prohibition against doing so and if an agreement on such subject is reached it is a valid agreement. 8/ Misinterpretation or misapplication of such agreement provision can thus properly give rise to a grievance even though the negotiated grievance

procedure is limited, as it is here, to grievances that "pertain only to the interpretation or application of this agreement". The task here, then, is to determine whether the grievance raises such an issue.

1. The grievance alleged that the granting of priority consideration to Askland and Smart violated certain regulations of the Activity. Article V of the negotiated agreement sets forth the grievance procedure. In Section 1 of that Article it is provided:

".... Grievances, to be processed under this article, shall pertain only to the interpretation or application of this agreement. ..."

Furthermore, Section 4 of Article V provides:

"Questions as to the interpretation of published agency policies or regulations ... shall not be subject to this negotiated grievance procedure. ..."

Clearly, that portion of the grievance was not subject to the negotiated grievance procedure.

2. The grievance alleged a violation of Article X, Section 9b of the negotiated agreement. As the Activity held, that provision was simply taken from the Federal Personnel Manual. See Exh. R-1, FPM 335-31, Part 6-4,C,(2). The Activity held that the corrective action taken therefor was not based on the terms of the agreement but on the FPM. Article X, Section 4, of the agreement provides:

"Questions as to the interpretation of ... regulations of appropriate authorities outside the agency shall not be subject to this negotiated grievance procedure regardless of whether such policies, laws or regulations are quoted, cited, or otherwise incorporated or referenced in this agreement."

The FPM is a regulation in part and a statement of policy in part of the Civil Service Commission. For the reason given by the Activity, and because of the above-quoted part of the agreement, this part of the grievance is excluded from the negotiated grievance procedure.

6/ Exh. A-14.

7/ Exh. A-15

8/ Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71; Community Services Administration and National Council of CSA Locals, AFGE, AFL-CIO, A/SLMR No. 749.

3. The grievance alleged a violation of Article III, Section 2. That Section (quoted above in relevant part) provides that the parties agree that the provisions of the agreement will be applied fairly and equitably to all employees without regard to union membership or non-membership. There is no contention that the Activity discriminated on the basis of union membership. The Activity takes the position that that provision requires fairness and equity in applying the provisions of the agreement without regard only to union membership or non-membership. The Union takes the position that that provision requires fairness and equity in applying the agreement in all respects, including without regard to union membership or non-membership, and that granting the priority consideration here involved was not fair and equitable.

There thus is a disagreement over the interpretation of that provision of the agreement. But to this point it is only an abstract dispute, and abstract disputes are not, or should not, be subject to arbitration. The contract provision here involved provides that the "provisions of this agreement shall be applied fairly and equitably ... without regard to Union membership", so until we find some provision of the agreement that is contended not to have been fairly applied, there is not an arbitrable dispute.

The dispute over the interpretation of Article III, Section 2, of itself, is not grievable or arbitrable.

4. The grievance alleged also a violation of Article II, Section 2 of the agreement. That provision, quoted in relevant part above, recites that in the administration of the agreement the parties are governed by existing and future laws and regulations of appropriate authority. The Union contended that the actions under contention violated certain regulations and policies. The Activity held that that provision was simply copied from Section 12(a) of the Executive Order and as such was required to be expressly stated in the agreement. This of course so. See the last paragraph of Section 12 of Executive Order 11491. The agency concluded that therefore the provision did not incorporate all laws and regulations as part of the agreement.

The position of the agency on this point was sound for the reason it gave and additional reasons. Surely if the agreement provided that the parties would be governed by all laws of the United States such provision would not make the entire United States Code part of the agreement, so that a violation of Title 18 § 1262 or § 1716 or Title 27 § 122 would be a violation of the agreement.

In addition, the agreement itself so provides. Article V, Section 4 provides, in its first sentence, that questions of the interpretation of provisions of law shall not be subject to the negotiated grievance procedure regardless of whether such laws are quoted, cited, or otherwise incorporated or referenced in the agreement.

This part of the grievance was not subject to the negotiated grievance procedure.

5. The grievance alleged also that the Activity's actions under question violated Article X, Section 1. That Section provides that the Activity will utilize skills and potentials to the maximum extent possible by "promoting employees on the basis of merit; without regard to race, creed, color" etc. The Activity took the position that since it did not appear that the Union contended that the Activity took the action it did because of race, color, creed, etc., that Section was inapplicable, and that if the Union did so contend the Activity disagreed. It appears that the Agency is of the view that that provision requires the application of the merit principle without regard only to race, creed, color, etc., and that the Union is of the view that it is not so limited and that it requires the application of the merit principle without limitation. Also, it appears that the Activity is of the view that that provision is applicable to promotions only within the unit and hence is inapplicable to the actions here involved, and that the Union is of the view that that provision applies to all promotions including at least promotions to first-line supervisory positions, and that the awarding of priority consideration to Askland and Smart violated such provision.

Such disagreement does constitute a dispute that pertains to the proper interpretation and application of the negotiated agreement and is not excluded by Section 4 of Article V of the agreement from being presented as a grievance under the negotiated grievance procedure. While an agency is not obligated to negotiate over the filling of supervisory positions, it is permissible for it to do so and if it does and reaches agreement the agreement is valid and binding. ^{9/} The question here is whether it did so and to what extent.

This part of the grievance does present a grievable and arbitrable dispute in three aspects: first, whether the quoted provision of Article X, Section 1 applies to promotions to first-line supervisory positions; second, whether the "without

^{9/} TANG, FLRC No. 74A-1; Community Services Administration, A/SLMR No. 749

regard to" clause limits the application of the merit principle only to disregarding race, creed, color, etc., and third, if it is not so limited was the principle violated by the Activity awarding Askland and Smart priority consideration for the next vacancies.

6. The grievance asserted that there was also a violation of Article X, Section 3. That provision is utterly inapplicable to this situation. The Activity so recognized and stated that it believed the Union meant to refer to Article X, Section 2 and it has developed that the Union did so intend. The Activity held that that provision had no application because it applied only when a promotion panel was established and did not require a promotion panel to be established for every promotion, and that when priority consideration is given a promotion panel is not established unless the promotion is not made on that basis.

That portion of the grievance was not subject to the negotiated grievance procedure for the reason given by the Activity and for an additional reason.

The provision in question provides that when a promotion panel is established the Union will be permitted to name one member. The Union was permitted to name a member of every such panel here involved and on every occasion either named one or declined to do so. The promotion panel was only a ranking panel. It took no part in the selecting or appointing of the individual appointed.

The Union appears to complain that in the case of two of the panels the rankings were found to be erroneous in some respects because of erroneous application of certain ranking criteria as a result of which priority consideration was determined to be called for. But the Union's participation on the panel is only for the purpose of ranking, and when the rankings are made and submitted to the appointing authority the panel is functus officio. It, including the Union member, had nothing further to do and the Union had no further contract interest in what happened thereafter except perhaps as provided in Article X, Section 2, discussed above, which I have found does present a grievance under the negotiated grievance procedure.

Conclusion and Recommendation

The grievance was not subject to the grievance and arbitration provisions of the collective agreement of the parties in most of its aspects. But it did present some issues, some of them contingently, that were subject to those provisions. I

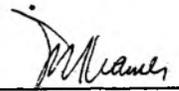
recommend that it be held that the grievance did present the following issues subject to the grievance and arbitration procedures of the collective agreement:

I. A. Does the second sentence of Article X, Section 1 of the collective agreement apply to promotions to first-line supervisory positions?

B. If the answer to the preceding question is "yes", then is the agreement to promote on the basis of merit limited to promoting without regard to race, creed, color, age, marital status, sex, physical handicap, or personal favoritism?

C. If issue I, B is reached and the answer is "No", was the granting of priority consideration to Askland a violation of that provision? Was it a violation to grant priority consideration to Smart?

II. If issue I, C is reached and the answer is "yes" to either of its parts, was such action also a violation of the second sentence of Article III, Section 2?


MILTON KRAMER
Administrative Law Judge

Dated: July 22, 1977
Washington, D.C.

January 11, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2578, AFL-CIO,
AND NATIONAL ARCHIVES AND RECORDS
SERVICE
A/SLMR No. 965

This proceeding involved two unfair labor practices complaints. The first complaint, filed by the National Archives and Records Service (NARS), alleged that the American Federation of Government Employees, Local 2578, AFL-CIO (AFGE) violated Section 19(b)(6) of the Order by failing to negotiate a new agreement during September 1975. The second complaint, filed by the AFGE, alleged that the NARS violated Section 19(a)(1) and (6) of the Order by failing to negotiate in good faith, to meet at reasonable times, and to give its negotiators the authority to negotiate an agreement.

The Administrative Law Judge found that the NARS violated Section 19(a)(6) of the Order by, in effect, engaging in a calculated strategy of delay which resulted in the exhaustion of official time for the AFGE negotiating team and discouraged the AFGE from proceeding with negotiations for a new agreement. Thus, he found that the NARS offered proposals "demeaning and unacceptable to the Union, which had the Union on the defensive attempting to hold on to what it had instead of moving for improvement on the existing contract." In this regard, he took particular note of proposals relating to three contract provisions, which, in his view, evidenced an intention on the part of the Activity negotiators to discourage the AFGE from proceeding with contract negotiations. With respect to the complaint against the AFGE, the Administrative Law Judge found that, under the circumstances, the AFGE was justified in breaking off contract negotiations and, therefore, its conduct was not violative of Section 19(b)(6) of the Order.

The Assistant Secretary disagreed with the Administrative Law Judge's finding of a Section 19(a)(6) violation against the NARS. He noted that the duty to bargain in "good faith" requires that parties to negotiations approach the bargaining table with an open mind and a sincere desire to reach agreement. This duty does not require either party

to agree to a proposal or make concessions and no inference of bad faith bargaining can be drawn solely from a party's failure to retreat from its initial proposals. In addition to approaching bargaining with an open mind and a sincere desire to reach agreement, the duty to bargain in good faith requires that the parties make an earnest effort to reach agreement through the collective bargaining process. In determining whether a party has bargained in good faith the Assistant Secretary will not substitute his judgment with respect to the merits of contract proposals. Thus, even if a proposal or proposals appear onerous or burdensome to the outside observer, they will not be deemed to constitute bad faith bargaining unless the totality of the evidence will support the conclusion that such proposal or proposals were advanced with the clear intent of evading or frustrating the bargaining responsibility.

The Assistant Secretary found that although Activity negotiators engaged in "hard bargaining" with the AFGE, the totality of its conduct did not reflect a closed mind and the absence of a desire to reach agreement. In this connection, he noted, among other things, that the NARS had made no take it or leave it demands but, rather, continued to make proposals and counter-proposals throughout the course of negotiations and displayed a willingness to consider alternative proposals.

With respect to the unfair labor practice complaint filed by the NARS alleging that the AFGE's absence from four negotiating sessions constituted a violation of Section 19(b)(6) of the Order, the Assistant Secretary, concluded, in agreement with the Administrative Law Judge, that the AFGE had not violated the Order. In this regard, he noted, among other things, that while the AFGE team did not appear at the September negotiating sessions, its Chief Negotiator continued to communicate with his NARS counterpart in an attempt to gain a favorable arrangement in regard to his team's exhausted official time.

Accordingly, the Assistant Secretary ordered that the complaints be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2578, AFL-CIO

Respondent

and

Case No. 22-6621(CO)

NATIONAL ARCHIVES AND RECORDS SERVICE

Complainant

NATIONAL ARCHIVES AND RECORDS SERVICE

Respondent

and

Case No. 22-6648(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2578, AFL-CIO

Complainant

DECISION AND ORDER

On June 15, 1977, Administrative Law Judge George A. Fath issued his Recommended Decision and Order in the above-entitled consolidated proceeding, finding in Case No. 22-6621(CO) that the Respondent labor organization, American Federation of Government Employees, Local 2578, AFL-CIO, hereinafter called AFGE or Union, had not engaged in conduct which was violative of the Order. In Case No. 22-6648(CA), the Administrative Law Judge found that the Respondent Activity, National Archives and Records Service, hereinafter called NARS or Activity, had engaged in certain unfair labor practices and recommended that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the NARS filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the

Administrative Law Judge's Recommended Decision and Order and the entire record in the subject cases, 1/ including the NARS' exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The evidence establishes that in October 1974, the Chief Negotiators for the NARS and the AFGE signed ground rules drafted to govern the negotiations for a new agreement. The ground rules specified the composition of the bargaining teams; the days and times of bargaining sessions; a limit of 40 hours of official time for negotiations during duty hours for each member of the AFGE negotiating team; and a procedure for the Chief Negotiators to "initial off" individual contract clauses to indicate tentative agreement pending full and final agreement.

Negotiating sessions started on November 25, 1974, and continued until February 1975, when they were suspended by mutual agreement because of questions concerning the effect of the impending amendments to Executive Order 11491 and because of lack of progress. The record indicates that negotiations resumed on May 22, 1975, and continued until July 1975, at which time most of the AFGE negotiators had exhausted their 40 hours of official time. After a series of informal discussions between the Chief Negotiators in August 1975, the AFGE negotiators did not appear for further meetings or respond to the NARS' request for bargaining sessions in September. The NARS subsequently filed the complaint in Case No. 22-6621(CO) alleging that the Union violated Section 19(b)(6) of the Order by failing to negotiate a new agreement during September 1975. Shortly thereafter, the AFGE filed its complaint in Case No. 22-6648(CA) alleging that the NARS violated Section 19(a)(1) and (6) of the Order by failing to negotiate in good faith, to meet at reasonable times, and to give its negotiators the authority to negotiate an agreement. 2/

In case No. 22-6648(CA), the Administrative Law Judge found that the NARS violated Section 19(a)(6) of the Order by, in effect, engaging in a calculated strategy of delay which resulted in the exhaustion of

1/ The Administrative Law Judge did not introduce the formal documents into the record. However, inasmuch as the record in the instant case transferred to the Assistant Secretary included the formal documents, they are deemed to be properly included in the record within the meaning of Section 203.23(b) of the Assistant Secretary's Regulations. See Local R1-57, National Association of Government Employees (NAGE), A/SLMR No. 896 (1977); Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Region V-A, A/SLMR No. 832 (1977); Puget Sound Naval Shipyard, U.S. Department of the Navy, A/SLMR No. 829 (1977); and Charleston Naval Shipyard, 1 A/SLMR 27, A SLMR No. 1 (1970).

2/ The Regional Administrator dismissed the complaint in Case No. 22-6648(CA) insofar as it alleged that the Activity had refused to meet at reasonable times and had failed to invest its negotiators with appropriate authority. This dismissal action was not appealed.

official time for the Union negotiating team and which discouraged the Union from proceeding with negotiations for a new agreement. Thus, the Administrative Law Judge found that the NARS offered proposals "demeaning and unacceptable to the Union, which had the Union on the defensive attempting to hold on to what it had instead of moving for improvement on the existing contract." In this regard, he took particular note of proposals relating to three contract provisions, the preamble, the grievance procedure, and the proposal on union representatives, which, in his view, evidenced an intention on the part of the Activity negotiators to discourage the AFGE from proceeding with contract negotiations. With respect to the preamble, the Administrative Law Judge noted that the amendment to the preamble was not "initialed off" until May 1975, some seven months after negotiations commenced, and that the only change from the existing preamble was the deletion of the concluding paragraph. In connection with the grievance procedure, the Administrative Law Judge found the Activity's proposals to be a "complicated maze of steps, stages, qualifications, time limits, and permission slips." And, in regard to management's proposal on union representatives, he noted that the NARS' negotiators proposed that a steward be appointed for each unit in each branch and division of the NARS, a proposal which would require 45 stewards, and that employee violations of smoking and drinking prohibitions would result in disciplinary action taken against the steward in the branch or division in which the violating employee involved was a staff member.

The Administrative Law Judge also found evidence of collateral matters which he felt had a bearing on the issue of good faith bargaining. ^{3/} He concluded that the course of conduct pursued by the NARS was tantamount to a refusal to consult, confer, or negotiate with the AFGE and, therefore, violated Section 19(a)(6) of the Order.

I disagree with the foregoing conclusion of the Administrative Law Judge. In my view, the record does not establish that the NARS engaged in a course of conduct which was violative of the Order. The duty to bargain in "good faith" set forth in Section 11(a) of the Order requires that parties to negotiations approach the bargaining table with an open mind and a sincere desire to reach agreement. This duty does not necessarily require either party to agree to a proposal or to make a concession. Thus, in my view, no inference of bad faith bargaining can be drawn solely from a party's failure to retreat from its initial proposals. In addition to approaching bargaining with an open mind and a sincere desire to reach agreement, the duty to bargain in good faith also requires that the parties make an earnest effort to reach agreement through the collective bargaining process. In determining whether a

^{3/} The collateral matters which the Administrative Law Judge noted were the alleged harassment by the Activity of Union officers by eavesdropping on a Union business call and bad performance ratings; management's exclusion of additional employees from the exclusively represented unit and failure to give the AFGE a copy of its certification; and the expressions of management that it was not obligated to formulate training programs policy with the Union.

party has bargained in good faith the Assistant Secretary will not substitute his judgment with respect to the merits of contract proposals. Thus, even if a proposal or proposals appear onerous or burdensome to the outside observer, they will not be deemed to constitute bad faith bargaining unless the totality of the evidence supports the conclusion that such proposal or proposals were advanced with the clear intent of evading or frustrating the bargaining responsibility. In my view, the record herein does not establish that the NARS violated its duty to bargain in good faith.

Although the Activity negotiators engaged in "hard bargaining" with the AFGE, the totality of their conduct, did not, in my opinion, reflect a closed mind and the absence of a desire to reach agreement. In this connection, the record reflects that the parties had reached tentative agreement on some eleven articles by the end of July 1975, and that the Activity, at no time, made any take it or leave it demands. Rather, it continued to make proposals and counter-proposals throughout the course of negotiations and it displayed a willingness to consider alternative proposals in order to reach agreement. ^{4/} With respect to the specific Activity proposals on the grievance procedure and on union representatives and disciplinary actions alluded to by the Administrative Law Judge, in my opinion, they were not so inherently onerous or burdensome that, standing alone, they would evidence an intent not to reach agreement on the part of the Activity negotiators. Further, with respect to these items, the Activity did not refuse to consider proposals from the Union, and its original proposals were modified in the course of negotiations. In regard to the bargaining over the preamble, the record discloses that the parties came to agreement on the proposed deletion the first and only time they negotiated over the matter. Further, the record reveals that the single paragraph deleted from the original preamble was essentially duplicative of one already contained in Article II of the negotiated agreement.

Nor, in my view, did the Activity's contention that certain proposals made by the Union were non-negotiable, constitute bad faith bargaining under the circumstances of this case. Thus, the Union never chose to contest the Activity's contention by other than a broad assertion that the latter was wrong and, with respect to those items deemed non-negotiable by the Activity's Chief Negotiators, the AFGE was informed that the Union could request a determination by the agency head regarding the negotiability of any Union proposal, and that it could avail itself of the procedures set forth in Section 11(c) of the Order to determine the negotiability of any management proposal. The record shows that the AFGE never sought such determinations of negotiability.

^{4/} With respect to the Administrative Law Judge's conclusion that the Respondent pursued a strategy of delay to cause the Complainant's negotiators to exhaust off duty-time, it is noted that the Regional Administrator dismissed the AFGE's allegation that the Activity had refused to meet at reasonable times and that the parties' ground rules were consistent with Section 20 of the Order. Moreover, the record reflects that the Activity's negotiators were willing to negotiate at adjustable times and, in a spirit of compromise, indicated that they would be willing to meet "half-on and half-off" the clock in an attempt to get the negotiations resumed.

ORDER

With respect to the collateral issues which the Administrative Law Judge referred to in his Recommended Decision and Order, the record reflects that the alleged harrasment, eavesdropping, and bad performance evaluations substantially pre-dated the commencement of the negotiations herein, and that no unfair labor practice complaints or grievances were filed in connection with these allegations. As to the allegations of bad performance evaluations, while a witness, in a self-serving statement, testified that his evaluations "could not be justified," there is no record evidence as to when the evaluations were made, what the evaluations were, or whether they were related in any way to his union activities.

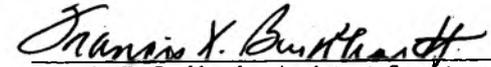
In connection with the Activity's contention in an unrelated proceeding that certain employees should be excluded from the existing unit, in my view, such contention, standing alone, is consistent with its rights under the Order and, absent any other evidence of improper motivation, cannot be deemed either violative of the Order or indicative of management's attitude with respect to the negotiation of an agreement. Thus, the Order permits management to question an employee's eligibility for inclusion within a unit, and it also permits an exclusive representative to contest management's position through the filing of a petition for clarification of unit. Finally, the AFGE had the opportunity to seek a negotiability determination in regard to management's unilateral formulation of some training programs and failed to do so.

Accordingly, under all of these circumstances, I find, contrary to the Administrative Law Judge, that the NARS' conduct was not violative of Section 19(a)(6) of the Order.

With respect to Case No. 22-6621(CO), the record indicates that in September 1975, the AFGE negotiators failed to appear for four negotiating sessions which had been proposed by the NARS negotiating team. The NARS contended that the AFGE's absence from these negotiating sessions constitute a violation of Section 19(b)(6) of the Order. The Administrative Law Judge found that the Union was justified in breaking off contract negotiations and, therefore, there was no violation of the Order. I agree with his conclusion. Thus, the evidence indicates that while the AFGE team did not appear at the September negotiating sessions, its Chief Negotiator continued to communicate with his NARS counterpart in an attempt to gain a favorable arrangement in regard to his team's exhausted official time. Moreover, in the context of the totality of the bargaining which took place between the parties, the AFGE's absence from the four sessions, standing alone, was not considered to constitute bad faith bargaining. Accordingly, I find that the AFGE's conduct was not violative of Section 19(b)(6) of the Order.

IT IS HEREBY ORDERED that the complaints in Case Nos. 22-6621(CO) and 22-6648(CA) be, and they hereby are, dismissed.

Dated, Washington, D.C.
January 11, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
 OFFICE OF ADMINISTRATIVE LAW JUDGES
 Suite 700-1111 20th Street, N.W.
 Washington, D.C. 20036



RECOMMENDED DECISION AND ORDER

.....
 In the Matter of :

AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES, LOCAL 2578, AFL-CIO :
 Labor Organization :

and :

NATIONAL ARCHIVES AND RECORDS SERVICE : Case Nos. 22-6621(CO)
 Complainant : 22-6648(CA)

and :

NATIONAL ARCHIVES AND RECORDS SERVICE :
 Activity :

and :

AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES, LOCAL 2578, AFL-CIO :
 Complainant :

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For the Agency

Carmen R. Delle Donne, Local President
 William McHugh, Local Executive Vice President
 National Archives Building
 Room 2-E
 Washington, D.C. 20408

For the AFGE, Local 2578

Before: GEORGE A. FATH
 Administrative Law Judge

This case arises under Executive Order 11491, as amended (hereinafter called the Order). A Notice of Hearing on Complainant was issued on May 4, 1976 by the Regional Administrator for Labor-Management Relations, Philadelphia Region, on complaints alleging violations of Sections 19(a) (1) (6) and 19(b) (1) (6) of the Order.

On January 15, 1976, the National Archives and Records Service (hereinafter called the Activity) filed a complaint against Local 2578, American Federation of Government Employees (hereinafter called the Union) stating: "The Union refused to negotiate a new agreement during the period September 5-19, 1975, and is, therefore, guilty of violating Section 19(b) (6) of E.O. 11491, as amended".

On February 2, 1976, the Union filed a complaint against the Activity charging a violation of the Order in that the Activity failed to negotiate in good faith, refused to meet at reasonable times, and absence of authority to negotiate on agreement.

The cases were consolidated for trial by Order of the Regional Administrator entered on May 4, 1976, and were tried from the 6th through the 12th of October 1976. The Activity was represented by Counsel and the Union was represented by the President and Vice-President of the Local.

The following findings, conclusions, and recommendations are based upon the entire record, and include credibility determinations based on the observation of witnesses, their demeanor, and evaluation of their testimony.

Rulings on Evidence

At the conclusion of the Union's case, the Activity objected to the admission into evidence of certain of the Union exhibits. Ruling on the objections was deferred pending receipt of the transcript.

The objections to the admission of exhibits U-51, U-52, and U-53 are statements submitted to the Regional Administrator in support of the Union's charge. These exhibits are a mixture

of facts, self-serving statements of opinion and argument. The objections to the admission of these exhibits are sustained.

The objections to the admission of Union exhibits U-56, U-60, U-62, U-63, U-66, and U-68, which are proposals, counterproposals, and memoranda relating to negotiations between the parties, are overruled. These exhibits are found to be relative and material to the issues presented by the cases.

Findings of Fact

Local 2578, AFGE, is the exclusive collective bargaining representative of the personnel employed at the National Archives and Records Service exclusive of supervisors, management executives, temporary employees, guards and employees engaged in personnel work. There is a collective bargaining agreement effective November 6, 1972, operating between the parties.

In October 1974, the parties began negotiating a new collective bargaining agreement. "Ground Rules" governing the planned negotiations were agreed upon, which contained provisions naming the respective negotiating teams, establishing schedules for negotiating sessions, and allotting 40 hours off-duty time to the Union for negotiations.

Early in November 1974, the parties exchanged proposal. The Activity submitted 23 proposals to the Union and the Union offered 9 proposals to the Activity. Each proposal contained parts and subparts amendatory of the existing agreement. The parties met regularly, but by May 22, 1975, they had reached agreement only on Articles dealing to the Preamble, Recognition and Unit Determination, Restrictions and Conditions, Leave, Government Facilities and Services, Management Rights, and Incentive Awards. Up to that point the parties had been in session for at least 58 hours not including informal discussions which were not considered negotiating sessions.

In June, the chief negotiator for the Activity went on leave for a month and his place was taken by the alternate chief negotiator. Under the alternate chief negotiator, the parties agreed upon articles covering Assignments and Details, Position Descriptions and Classification Appeals, Counseling, and Equal Employment Opportunity.

Upon his return, the chief negotiator resumed his position and the alternate dropped out of active participation because of work demands of a promotion. By letter dated July 9, 1975, addressed to the Union, chief negotiator called a meeting for the following day to discuss unsettled contract articles with view to reaching an understanding of "each other's position in search for a compromise to our differences." The Union attended the meeting which took place on July 11, 1975 despite its complaints that it could not get the team together. Management found reason in the Union complaints for charging that the Union did not want to negotiate. The meeting ended in acrimony.

On the 23rd of July, the chief negotiator addressed a letter to the Union in which he cited 26 of the Union proposals which were nonnegotiable. The reasons given for the non-negotiability of these proposal were the conflicts with management rights.

On or about August 1, 1975, the chief negotiator was promoted and replaced on the management team. The new chief, who had been a member of the management team from the outset, began a vigorous letter writing campaign ostensibly to get the negotiations back on the track. On October 23, 1975, under the new chief, the Activity submitted to the Union a packaged version of management's proposals covering the whole contract including new matter and changes on initialed off (agreed) articles.

Bargaining sessions, as such, terminated in September, although the parties were discoursing informally and the chief was writing letters to the Union. The parties reached impasse over the scheduling of future sessions. The Union had exhausted the 40 hours bargaining off-clock time in February and desired to negotiate off the clock, but the Activity, in what it termed a spirit of compromise, was willing to negotiate only half off the clock. Up to July 11, 1975, the parties had been in formal negotiating sessions for not less than 80 hours.

From the beginning, the Activity questioned the meaning of each detail of the Union's proposals. The Union was required to explain, again and again, the most simple terms in the proposals. After each clarification, the proposals were then subjected to analysis. The management team talked at length on the philosophy of labor-management relations and

current personnel problems.

The pace of the negotiations can be measured by the fact that management's proposal for amending the preamble of the existing contract was not initiated until May 1975. The effect of the amendment was to delete the following: "Pursuant to policy set forth in the Executive Order 11491, as amended, and subject to all existing or future laws and the regulations; of appropriate authorities, including policies set forth in the Federal Personal Manual; published GSA policies and regulations in existence at the time the agreement was approved; and by subsequently published GSA policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level."

Management offered proposals demeaning and unacceptable to the Union, which had the Union on the defensive attempting to hold on to what it had instead of moving for improvement on the existing contract. For example, management proposed that a steward be appointed for each unit in each branch and division of the Activity, and, in addition that an alternate be appointed for each steward. The proposal would require the appointment of 45 stewards. Further, it was proposed that only the steward in a unit could handle a complaint in the unit. These proposals arose out of a fear expressed by management that qualified stewards for the activity would "beat down" the supervisors. Under provisions for disciplinary action for violation of the smoking and drinking prohibitions, management proposed: "Any violations of such regulation will result in Management taking disciplinary or adverse action against the employee when it deems appropriate and will take disciplinary and adverse action against the Union representative for the organizational element in which the violating employee is a staff member." (emphasis added)

The grievance procedure proposed by management is a complicated maze of steps, stages, qualifications, time limits, and permission slips contained in Article XIII. This Article is supplemented by Article XXVII which expressly provides for the automatic termination of a grievance if any of the time limits or any procedures are violated, and, further, the article voids any decision in a grievance matter if the violation occurred prior to the decision and became known within 90 days after the decision was rendered.

The chief negotiator for management fostered an atmosphere of uncertainty during the negotiations relative to the negotiability of the Union's proposals. He unilaterally decided which proposals would be discussed based on his conception of what the Agency would approve. In his testimony at the formal hearing he stated that he did not want to negotiate on provisions for the contract which he thought would not be approved by the Agency.

Concurrently there were collateral matters bearing on the issues.

Through its supervisors, the Activity harassed the Union officers. The Union Vice-President witnessed his supervisor standing outside the door to his office eavesdropping on a Union business call. This same Union officer was given bad performance ratings and was unable to find out the reasons for the ratings.

The Activity challenged the right of the Union to represent certain employees. It contended that 19 employees should be excluded from the unit for various reasons. In January 1975, the Union requested a copy of the original certification for the unit. Management denied having the certification. In July of that year, management expanded the list of ineligible to 70 employees and therein classed all GS-12 personnel as supervisors. The Activity continued to deny it possessed the certification. The Union filed a grievance against the Activity, and, within a few days of the hearing on the grievance, management produced the certification.

There were expressions of opinion by top management in the Activity that it was not obligated to formulate personnel policy with the Union in the matter of training programs (T 85, 86).

Conclusions

After prolonged and fruitless negotiations, the Union was justified in breaking off contract negotiations. There is no violation by the Union of Section 19(b) (6) of the Order.

Throughout the negotiations the Activity delayed and hedged in a manner calculated to discourage the Union from proceeding with contract negotiations.

The strategy of delay pursued by the Activity placed the Union at a disadvantage in that it exhausted off-duty time and could only proceed at the considerable cost of annual leave or leave without pay.

The totality of the conduct of the Activity prior, during, and after the contract negotiations is indicative anti-union animus.

Negotiation by management is this instance, if it may be called that, was only token compliance with the Executive Order. The more than 80 hours spent by the parties in wrangling over the terms of a new contract were wasted. Off-duty time up to 40 hours should not be charged to the Union team.

The Union witnesses, the President and Vice-President are sincere, credible witnesses and their testimony is given great weight. They demonstrated an understanding of the meaning of the Executive Order. They have pursued their rights under the Order (without counsel) with great dedication and at considerable personal sacrifice.

Considering the history of these negotiations, the current attitudes of the parties, and the disarray which characterized their meetings, a mediator capable of maintaining constructive discussions between them is recommended for future negotiations.

The course of conduct pursued by the Activity is tantamount to a refusal to consult, confer, or negotiate with the Union and, therefore, violates Section 19(a)(6) of the Order.

Recommendations

In view of the findings and conclusions expressed above, it is recommended that the Assistant Secretary of Labor for Labor-Management Relations find that Local 2578, AFL-CIO did not violate Section 19(b)(6) of the Order and that the allegation of the complaint be dismissed, and, further, that the Assistant Secretary find that the National Archives and Records Service engaged in conduct in violation of Section 19(a)(6) of the Order, as amended, in that, it failed to consult, confer, and negotiate with the Union in the matter of a new contract as required by the Executive Order.

It is further recommended that the following Order, which

is designed to effectuate the policies of Executive Order 11491, as amended, be adopted:

Order

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.26(a) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders the National Archives and Records Service, shall:

1. Cease and desist from:

(a) Failing and refusing to negotiate a collective bargaining agreement with Local 2578, American Federation of Government Employees, AFL-CIO.

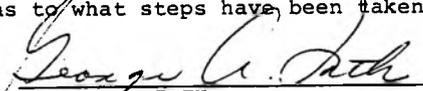
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Upon request, meet at reasonable times with representatives of Local 2578, AFGE, for the purpose of negotiating a collective bargaining agreement.

(b) Credit Local 2578, AFGE, with 40 hours of off-duty time for negotiating upon commencement thereof.

(c) Post at all of its facilities copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Archivist, or other appropriate official in charge of the Activity, and they shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places including all bulletin boards and other places where notices to employees are customarily posted. The Archivist, or other appropriate official in charge of the Activity, shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.


GEORGE A. FATH
Administrative Law Judge

Dated: June 15, 1977
Washington, D.C.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT fail or refuse to meet at reasonable times with representatives of American Federation of Government Employees, Local 2578 in order to negotiate a collective bargaining agreement.

WE WILL upon request meet at reasonable times with representatives of American Federation of Government Employees, Local 2578 in order to negotiate a collective bargaining agreement.

(Agency or 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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UTAH ARMY NATIONAL GUARD,
SALT LAKE CITY, UTAH
A/SLMR No. 966

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees (Ind.), Local 1724, (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when, in the process of negotiating an agreement, the Respondent refused to continue negotiations because a former unit employee was present on the Union negotiating team. The Respondent contended that in accordance with mutually agreed upon ground rules, the Complainant waived its right to select nonemployees as members of its negotiating team.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to continue negotiations. He concluded that the ground rules did not clearly and unmistakably waive the Complainant's right under the Executive Order to select its own negotiating team members.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations and issued an appropriate remedial order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UTAH ARMY NATIONAL GUARD,
SALT LAKE CITY, UTAH

Respondent

and

Case No. 61-3236(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES (IND), LOCAL 1724

Complainant

DECISION AND ORDER

On August 5, 1977, Administrative Law Judge Steven E. Halpern issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, both the Complainant and the Respondent filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting briefs filed by the Complainant and the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations.

ORDER 1/

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Utah Army

1/ The Complainant excepted to the Administrative Law Judge's failure to grant its prayer for relief, set forth on pages 11 and 12 of his Recommended Decision and Order. In agreement with the Administrative Law Judge, I find that the Complainant's request is overly speculative and broad and I shall issue an affirmative bargaining order which, in my view, adequately remedies the violation found herein.

National Guard, Salt Lake City, Utah, shall:

1. Cease and desist from:

(a) Refusing to meet and confer with the National Federation of Federal Employees (Ind.), Local 1724, by refusing to engage in further negotiations of a basic negotiated agreement until such time as the chief representative designated by the Union is removed as a member of the Union's negotiating team.

(b) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Order by failing to afford the National Federation of Federal Employees (Ind.), Local 1724 the opportunity to be represented by representatives of its choice at future negotiations of a basic negotiated agreement.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

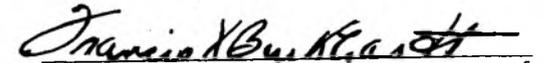
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Upon request of the National Federation of Federal Employees (Ind.), Local 1724, resume and continue to engage in further negotiations of a basic negotiated agreement.

(b) Post at its facility at the Utah Army National Guard, Salt Lake City, Utah, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer of the Utah Army National Guard, Salt Lake City, Utah, and they shall be posted for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
January 11, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer with the National Federation of Federal Employees (Ind.), Local 1724, by refusing to engage in further negotiations of a basic negotiated agreement until such time as the chief representative designated by the Union is removed as a member of the Union's negotiating team.

WE WILL NOT interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Order by failing to afford the National Federation of Federal Employees (Ind.), Local 1724, the opportunity to be represented by representatives of its choice at future negotiations of a basic negotiated agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request of the National Federation of Federal Employees (Ind.), Local 1724, resume and continue to engage in further negotiations of a basic negotiated agreement.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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

If any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036

211 Main Street, Suite 528

San Francisco, California 94105



(202) 653-5092

(415) 556-0555

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding heard at Salt Lake City, Utah, on May 19, 1977, arises under Executive Order 11491, as amended (hereinafter referred to as the Order) pursuant to a Notice of Hearing issued May 5, 1977, by the Acting Regional Administrator, United States Department of Labor, Kansas City Region.

The proceeding was initiated by the filing of a complaint by the National Federation of Federal Employees, Local 1724, (hereinafter referred to as Complainant) against the Utah Army National Guard (hereinafter referred to as Respondent) on September 2, 1976.

The gravamen of the charge is that Respondent violated section 19(a)(1) and (6) of the Order by its failure to recognize a former employee as Complainant's chief representative. Conceding Complainant's right to appoint its own representatives, 1/ Respondent contends that such has been waived by language contained in an instrument designated "Ground Rules for Negotiation." 2/

At the hearing the parties were afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses and to make oral argument. Briefs were subsequently filed and have been considered.

Based upon the preponderance of the evidence of record in this case, having observed the witnesses and assessed their credibility, I make the within findings, conclusions and recommendations.

In substance it is my opinion that Complainant, not clearly and unmistakably having waived its fundamental

1/ In its September 17, 1976, answer to the Complaint, Respondent states: "We fully recognize the rights of the Union to choose their negotiators knowing that it is a long and established policy in government and the private sector."

2/ Respondent's contention in said answer that the Ground Rules (and therefore the language relied upon) "were entered into with very little discussion or debate" is not beneficial to its cause.

In the Matter of

UTAH ARMY NATIONAL GUARD,
SALT LAKE CITY, UTAH

Respondent

and

CASE NO. 61-3236 (CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES (IND.), LOCAL 1724
Complainant

Leland D. Ford, Esquire
Assistant Attorney General
115 State Capitol Building
Salt Lake City, Utah
For the Respondent

Janet Cooper, Esquire
Associate General Counsel
Director of Local Support
National Federation of Federal
Employees
1016 - 16th Street, N. W.
Washington, D. C. 20036
For the Complainant

Before: STEVEN E. HALPERN
Administrative Law Judge

right to select its representatives, Respondent having refused to recognize its Chief Negotiator stands in violation of the Executive Order.

Preliminary Matter

To the extent that Respondent's pre-trial motion to dismiss is a request for summary dismissal, said motion is denied; to the extent that it constitutes Respondent's ultimate prayer for relief on the merits, a recommendation of its disposition is made hereinbelow.

Findings of Fact

1. Complainant has, and at all times material hereto had, exclusive recognition as representative of Respondent's non-supervisory employees.

2. Since the testimony in the area of dates is less than satisfactory, it has been necessary to rely also upon the unobjected to representations made in Complainant's brief. I accordingly find that the parties' first collective bargaining agreement became effective on December 2, 1974, with a term of 18 months, with automatic one-year renewal periods thereafter. Thus, the first term would run in June 1976; the agreement currently continues in effect as a consequence of Respondent's refusal to bargain out of which this action arises.

3. On July 9, 1974, the parties had executed a memorandum of understanding as "Ground Rules for Negotiation" of the aforementioned basic agreement. The evidence indicates that the parties were then in possession of sample written materials from which the 1974 Ground Rules language likely in large part was adopted and that technical assistance was furnished through the participation of Complainant's national representative. Provision was made for the presence of such technical advisor by Article I(c) of the Ground Rules; and, by agreement of the parties, he actively participated in both discussions on the Ground Rules and on the basic agreement.

4. (a) Article I of said Ground Rules identifies those individuals constituting Management's negotiating committee and those individuals constituting the Union's negotiating committee, the latter all being employees.

(b) Article VI(a) of said Ground rules records that "The five members of the Union negotiating team are Utah Army National Guard employees ... ", and authorizes

the use of a stated amount of official time by said employees in negotiations.

5. Early in March 1976, the Union requested renegotiation of the basic agreement. The 1974 Ground Rules are silent as to term, and I do not believe that either party contemplated they would control all contract negotiations in perpetuum. I find and conclude that said Ground Rules had no prospective life beyond negotiation of the 1974 basic agreement and such further incidental negotiations as may have been necessary thereon; but that said Ground Rules did not govern the procedures to be used in developing a new set of Ground Rules for the major renegotiation of the basic agreement requested in 1976.

6. On April 23, 1976, the parties executed a memorandum of understanding designated "Ground Rules for Negotiation" at Article VI(a) of which is the language on which Respondent relies.

7. As pertinent hereto, Articles I and VI(a) of the 1976 Ground Rules were copied verbatim from the corresponding sections of the 1974 Ground Rules:

(a) Article I of the 1976 Ground Rules identifies those individuals constituting Management's negotiating committee but does not set forth the composition of the Union's committee, it having been agreed that such information would be furnished at a later time.

(b) Nevertheless, Article VI(a) of said Ground Rules again records that "The five members of the Union negotiating team are Utah Army National Guard employees ... ", and again authorizes the utilization of official time for negotiations.

8. The following testimony of Respondent's sole witness^{3/} places in perspective the interrelationship between Articles I and VI(a):

Q. And will you tell me how Article VI came to exist?

3/ I credit the testimony of Respondent's sole witness who acted as its Assistant Chief Negotiator in 1976. Such was delivered in a forthright and candid manner and displayed his command of the sequential operative facts.

A. We received, I think some sample Ground Rules from the Civil Service Commission, and we developed our Ground Rules from that,

Q. Was there any discussion in 1974 prior to the time the then Ground Rules were signed off concerning the intent and implications of Article VI?

A. I recall none. One of the things was that both parties gave the names of their team at that time, and all members of that team were Utah National Guard employees at the time in '74 (Tr. 98, 99).

And referring to negotiation of the 1976 Ground Rules--

Q. Was anything said about Paragraph VI a. at that time?

A. No. I recall no conversation at all about the agreement itself.

Q. During the negotiations on the 22nd of April, was anything said about the provision in Paragraph VI a. dealing with National Guard membership?

A. No, it wasn't (Tr. 79).

Q. And as well with regard to the other lettered portions of Article VI with the exception of the language questioned here in Paragraph a., all of the other provisions of Article VI deal, do they not, with time and attendance and those sorts of things?

A. They do.

Q. Is it correct that Article I deals primarily with the composition and function of the negotiating teams both in the 1974 and in the 1976 version?

A. It does.

Q. Would you like to have a copy of that, Colonel, '76? You did respond to my question?

A. I did, I said I agree with that.

Q. Will you explain to me, Colonel, why a matter having to do with composition is included in Article VI rather than in Article I, if it is intended to have to do with composition of the team?

A. No, I can't. It would probably be better put in Article I (Tr. 100).

Q. Now, conjecturally for a moment, suppose there had been a discussion, a full-blown discussion at the time of the 1976 negotiations in which the Union insisted that it had the right to appoint anybody it wanted to its own negotiating team, be it an employee or non-employee, what would have happened?

A. We would negotiated that.

Q. And if ultimately they had not backed off that position, what would you have done as chief negotiator?

A. Well, hopefully we would bargain for something that would be helpful to us if we had given in on that situation (Tr. 101).

9. The process by virtue of which the respective Articles were constructed, thus having been revealed, counsel for Respondent in closing argument was prompted to state with regard to the language of Article VI(a) upon which its position is dependent:

I don't think the record shows that provision, per se, restricts it to National Guard employees was, in fact, negotiated. My use of that term is probably too broad in that context.

The provision existed in both the '74 agreement and the '76 agreement. I think you can say that it was negotiated by implication since it existed and nobody raised it, therefore, nobody was concerned about it. So, it simply found its way into the '76 agreement.

Whether it was negotiated prior to '74, I think, might be an open question. But, I

think there has been such a lapse of time and the fact that it existed in both agreements, one can say by silence, the negotiation, if anything, that is a valid provision (Tr. 109).

10. Accordingly, I find as fact that there was no prior discussion either on the 1974 or the 1976 Ground Rules of the intent of the parties or the purpose or implications of Article VI(a) (Tr. 23, 24, 46, 56, 79, 98, 99, 109).

While the issue has been raised, the purpose of Article VI(a) as subjectively understood or intended by Respondent is not here of significant consequence; in any event it is difficult to make a definitive finding of Fact thereon. As I have elsewhere herein noted, Respondent's witness testified forthrightly and credibly; and it runs through his testimony that Respondent would like to negotiate local issues with local representatives" (Tr. 86, 92, 96). This I believe and find as fact; however, it does not speak to the question of whether or not Respondent intended Article VI(a) to achieve that purpose at the time it was inserted in either set of Ground Rules.

Even in response to the direct question from Respondent's counsel, the testimony is less than might be expected of its chief witness. The manner in which the response is couched leaves room for doubt:

Q. For what reason is that provision inserted in the Ground Rules, do you know?

A. Our feeling is that as Management, that we would prefer to negotiate local issues with local people, local representatives of the unit, and we had taken that attack in '74, and we felt the same way in '76 (Tr. 73).

If I were required to make a finding thereon, I would find that while Respondent then held such preference, it did not contemplate or intend that Article VI(a) would be the instrumentality of accomplishing it. From all of the evidence bearing on the point, and having had the opportunity of observing the witness as he gave the testimony I shall refer to, I do not believe that Respondent prospectively intended Article VI(a) to have the limiting effect it now argues. I believe that only upon being told who Union's negotiator was did Respondent's Chief Negotiator realize that Article VI(a) could be used as an argument. In this connection, he testified:

... I asked then, "Have you decided on your team or your chief negotiator?" I think Mr. Blair turned and said, "Oh, don't you know who the team is?" I said, "No, I don't." He says, "Don't you know who the chief negotiator is," and I said, "No." He said, "Well, Tom here is going to be the chief negotiator."

I thought about that for a few minutes, and then I presented, I had a set of Ground Rules in my desk, so I got them out and looked at them to make sure of what I was thinking about. I read through what I was thinking about, which was Article VI a. in question, and I said, "Tom can't be the chief negotiator, he is not a Utah National Guard employee." I showed him that, and Tom came over to my desk and read the thing and said, "You are not going to hold us to that, are you," and I said, "Yes, we are" (Tr. 82).

This seems to me to be the reaction of one who has just realized there to be "fine print" upon which reliance might be placed and not of one who on two separate occasions had such contractual language purposefully inserted.

11. Relying on the language of Ground Rule Article VI(a) Respondent, on July 26, 1976, at the first negotiation session on the basic agreement refused, and continues to refuse, to bargain with Complainant by refusing to recognize its duly appointed Chief Negotiator, a former employee.

Conclusions of Law

1. The Assistant Secretary has jurisdiction to adjudicate this matter (A/SLMR No. 417 at footnote 2).

2. Complainant Union's right to select its representatives for the purpose of negotiation is fundamental; absent a clear and unmistakable waiver, a labor organization holding exclusive recognition has the right to select its own representatives when dealing with Management (Internal Revenue Service Omaha District Office, Respondent and National Treasury Employees Union (NTEU) and Chapter No. 003, Complainant, A/SLMR No. 417).

3. While Complainant must prove its charge by a preponderance of the evidence, it being conceded that Respondent in fact refused to recognize Complainant's chief representative, there shifts to it the burden of

coming forward with evidence sufficient to support the affirmative defense that Complainant has waived its right to select its representatives in a manner "clear and unmistakable". It has not carried this burden.^{4/}

4. There appears nothing in the history of the negotiations on either set of Ground Rules from which it reasonably can be argued either that Complainant intended to waive its right to appoint negotiators of its choice or that Respondent intended to attenuate that right by inclusion of the language in question. Furthermore, even if the determination were to turn on an analysis of the bare language alone, Respondent would not prevail, for the Article VI(a) word "are" is not of prospective application.

5. I conclude that Article VI(a) exists in the subject Ground Rules for the purpose of authorizing the use of official time by employees during negotiations and not for the purpose of limiting the composition of the Union's negotiating committee.

In reaching this conclusion, I have taken into consideration inter alia the structure of the Ground Rules and the specific Articles involved, the lack of actual negotiation on the critical Article and, particularly, the forthright and credible testimony of Respondent's Assistant Chief Negotiator in 1974 and its Chief Negotiator in 1976 (Tr. 100) from which I infer that notwithstanding the titles given the respective Articles, that were any limitation on the composition of Complainant's negotiating committee actually contemplated such would have been placed in Ground Rule Article I rather than Article VI.

In 1974, Article VI(a) correctly reported (by reference back to Article I) that all five members of the Union's negotiating team were employees. In 1976, without discussion, the same language was perpetuated; however, reference back to Article I shows it to be silent as to the identities of the Union's negotiating committee. The Union not yet being ready to commit itself in Article I as to its team's composition, the parties, having agreed that such could be disclosed at a later time, proceeded to execute the Ground Rules.

^{4/} ALJ instructions to counsel pursuant to the Acting Regional Administrator's May 5, 1977, letter to the parties (Tr. 5 and Joint Exh. 1).

Article VI(a) has no greater significance or function in the 1976 Ground Rules than it did in the 1974 Ground Rules in which it quite obviously was included reperto-rially rather than restrictively. It was perpetuated in the 1976 Ground Rules without consideration and was not then intended or understood by either party to constitute a commitment by the Union or a waiver of its right to select its representatives.

If any fault can be assessed against Complainant, it lies in that its representatives were insufficiently scrupulous draftsmen as to have excluded language which might later be misinterpreted to their disadvantage should it later prove, as it did, factually untrue. Given that such language could justifiably have given rise to an assumption by Respondent and caused it to be misled, there cannot be held to arise from such circum-stantiality the purposeful, unequivocal, unambiguous abandonment that must characterize a clear and unmistakable waiver of the most valuable and fundamental right of selection by the Union of its own representatives.

6. Accordingly, I conclude that Complainant did not, by executing the 1976 Ground Rules, clearly and unmistakably or otherwise waive its fundamental right to select its representatives; and it continues free to appoint non-employees to negotiate on its behalf if it so chooses.

7. It having been concluded that Complainant has made no clear and unmistakable waiver of its right to select its representatives, it is unnecessary to determine:

(a) Whether or not by permitting a non-employee to participate in negotiations on the first basic contract, Management abandoned its right to rely on the alleged waiver. However, if such determination were required, I would conclude that it had not on the facts in finding 3 hereinabove.

(b) Whether or not Management, by negotiating with the Union's chief representative, then known by it to be a non-employee, at the time of the negotiation of the 1976 Ground Rules, abandoned its right to assert the alleged waiver. However, if such determination were required, I would conclude that it did not on the facts in finding 5 hereinabove.

(c) Whether or not Management had abandoned its right to assert the waiver by failing promptly to advise Complainant of its reliance on Article VI(a) after the

written notice of June 4, 1976, of the composition of its negotiating committee. However, if such determination were required, I would conclude that it did not on the finding that Management's Chief Negotiator upon receiving prior oral advice that the Union's Chief Negotiator would be a non-employee promptly orally objected and that the time delay between the first written notice and the first written objection does not establish a withdrawal from such position.

(d) Whether or not the individual objected to was duly selected as a Union representative (either Chief Negotiator or otherwise) prior to the 1976 Ground Rules negotiations and, if so, whether or not Respondent was so aware. However, if such determinations were required, I would find that the Union's representatives, including said individual, were selected prior to the 1976 Ground Rules negotiations at a point in time when he still was an employee but that Management was unaware thereof. Said selections were subject to change and, in fact, as reflected in the June 4 and July 4 written notices from Complainant to Respondent, one substitution, of no moment here, was made. Respondent's first advice of the identity of any of Complainant's negotiators was received in late May 1976 orally as aforesaid.

8. Finally I conclude that Respondent's refusal to recognize Complainant's chief representative and its attempt to control the selection of Complainant's chief representative constitute, in effect, an attempt to interfere improperly in Complainant's internal affairs, being violative of section 19(a)(1) and (6) of the Order as both an interference with assured employee rights and an improper refusal to negotiate with the duly appointed representatives of Complainant, the exclusive bargaining representative of Respondent's employees.

RECOMMENDATION

Having concluded that Respondent stands in violation of section 19(a)(1) and section 19(a)(6) of the Order, I recommend to the Assistant Secretary of Labor for Labor-Management Relations the following:

1. That Respondent's motion to dismiss be denied.
2. That Complainant's prayer for relief contained in its post-trial brief " ... that the agency be ordered to accept as the final new contract whatever proposals NFFE, Local 1724, presents within 60 days from the decision

in this case, subject to section 15 review by the agency ahead ... " be denied as being overly broad and unnecessary to meet the ends of justice in this case.

3. That an Order be entered pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the Regulations directing that the Utah Army National Guard, Salt Lake City, Utah, shall cease and desist from:

(a) Refusing to recognize the chief representative designated by National Federation of Federal Employees, Local 1724, the exclusive representative of its employees,

(b) Interfering with, restraining, or coercing its employees by refusing to recognize the chief representative designated by National Federation of Federal Employees, Local 1724, the exclusive representative of its employees,

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

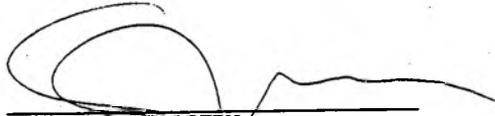
4. That the Assistant Secretary further direct Respondent to take the following affirmative actions to effectuate the purposes and policies of the Order.

(a) Upon request, recognize the chief representative designated by National Federation of Federal Employees, Local 1724, and the other duly appointed members of its negotiating committee.

(b) Upon request forthwith enter into contract negotiations with the negotiating committee designated by National Federation of Federal Employees, Local 1724.

(c) Post at the Utah Army National Guard facility, Salt Lake City, Utah, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of the Order, what steps have been taken to comply therewith.



STEVEN E. HALPERN
Administrative Law Judge

Dated: August 5, 1977
San Francisco, California

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE
We hereby notify our employees that:

WE WILL NOT refuse to recognize the Chief Representative designated by National Federation of Federal Employees, Local 1724.

WE WILL NOT interfere with, restrain, or coerce our employees by refusing to recognize the Chief Representative designated by National Federation of Federal Employees, Local 1724, the exclusive representative of the employees of the Utah Army National Guard at Salt Lake City, Utah.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, recognize the Chief Representative designated by National Federation of Federal Employees, Local 1724.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

January 11, 1978

A/SLMR No. 967

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD,
PORTSMOUTH, VIRGINIA
A/SLMR No. 967

DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD,
PORTSMOUTH, VIRGINIA

Respondent

and

Case No. 22-07352(CA)

TIDEWATER VIRGINIA FEDERAL
EMPLOYEES METAL TRADES COUNCIL
(AFL-CIO)

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the Tidewater Virginia Federal Employees Metal Trades Council AFL-CIO (Council) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by responding, through an agent, to an inquiry by a personnel staffing and classifications specialist, concerning a unit member's qualification for selection for a position, that the employee involved was a union steward and spent a lot of time away from the job without permission. The Respondent contended that the agent, the employee's temporary supervisor, was acting in direct conflict with existing management policy and that it had remedied all possibility of prejudice to the offended employee. The Respondent further contended that it had taken steps to foreclose any repetition of such error in the future.

On September 12, 1977, Administrative Law Judge Peter McC. Giesey issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Administrative Law Judge noted that, upon discovery of the offending material, the information complained of was deleted from consideration, replaced with a favorable evaluation from the employee's former supervisor, and the employee was re-ranked by an entirely new promotion panel. He further noted that the Shipyard commander immediately published a memorandum to supervisors designed to avoid repetition of similar occurrences in future evaluations. Accordingly, he concluded that the Respondent did not violate Section 19(a)(1) and (2) of the Order and recommended that the complaint be dismissed in its entirety.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 1/

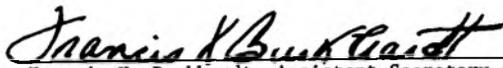
Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed.

1/ In reaching the disposition herein, I find it unnecessary to pass upon the conclusions of the Administrative Law Judge with respect to the matter set forth on page 5 of his Recommended Decision and Order inasmuch as such matter was not alleged in either the pre-complaint charge or the complaint.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-07352(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
January 11, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



.....
In the Matter of

DEPARTMENT OF THE NAVY
NORFOLK NAVAL SHIPYARD
PORTSMOUTH, VIRGINIA
Respondent

and

TIDEWATER VIRGINIA FEDERAL
EMPLOYEES METAL TRADES COUNCIL
(AFL-CIO)
Complainant
.....

Case No. 22-07352(CA)

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Portsmouth, Virginia 23704
For the Complainant

Mitchell Arkin, Esquire
Labor Relations Division
Office of Civilian Personnel
Department of the Navy
Washington, D.C. 20390
For the Respondent

Before: PETER McC. GIESEY
Administrative Law Judge

Recommended Decision and Order

This is a proceeding brought under Executive Order 11491, as amended (hereafter, "the Order") by Tidewater Virginia Federal Employees Metal Trades Council (AFL-CIO) (hereafter, "Council") against Norfolk Naval Shipyard. Council complains that Shipyard violated sections 19(a)(1) and (2) of the Order 1/ by responding,

-2-

1/ Sec. 19. Unfair labor practices. (a) Agency management shall not-

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion or other conditions of employment.

through an agent, to an inquiry by a personnel staffing and classifications specialist concerning a unit member's qualification for selection for a position that:

He is a union steward, spends a lot of time away [from his] job without permission.

A hearing was held in Norfolk, Virginia on February 9, 1977. Briefly, the record shows the following.

Statement of the Case

The facts are undisputed.

In June, 1976, 2/ a personnel staffing and classifications specialist in Washington, D.C. was engaged in gathering information in order to rate 3/ applicants for an advertised position as planner and estimator. He called a supervisor in connection with an applicant who was a member of the appropriate unit represented by Council. The supervisor replied in the way complained of. 4/

Shortly thereafter, the applicant inquired of the personnel specialist concerning the status of his application and was told of the supervisor's comment. Council filed an unfair labor practice charge as summarized, supra.

Shipyard investigated the charge and answered it in July. Inter alia, the reply stated that the supervisor's offending comment had been deleted from the performance appraisal and that

2/ All dates are 1976.

3/ The record shows that a "job element rating sheet for inservice placement" is used for this purpose. Applicants are assigned numerical values in each of the "job elements" (required skill or knowledge, or potential), and the total points attained result in a "rating" of "highly qualified", "qualified", or "not qualified".

4/ While the language used may not be set forth exactly, there is no question that the supervisor coupled a disparaging remark about the applicant with the statement that he was a union steward.

a memorandum setting forth applicable policy had been circulated to all shipyard supervisors. 5/

Meanwhile, a former supervisor's appraisal of the applicant was substituted for the offending comments of the active supervisor, the applicant was re-rated by a panel different from the earlier panel, and the applicant was rated "qualified". Because only the names of applicants rated "highly qualified" were forwarded to the selecting official, the applicant in question was not considered for the sought position.

5/ The memorandum from the Shipyard commander, a copy of which was attached to the Shipyard's answer, is as follows;

1. Recently, I have received information which indicates there may exist some misunderstanding on the part of supervisors as regards to the marking of performance appraisals for promotional purposes of properly designated union representatives. This memorandum shall serve as guidance to those supervisors requiring it.

2. The recognized activities of employees who serve as representatives of labor organizations (such activities may include representing employees in the presentation of grievances, investigating bona fide employee dissatisfactions, negotiating with management officials, meeting with management and so on) are neither a part of nor related to the official duties of such employees. Such activities are not subject to appraisal for promotion purposes and such activities shall not be cited or referred to in any manner as justifying or supporting, in whole or in part, supervisory judgements of an employee's performance. The assessment of a union representative for promotional purposes will therefore be consistent with his on the job performance and represent a sound and realistic and fair appraisal of his work.

Emphasis in original.

Findings of Fact and Conclusions of Law

Having considered the entire record including the testimony, 6/ exhibits and brief of respondent and having observed the demeanor of the witnesses, I make the following findings of fact, conclusions of law and recommended decision and order based thereon.

The facts are as set forth in the statement of the case.

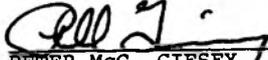
Shipyard argues that a violation of the order is not shown on this record because anti-union animus and intent to discouragage union membership has not been shown. I disagree. It is a legal commonplace that persons intend the reasonably foreseeable consequence of their actions. To permit the protected activity of an employee to constitute a negative consideration in selection for promotion violates the Order. E.g., Department of the Army, Fort Benning, Georgia, A/SLMR 515; Internal Revenue Service, Wilmington, Delaware, A/SLMR 516; Federal Deposit Insurance Corporation, New York Region, A/SLMR 580.

However, I do agree with Shipyard's position that this sort of violation never occurred in this case. Thus, it is undisputed that immediately upon discovery of the offending material and before evaluation of the employee's fitness for promotion, the information complained of was removed from consideration and a different - and favorable - report was substituted. Moreover, the Shipyard commander immediately published a memorandum designed to avoid repetition in future evaluations of the offending evaluation. It is equally significant that a long standing (March, 1975) memorandum detailed quantified credit to be afforded employees active in local union and Council affairs. Thus, it is plain that the supervisor who coupled disparagement of an employee with that employee's activity as a steward was acting in direct conflict with existing management policy. In view of this and of Shipyard's swift and effective action to remedy all possibility of prejudice to the offended employee and to foreclose any repetition of the supervisor's error, I agree with Shipyard that its action conformed with the purpose of the Order as set forth in the Study Committee Report and Recommendations, August, 1976, Which Led to the Issuance of Executive Order 11491, Labor-Management Relations in the Federal Service; p.69, U.S. Government Printing Office, FLRC 75-1(4/75). Moreover, were the Assistant Secretary to issue a remedial Order, in my opinion, he could do no better than to order Shipyard to do what it has already done.

6/ The transcript introduced each witness as "having been first duly warned." The transcript is corrected in each case by inserting "affirmed" vice "first duly warned."any

Finally, the record reflects a criticism of a union steward 7/ delivered by a supervisor during the course of a meeting between management and officials of the union. In this context, I believe that the record demonstrates that the remark was isolated, ambiguous (de minimis), and neither intended to, nor effective in discouraging protected activity. Such meetings are intended to allow a frank interchange and are frequently marked by rancor, misunderstanding, and inappropriate or even personally offensive statements. It is an understatement to say that this aspect of labor-management relations is commonly experienced in both the public and private sector - and is likely to continue. I note also that, although the incident was spread on this record and briefed by Shipyard, it is not alleged in the charge to constitute a separate violation of the Order.

Accordingly, I recommend that the Assistant Secretary dismiss the complaint in its entirety.


PETER McC. GIESEY
Administrative Law Judge

Dated SEP 13 1977.
Washington, D.C.

7/ Specifically, that he was a "troublemaker" who the supervisor was "glad to get rid of."

January 11, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD,
PORTSMOUTH, VIRGINIA
A/SLMR No. 968

This case involved an unfair labor practice complaint filed by the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Council) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when management representatives refused to furnish information requested by the Council regarding an employee's grievance. The information requested by the Council was the identity of the informant who spotted the aggrieved employee receiving a traffic ticket off the Shipyard when the employee was officially "on-the-clock." The informant, who was a supervisor, reported the information to the employee's superiors who then sought and received a copy of the citation from the local police. Subsequently, pre-action investigation was conducted which resulted in the employee's suspension. The employee then filed a grievance over his suspension. After the second step of the grievance had been processed, the Respondent furnished the Complainant with the information sought. The Respondent contended its actions did not constitute a violation of the Order, and that the complaint in this matter was barred by Section 19(d) of the Order in that the denial of the requested information was the subject of the aggrieved employee's grievance conducted pursuant to the parties' negotiated agreement.

The Administrative Law Judge found that Section 19(d) did not bar the instant complaint but that, under the particular circumstances of the case, the Respondent had not violated the Order. Accordingly, he recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations and ordered that the complaint be dismissed.

A/SLMR No. 968

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD,
PORTSMOUTH, VIRGINIA

Respondent

and

Case No. 22-06884 (CA)

TIDEWATER VIRGINIA FEDERAL
EMPLOYEES METAL TRADES COUNCIL
(AFL-CIO)

Complainant

DECISION AND ORDER

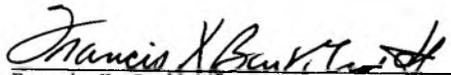
On September 12, 1977, Administrative Law Judge Peter McC. Geisey issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-06884 (CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 11, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



that the Shipyard violated sections 19(a)(1) and (6) of the Order 1/ when management representatives "refused to furnish the Metal Trades Council vital information regarding [an employee's grievance]."

A hearing was held in Norfolk, Virginia, on February 9, 1977. Briefly, the record shows the following.

Statement of the Case

The Council is the exclusive collective bargaining for certain employees of the Shipyard in an appropriate unit. The employee whose grievance is the subject of this charge is a member of that unit.

On or about July 31, 1975, a "pre-action investigation" was commenced in the case of an employee who management had reason to believe had been away from his work-place on private business during a period when he was "on the clock" (being paid) and outside of the time designated as meal time. A "pre-action investigation" is commenced in instances where the employee's immediate supervisor, after informally consulting with an employee who he believes has violated a work-rule, recommends disciplinary action to the general foreman II ("chief quartermen") who appoints a supervisor to conduct the investigation and make recommendations based upon the information discovered.

In the instant case, a supervisory employee observed an employee receiving a traffic ticket on a city street during working hours. He informed the general foreman II. This supervisor, after ascertaining that the employee had not been granted an excused absence during the time of the observed incident, obtained a copy of the traffic citation from the town (Portsmouth) police. The citation indicated that it had been issued during working hours at a place outside the shipyard. A charge was drawn up and signed by the general foreman II and given, together with the copy of the traffic citation, to a general foreman I who was instructed to conduct a pre-action investigation.

1/ Agency management shall not -

(1) Interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

..... :
: In the Matter of: :
: :
DEPARTMENT OF THE NAVY :
NORFOLK NAVAL SHIPYARD :
PORTSMOUTH, VIRGINIA, :
Respondent, :
: Case No. 22-06884
: and :
: :
TIDEWATER VIRGINIA FEDERAL :
EMPLOYEES METAL TRADES COUNCIL :
(AFL-CIO), :
Complainant. :
..... :

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For the Respondent.

Before Peter McC. Giesey
Administrative Law Judge

Recommended Decision and Order

This is a proceeding brought under Executive Order 11491, as amended (hereafter, "the Order") by Tidewater Virginia Federal Employees Metal Trades Council, (AFL-CIO) (hereafter, "the Council") against Norfolk Naval Shipyard ("the Shipyard"). Council complains

The employee charged with the infraction requested and was given representation by the Council. He denied the charge and offered no further information or evidence corroborating his denial. 2/

During the pre-action investigation and the review of the recommendation of disciplinary action that followed, the charged employee's representative repeatedly requested that he be furnished the name of the "accuser" or informant. The supervisor conducting the pre-action investigation did not know that there was an informant and made no attempt to find out. The reviewing official knew the identity of the informer but refused to reveal his name. He testified that both he and the supervisor who had signed the charge had unilaterally determined that, because "there had been . . . violence in the shipyard . . . employees striking supervisors, employees striking employees, . . . threatening phone calls to my home [,]. . . it was best. . . as long as we felt it was not necessary for the union to know who had seen [the charged employee], we shouldn't reveal [the informer's identity]."

When the reviewing supervisor confirmed the disciplinary action, the disciplined employee filed a grievance. The grievance was processed through the second step before management asked the informant (who had been assured that his identity would not be revealed) if he objected to the disclosure of his identity. He agreed to the disclosure and the grievant was given the information.

Findings of Fact and Conclusion of Law

The facts are as set forth above. All witnesses were credible and no material discrepancies appear in the testimony. 3/

2/ It is undisputed that the chief steward who advised the charged employee and the steward appointed to represent him, "instructed [the accused employee] not to . . . inform any[one]" of the fact that two fellow employees were with him when he received the traffic citation.

3/ I note that the person who typed the record consistently introduced the testimony of each witness as "having been first duly warned. . . ." The record is now corrected in each case by inserting "affirmed" vice "duly warned."

Having considered the entire record, including the testimony, exhibits and briefs and having observed the demeanor of the witnesses, I make the following findings of fact, conclusions of law and recommended decision and order based thereon.

Council urges that the record reveals actions on the part of agents of the Shipyard which violate section 19(a) (6) of the Order's requirement that it negotiate and consult in good faith and cites the terms of its collective bargaining agreement, viz.;

All personnel involved in a disciplinary action investigation or grievance procedures thereto shall not conceal any material facts relevant to such proceedings at any time.

Sic, Joint Exhibit 1, p. 72, Article 31, section 4.

I agree that the section of the collective bargaining agreement cited is wholly consistent with and admirably designed to further the responsible performance of mutual obligations under the Order. I do not agree that the facts on this record demonstrate a breach of good faith on the part of the Shipyard.

Nor do I agree with Shipyard's position that section 19(d) of the Order 4/ is applicable. Such a charge as this, if established, would constitute interference with rights assured by section 10(e) of the Order. E.g., Dallas Naval Air Station, A/SLMR No. 510; S.S.A. Kansas City Payment Center A/SLMR No. 411. Moreover, assuming that section 19(d) could be applicable, the Council did not invoke the grievance procedure in the matter at issue. Thus, section 19(d) does not preclude these proceedings under the Order. Internal Revenue Service, A/SLMR No. 642. Cf., Department of Defense, State of New Jersey, A/SLMR No. 539 and authority cited.

4/ (d) Issues which can properly be raised under an appeals procedure may not be raised under this section. Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. Appeals or grievance decisions shall not be construed as unfair labor practice decisions under this Order nor as precedent for such decisions. All complaints under this section that cannot be resolved by the parties shall be filed with the Assistant Secretary.

Shipyard also argues that the charged employee received all the information to which he was entitled. I agree in part. First, management reasonably concluded that the copy of the traffic citation sufficiently evidenced the breach of work rules and informed the employee of time, place and circumstance.

Moreover, the assertions of management employees concerning the bases for their apprehension of retaliatory violence against the informant supervisor are undisputed on this record. I believe that management reasonably concluded that the informant's identity was unnecessary to the charged employee's defense and that, in view of the atmosphere of the shipyard at the time, it was both prudent and reasonable to refrain from revealing the identity of the informer. Moreover, the record demonstrates the good faith of these management employees following the second stage of the proceedings. At this point, although still convinced that the informant's identity was not necessary to the charged employee's defense, they took the generous position that they would no longer "hold out" this information in view of the employee's representative's insistence. It is significant that at no time did management conceal the existence of an informant, yet council admittedly concealed the fact that two fellow employees had been present in the charged employee's automobile when the traffic citation was issued. In these circumstances, it would appear that Shipyard's defense of pari delicto or its variation of an unclean hands doctrine understates the absence of good faith on the part of Council. Council, in bringing this case, is seeking to turn adversity to virtue in a manner which emphasizes the unattractive nature of its case. However that may be, the information sought by Council was provided as soon as Shipyard received the permission of the informant who was being protected from physical threat. Thus, no lasting prejudice was suffered by the charged employee and no violation of the Order occurred. Vandenberg Air Force Base, A/SLMR No. 410.

Accordingly, I recommend that the Assistant Secretary dismiss this complaint in its entirety.


Peter McC. Glesey /
Administrative Law Judge

Dated: September 12, 1977
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

PENNSYLVANIA ARMY AND AIR NATIONAL GUARD
A/SLMR No. 969

This case involved an unfair labor practice complaint filed by the Pennsylvania State Council, Association of Civilian Technicians (Complainant) alleging that the Respondent violated Section 19(a)(1), (2), (5), and (6) of the Order by changing its policy regarding the use of military titles by civilian technicians in completing repair records, without first negotiating with the Complainant. The complaint also alleged that the Respondent's actions violated an earlier settlement agreement between the parties.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In reaching this conclusion, he found, among other things, that the memorandum did not constitute a change in working conditions, and noted that even if it did constitute a change in working conditions, the Respondent had followed procedures for effecting such a change as set out in the prior settlement between the parties. Finally, he noted that even if the provisions of the agreement were breached, such a breach was not the type which would constitute a violation of Section 19(a)(1) and (6) of the Order.

While agreeing with the Administrative Law Judge's recommendation to dismiss the Section 19(a)(2) and (5) allegations, the Assistant Secretary found that the Respondent's conduct improperly constituted a change in working conditions in violation of Section 19(a)(1) and (6). In this regard, the Assistant Secretary found that by issuing its memorandum of April 19, 1976, the Respondent unilaterally established what had been an ambiguous, irregularly enforced personnel policy covering unit employees without affording their exclusive representative the opportunity to bargain on such matter and that the parties' earlier settlement agreement did not preclude the utilization of the unfair labor practice procedures.

Under these circumstances, the Assistant Secretary issued an appropriate remedial order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PENNSYLVANIA ARMY AND AIR NATIONAL GUARD

Respondent

and

Case No. 20-5945(CA)

PENNSYLVANIA STATE COUNCIL,
ASSOCIATION OF CIVILIAN TECHNICIANS

Complainant

DECISION AND ORDER

On August 25, 1977, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The Administrative Law Judge concluded that the Respondent had not violated the Order when it issued a memorandum requiring civilian technicians to include their military rank on repair records. In reaching this conclusion, he found, among other things, that the memorandum in question did not constitute a change in working conditions, and noted that, even if it did, the Respondent had followed procedures for effecting such a change as set out in a prior settlement between the parties. Finally, he noted that even if the provisions of the agreement were breached, such a breach was not the type which would constitute a violation of Section 19(a)(1) and (6) of the Order.

While I agree with the Administrative Law Judge's recommendation that the Section 19(a)(2) and (5) allegations of the instant complaint should be dismissed, I find that, under the particular circumstances of this case, the Respondent's conduct herein constituted an improper unilateral change in employee working conditions and thereby violated Section 19(a)(1) and (6) of the Order. 1/ Thus, it is undisputed that the purpose of the memorandum involved herein was to clarify the Respondent's position on the use of military titles, a subject which previously has been found to be within the ambit of Section 11(a) of the Order. 2/ In this regard, the evidence establishes that if there was any policy prior to the memorandum, the Respondent's attempts to enforce such "policy" were irregular and ambiguous. Thus, confusion over the issue was so widespread that the officer who issued the memorandum in question had himself used his civilian grade in completing at least one document. In this context, I find that by issuing the memorandum herein, the Respondent unilaterally established what heretofore had been an ambiguous, irregularly enforced personnel policy covering unit employees without affording their exclusive representative the opportunity to bargain on such matter. 3/

Under these circumstances, I conclude that the Respondent's unilateral change in working conditions, resulting from its memorandum of April 19, 1976, was violative of Section 19(a)(1) and (6) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Pennsylvania Army and Air National Guard shall:

- 1/ In my view, the record does not support a finding that the parties' earlier settlement agreement or subsequent conduct constituted a clear and unmistakable waiver of the Complainant's right under the Order to seek redress under the unfair labor practice procedures with respect to the matter in question. Cf. NASA, Kennedy Space Center, Kennedy Space Center, Florida, 2 A/SLMR 566, A/SLMR No. 223 (1972).
- 2/ New York Army and Air National Guard, Albany, New York, 4 A/SLMR 681, A/SLMR No. 441 (1974).
- 3/ See New Mexico Air National Guard, Department of Military Affairs, Office of the Adjutant General, Sante Fe, New Mexico, 4 A/SLMR 175, A/SLMR No. 362 (1974). Compare Alabama Air National Guard, Montgomery, Alabama, A/SLMR No. 895 (1977), where the complaint alleged 19(a)(1) and (6) violations based upon the alleged unilateral implementation of a program of more strict enforcement of existing rules. The complaint was dismissed because the directive involved therein was found not to constitute a change in enforcement policy but, rather, a reaffirmation of existing policy intended to ensure uniformity of enforcement.

1. Cease and desist from:

(a) Unilaterally implementing its memorandum issued on April 19, 1976, concerning the use of military titles by civilian technicians in the completion of repair records, without affording the Pennsylvania State Council, Association of Civilian Technicians, the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to change existing policy regarding use of titles.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Rescind the memorandum of April 19, 1976, concerning the use of military titles by civilian technicians in the completion of repair records.

(b) Upon request, meet and confer with the Pennsylvania State Council, Association of Civilian Technicians, to the extent consonant with law and regulations, concerning any change in policy regarding the use of titles by civilian technicians.

(c) Post at all Pennsylvania Army and Air National Guard facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding General, Department of Military Affairs, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding General shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges violations of Section 19(a)(2) and (5) of the Order be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 13, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT implement a change in policy regarding the use of military titles in the completion of repair records by civilian technicians represented exclusively by the Pennsylvania State Council, Association of Civilian Technicians, without notifying that organization and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to change existing policy regarding the use of titles.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind our memorandum of April 19, 1976, concerning the use of military titles by civilian technicians in the completion of repair records.

WE WILL, upon request, meet and confer with the Pennsylvania State Council, Association of Civilian Technicians, to the extent consonant with law and regulations, concerning any change in policy regarding the use of titles by civilian technicians.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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 In the Matter of :

 PENNSYLVANIA ARMY AND AIR :
 NATIONAL GUARD :
 Respondent :

 and : Case No. 20-5945 (CA)

 PENNSYLVANIA STATE COUNCIL, :
 ASSOCIATION OF CIVILIAN TECHNICIANS :
 Complainant :

Appearances:

Leonard Spear, Esq.
 Meranze, Katz, Spear and Wilderman
 Lewis Tower Building
 15th and Locust Streets
 Philadelphia, Pennsylvania 19102
 For the Complainant

Major George M. Orndorff
 Adjutant General's Office
 Commonwealth of Pennsylvania
 Annville, Pennsylvania 17003
 For the Respondent

Before: MILTON KRAMER
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated September 8, 1976 and filed September 10, 1976 alleging a violation of Sections 19(a) (1), (2), (5), and (6) of the Executive Order. The violation was alleged to consist of the Chief of Maintenance issuing a memorandum, without consultation with the recognized exclusive

representative, requiring technicians, in signing a form showing that they had corrected a defect in equipment, to indicate their military grade. This was alleged also to constitute a violation of an agreement between the parties specifically providing that such a change would not be made without prior consultation. The Respondent filed a response dated September 16, 1976 admitting the action taken, arguing that it was not a change in working conditions and not in violation of the Executive Order, and requesting that the complaint be dismissed.

On November 24, 1976 the Regional Administrator issued a Notice of Hearing to be held in Pittsburgh, Pennsylvania, on February 3, 1977. There were several continuances on motion and Amended Notices of Hearing. A hearing was held in Pittsburgh on April 21, 1977. Both parties were represented, produced witnesses who were examined and cross-examined, offered exhibits which were received in evidence, made closing arguments, and filed briefs.

At the hearing the name of the Complainant in this proceeding, on motion and without objection, was changed as shown in the caption of this Recommended Decision.

FACTS

A statutory requirement for employment by the National Guard as a civilian technician is membership in the National Guard. 1/ Respondent's regulations at least since 1973 have provided that rules and customs of the military service be observed by technicians while performing technician duties just as though the technician were on duty in his military grade. 2/

Included among the duties of civilian technicians is the repair of defects in airplanes. In performing such operation Forms 781 are used. Air Force Form 781A is used to record the date a defect was discovered, who discovered it, what the defect was, who corrected it, the date he corrected it, and the like. 3/ The manner of using various forms used by civilian technicians, the responsibilities of the personnel involved, certain methodology in servicing airplanes, and the like are prescribed in "technical orders" issued by the Secretary of the Air Force.

The Technical Order here involved is TO 00-20-5. It provides that the minimum signature on Form 781A (and others) are the first name, middle initial, last name, and "grade". It

1/ 32 U.S.C.A. § 709(b).
 2/ R. Exh. 4.
 3/ C. Exh. 9.

has so provided since 1973. Several specific instructions in TO 00-20-5 direct that certain blocks in forms be filled with the signature and "grade" of the person who performed the particular function. Only two of them give an indication of what is meant by "grade", whether the civil service grade or military grade or rank. One of them, covering Form 781H (not involved in this case) provides that in filling out that form the crew chief shall enter the initial of his first name, his last name, and his grade and gives as an example "O. Weaver, SSgt". 4/ The other, applicable to Form 781A, the form here involved, also directs the crew chief to enter the initial of his first name, his last name, and grade in a particular box and gives as an example "M. Griffin, SSgt". 5/

On October 1, 1974, the Chief of Maintenance of the 171st Maintenance Technicians, the group involved in this proceeding, in accordance with TO 00-20-5 issued a memorandum stating that the technician who performs or supervises the corrective action covered by Form 781A shall enter his first name, middle initial, last name, and grade on the form in the "corrected by" block.

Some of the civilian technicians in the 171st understood the term "grade" to mean wage grade and entered their name on Form 781A accordingly in the "corrected by" box. The majority of the technicians always entered their military grade, some of the remainder sometimes entered their military grade and sometimes entered their civilian grade, and some of the remainder always entered their civilian grade. Sometimes a supervisor told a technician who entered his civilian grade that he should enter his military grade, but no sanctions were imposed or threatened.

In 1976, a year and a half after the memorandum of October 1974, the Chief of Maintenance noticed the lack of uniformity in the way technicians entered their names in the "corrected by" box on Form 781A. On April 19, 1976 he issued a memorandum to the 171st stating that the references to "grade" in TO 00-20-5 and the examples given were references to military grade and that for uniformity only the military grade should be used. Before issuing the memorandum the Chief of Maintenance discussed it with the Chairman of the Complainant. The Chairman discussed it also with representatives of the Adjutant General's Office who took the position that that had been the rule and all the technicians should have been entering their military grade all the time. 6/

4/ R. Exh. 7, p. 2-7.
 5/ R. Exh. 7, p. 2-14
 6/ R. 23-24

On May 18, 1976 the Complainant filed an unfair labor practice charge with the Adjutant General contending that the memorandum of April 19, 1976 created a unilateral change in working conditions without first meeting and conferring with the Complainant, in violation of the Executive Order. On June 8, 1976 the Personnel Officer in the Adjutant General's Office replied denying that the April 19 memorandum changed working conditions, stating that the previous policy and oral instructions were to use the military grade, that a few technicians were not doing so, and that the memorandum was issued to achieve uniformity. 7/

The 171st Maintenance Technicians are stationed at the Greater Pittsburgh Airport. Also stationed at that Airport is the 112th. A similar situation arose with the 112th in 1974. In that unit a memorandum had been issued similar to the memorandum of April 19, 1976 in this case. A complaint alleging a violation of Section 19(a) of the Executive Order was filed and a hearing was scheduled. Case No. 20-5070(CA). The complaint was withdrawn after an agreement was entered into on October 29, 1975. That agreement was entered into by the Chairman of the Complainant and the Technician Personnel Officer of the Adjutant General. It provided that when a change in "terms and conditions of employment" was intended, sufficient notice would be given the Chairman of the Complainant to afford him the opportunity to negotiate on the matter with the Technician Personnel Officer, and in the event they could not resolve the matter "it may then be presented by ACT to the Deputy Adjutant General for his decision within 5 days." 8/

DISCUSSION AND CONCLUSIONS

There was no evidence whatsoever introduced concerning an alleged violation of Sections 19(a)(2) or (5) of the Executive Order. Those aspects of the complaint should be dismissed. There remains the allegation that Sections 19(a)(1) and (6) were violated by the Respondent's conduct described above.

Were this a case of first impression, I would recommend that the complaint be dismissed out-of-hand because the prefix or suffix one is directed to use with his name in a small box, on a particular form (AFTO Form 781A), to indicate who did the work to remedy a defect in some airplane equipment (so long as the prefix or suffix is not degrading or demeaning), is not a "working condition" within the meaning of Section 11(a) of the Executive Order, and hence a change directed by management in such a matter, without meeting and conferring with

7/ R. Exh. 1A.
 8/ C. Exh. 1.

the exclusive representative, is not a unilateral change in established working conditions. Or if it is technically such a change, it is so inconsequential as not to warrant an unfair-labor-practice proceeding. If John Smith, a civilian employee working for the military who must be a member of the military branch by which he is employed as a civilian to be eligible for employment as a civilian, is directed to enter his name when he completes an assignment in a small box on AFTO Form 781A, it should not be a matter of any consequence whether he is directed to write his name without any prefix or suffix, or to use the prefix "Mr.", or the suffix "TSgt", or the suffix "WG 10" (assuming each of them is true).

But I am constrained by New York Army and Air National Guard and New York State Council, Association of Civilian Technicians, Inc., A/SLMR No. 441 (1974) to hold that the suffix one adds to one's name in filling out a prescribed form in the course of his employment is a working condition, and that a unilateral change in such suffix, without meeting and conferring with the exclusive representative, may, under certain circumstances, constitute a by-pass of the exclusive bargaining representative, be clearly inconsistent with an agency's obligations set forth in Section 11(a) of the Executive Order, thus constitute a violation of Sections 19(a)(6) of the Order, and also necessarily have a restraining influence on unit employees and a concomitant coercive effect on their rights assured by the Order in violation of Section 19(a)(1).

There remains to be considered whether this case is sufficiently analogous to the New York case to be governed by that case. I conclude it is not, both because of dissimilarities in the comparable underlying facts and because of a critical contractual difference.

In the New York case the requirement was that the technicians wear the clothing of the military, and the use of military rank in more or less formal conversation or written communication was construed by the Respondent as a corollary of the military uniform requirement. However, neither the specific requirement nor its corollary was strictly enforced, from its inception on January 1, 1969 to May 1971. There were three classes of technicians there involved; one class of about 300 and another of about 600 generally wore the uniform, while the third class of about 900 generally did not. The practice in using military titles varied considerably. Technicians "frequently" did not use military titles in discussions with fellow technicians of the same or lower rank but the "usual practice" was to use the military

title in addressing a technician of higher rank. 9/ It was concluded that this practice constituted a tacit grant of an exception to the requirement of wearing the uniform, an exception the Respondent there was authorized to make. In April 1966, before membership in the National Guard was a requirement of employment as a civilian technician, a memorandum was issued that in correspondence officers and warrant officers will use their military rank, non-members will use "Mr.", and enlisted men would use at their option, their military rank or "Mr." but once an enlisted man selected either prefix it should be maintained. 10/ That policy was never specifically withdrawn or modified until May 1971 when the Respondent announced that thereafter the military uniform and form of address requirements would be strictly enforced. 11/

The facts here are quite different and call for a different conclusion. Here there was no unrescinded memorandum giving the men an option in the form of address to be employed. Here the form of address was unrelated to the wearing of the uniform and the men did wear the uniform appropriate to their military rank when performing their civilian duties, unlike the situation in the New York case. In this case the form of appellation was contained in a Technical Order directing the technician in the manner of filling a box in a form showing that he had done the work involved by entering his name and "grade". The Technical Order was issued in 1973 and in October 1974 the Chief of Maintenance, in accordance with TO 00-20-5, issued his memorandum advising his men of the TO direction to enter their names and "grade" in the box in question. In this case the departure from the direction was not as widespread or as prolonged, -- most of the technicians understood the word "grade" as it was intended, to mean military rank. Some were confused and sometimes used their military grade and sometimes their civilian grade. The remainder misunderstood and always used their civilian grade. It was only a year and a half later, on April 19, 1976, that the Chief of Maintenance, when his attention was called to the lack of uniformity in how the technicians entered their name in the box in question, issued his memorandum explaining that the word "grade" as used in the Technical Order meant military grade. A month later the unfair-labor-practice charge was served.

9/ Page 5 of ALJ Recommended Decision.
10/ Page 8 of ALJ Recommended Decision.
11/ Page 26 of ALJ Recommended Decision.

There can be no question that the Chief of Maintenance correctly interpreted the Technical Order. The word "grade" is used a number of times in that Order and in the only two examples of what was meant by name and grade the name of the technician is given followed by "SSgt", or staff sergeant. ^{12/} That Order was issued by the Secretary of the Air Force, and unlike the situation in the New York case there is nothing in the record to show that the Chief of Maintenance or anyone else had authority to waive its requirement, specifically or tacitly.

Finally, the parties had an agreement on the procedure for changing such a "working condition" if it was indeed a working condition. In 1974 the same situation arose with the 112th Maintenance Technicians, a different unit located at the same airport and represented by the same union. A complaint was filed under Executive Order 11491 and a hearing was scheduled. An agreement was made on October 29, 1975 and the complaint withdrawn. The agreement provided ^{13/} that when a "change in terms and conditions of employment is envisioned, the State Chairman of Pennsylvania State Council, ACT" would be given advance notice providing him with an opportunity to negotiate. It provided also that if the State Chairman and the Technician Personnel officer could not resolve the matter, "it may then be presented by ACT to the Deputy Adjutant General for his decision within 5 days" after which "further steps consonant with law and regulations" might be taken. The agreement was executed by the Technician Personnel Officer for the Respondent and the Chairman of the State Council, ACT, The Complainant in that case and in this case.

Before issuing his memorandum of April 19, 1976 the Chief of Maintenance advised the Chairman of the State Council and discussed it with him. ^{14/} The Chairman then discussed it with the Technician Personnel Officer and others in the Adjutant General's Office who took the position that that had always been the rule. ^{15/} ACT did not present the matter to the Deputy Adjutant General as permitted by the 1975 agreement if the April, 1976 memorandum effected a change in working conditions. Nor were any grievances filed. Instead, an unfair labor practice charge was served and a complaint filed under the Executive Order.

^{12/} R. Exh. 7, pp. 2-7, 2-14.
^{13/} C. Exh. 1.
^{14/} Tr. 23.
^{15/} Tr. 23-24.

I have concluded above that the April 1976 memorandum did not constitute a change in working conditions. Even if it did, the procedure for effecting such a change, provided for in the October 1975 agreement, was complied with by the Respondent; it was the Complainant who did not carry it further. And if there was a breach of that agreement, a breach not perceptible to me on the basis of this record, not every breach of contract is an unfair labor practice. ^{16/} If there was a breach, it does not remotely approach the kind of breach that would constitute a violation of Section 19(a)(6) and in consequence a breach of 19(a)(1) of the Executive Order. ^{17/}

RECOMMENDATION

The complaint should be dismissed.


 MILTON KRAMER
 Administrative Law Judge

Dated: August 25, 1977
 Washington, D.C.

^{16/} General Services Administration, Region 5, Public Buildings Service and Local 739, National Federation of Federal Employees, A/SLMR 528, pp. 4, 6 of ALJ Decision
^{17/} Ibid.

MK/mml

January 17, 1978

A/SLMR No. 970

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NAVY EXCHANGE,
NAVAL AIR STATION MEMPHIS,
MILLINGTON, TENNESSEE
A/SLMR No. 970

This case involved a petition for amendment of certification filed by the National Association of Government Employees, Local R5-66 (NAGE) seeking to amend its certification to reflect the results of an agency directed reorganization involving the Activity. The NAGE proposed to amend the designation of the Activity on its certification by adding the words "Enlisted Mess Open, Recreation Department," and to amend the unit description by adding the employees of the Enlisted Mess Open, Recreation Department.

The reorganization resulted from a directive of the Deputy Chief of Naval Operations (Manpower) that the management of all clubs and messes within the Department of the Navy be performed by the Chief of Naval Personnel, rather than the Navy Resale Systems Office in Brooklyn, New York. The directive was implemented locally when control of the Enlisted Club and its employees was transferred from the Activity to the Recreation Department of the Naval Air Station, Memphis. The Enlisted Club was redesignated the Enlisted Mess Open.

The NAGE contended, in essence, that there should be no change in its representation of the employees who now work for the Enlisted Mess Open because the reorganization changes were purely administrative in nature and did not substantially change the employees' working conditions or their work location. The Activity, on the other hand, asserted, among other things, that the amended unit description proposed by the NAGE does not describe an appropriate unit.

The Assistant Secretary found that the employees who were transferred from the Enlisted Club of the Activity to the Enlisted Mess Open of the Recreation Department no longer share a community of interest with the employees of the Activity and that, with different organizational structures and servicing personnel offices, differing personnel policies, and in the absence of common negotiating authority, the retention of those employees in the Enlisted Mess Open in the current Activity unit, as proposed by the NAGE, would not promote effective dealings or efficiency of agency operations at the Activity. In view of these circumstances, the Assistant Secretary found that the instant petition for amendment of certification was not appropriate as the reorganization resulted in more than mere nominal or technical changes.

Accordingly, the Assistant Secretary ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVY EXCHANGE,
NAVAL AIR STATION MEMPHIS,
MILLINGTON, TENNESSEE

Activity

and

Case No. 41-5386(AC)

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, LOCAL R5-66

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Steven Riggs. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Activity, the Assistant Secretary finds:

The Petitioner, National Association of Government Employees, Local R5-66, herein called NAGE, filed the subject petition seeking to amend its certification in order to conform its unit to the results of an agency directed reorganization of the Activity. The NAGE was certified on November 28, 1973, as the exclusive representative for a unit of all employees of the Navy Exchange at Naval Air Station Memphis, Millington, Tennessee. In this regard, it proposes to amend the Activity's designation on its certification by adding the words "Enlisted Mess Open, Recreation Department," and to amend the unit description by adding the employees of the Enlisted Mess Open, Recreation Department.

The NAGE contends, in essence, that there should be no change in its representation of the employees who now work for the Enlisted Mess Open because the changes resulting from the reorganization were purely administrative in nature and that there has not been substantial change in the employees' working conditions or their work location. The Activity, on the other hand, asserts, among other things, that the amended unit description proposed by the NAGE does not describe an appropriate unit.

The details of the reorganization are as follows:

On August 5, 1976, the Deputy Chief of Naval Operations (Manpower) directed that the management of all clubs and messes within the Department of the Navy be performed by the Chief of Naval Personnel, rather than by the Navy Resale Systems Office in Brooklyn, New York. The directive was implemented locally by the Activity, the Navy Exchange, and its host, the Naval Air Station Memphis, on March 26, 1977, by transferring control of the Enlisted Club from the Navy Exchange to the Recreation Department of the Naval Air Station Memphis, and redesignating it the Enlisted Mess Open. Approximately 465 nonsupervisory, nonappropriated fund employees remain in the Navy Exchange after the approximately 50 nonappropriated fund employees of the former Enlisted Club were transferred. The gaining Recreation Department apparently had 280 unrepresented, nonsupervisory, nonappropriated fund employees prior to the reorganization.

The mission of the Navy Exchange is to serve authorized patrons as a large, diversified retail store at the Naval Air Station Memphis, and, through profits, provide a source of funds for the welfare and recreation of military personnel. The mission of the Recreation Department at the Naval Air Station Memphis is to supervise and administer the morale, welfare and recreation programs for the physical fitness and recreation of all assigned military personnel and their dependents and to be responsible for the safe and efficient operation of several entities, including the Consolidated Package Store, the Commissioned Officers' Mess Open, the Chief Petty Officers' Mess Open, and since the reorganization, the Enlisted Mess Open.

The Enlisted Mess Open is in the same building as the former Enlisted Club. However, as a result of the reorganization, the employees of the Navy Exchange's Enlisted Club were treated essentially as new hires by the Recreation Department's Enlisted Mess Open. For some purposes they were treated as being terminated, but for other purposes merely transferred. 1/

The Navy Exchange contends that the approximately 50 former Enlisted Club employees who were transferred to the Enlisted Mess Open of the Recreation Department no longer share a community of interest with the remaining employees of the Navy Exchange. In this connection, the record shows that the employees of the Enlisted Mess Open do not have routine and regular working contact with Navy Exchange employees, nor is there any interchange between them and employees of the Navy Exchange. 2/

1/ The employees involved were afforded the rights of transferees by receiving credit toward their next step increase for the time they had worked for the Navy Exchange. On the other hand, they were given the right as terminated employees to withdraw their retirement funds, or as transferees to transfer their retirement funds to the Recreation Department's retirement program.

2/ The record reveals, however, that the three open messes of the Clubs/Messes Division of the Recreation Department reciprocate temporary details and are going to use standard uniforms to facilitate interchange.

Further, the employees of the Enlisted Mess Open no longer are serviced by the same personnel office as are all the remaining Navy Exchange employees. In this connection, the record shows that while the Navy Resale Systems Office in Brooklyn, New York, is the command headquarters element for the Navy Exchange, Naval Air Station Memphis, with respect to the promulgation of personnel policy, practices, and matters affecting the working conditions of Navy Exchange employees, the Bureau of Naval Personnel fulfills this role for the nonappropriated fund instrumentalities managed by the Recreation Department, Naval Air Station Memphis. In addition, the Recreation Department and the Navy Exchange each has its own personnel office.

The record shows that the transferred employees no longer are subject to many of the same programs and conditions of employment as are all the remaining Navy Exchange employees. Thus, the Enlisted Mess Open employees no longer continue to enjoy the same retirement, group health, or insurance programs as they did as Enlisted Club employees under the Navy Exchange. Further, the Consolidated Civilian Personnel Office of the Naval Air Station Memphis assists the personnel office of the Recreation Department by providing full wage and classification service to the nonappropriated fund activities other than the Navy Exchange while the Navy Resale Systems Office in Brooklyn, New York, classifies the employees' positions within the Navy Exchange. With respect to reduction-in-force actions, the Enlisted Mess Open constitutes its own area of consideration, as opposed to the former Enlisted Club which was a part of the larger Navy Exchange area of consideration. The Recreation Department and the Navy Exchange each has its own separate employment program in order to fill nonappropriated fund position vacancies, and separate merit promotion programs. Further, there is separate responsibility for collective bargaining negotiations. Thus, the Navy Exchange Officer has responsibility for negotiations on behalf of the Navy Exchange, whereas the consolidated Civilian Personnel Office represents the Recreation Department in negotiations concerning employees of the Enlisted Mess Open.

Under all of these circumstances, I find that the employees who were transferred from the Enlisted Club of the Navy Exchange to the Enlisted Mess Open of the Recreation Department no longer share a community of interest with the employees of the Navy Exchange and that, in the absence of common negotiating authority, and different organizational structures and servicing personnel offices as well as differing personnel policies, the retention of those employees in the Enlisted Mess Open in the current Navy Exchange unit, as proposed by the NAGE, would not promote effective dealings or efficiency of agency operations at the Navy Exchange.

In view of the foregoing, I find that the instant petition for amendment of certification should be dismissed. Thus, it has been held previously that an amendment of certification is appropriate only when

the facts support a finding that the amendment will conform the recognition involved to existing circumstances resulting from such nominal or technical changes as a change in the name of the exclusive representative, or a change in the name or location of the agency or activity. ^{3/} In the instant case, the evidence establishes that more than mere nominal or technical changes have resulted from the reorganization herein. Accordingly, I shall order that the petition herein be dismissed.

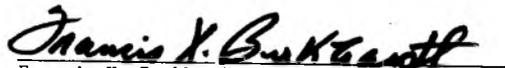
January 17, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 41-5386(AC) be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 17, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

SIXTH NATIONAL BANK REGION,
OFFICE OF THE COMPTROLLER OF THE CURRENCY
A/SLMR No. 971

This case involved a petition filed by the National Treasury Employees Union (NTEU) seeking to represent a unit of nonprofessional employees of the Sixth National Bank Region, Office of the Comptroller of the Currency. The Activity contended that the unit was not appropriate as it would result in fragmentation and would not promote effective dealings or efficiency of agency operations. The Activity further contended that the proposed unit was based solely on the extent of organization.

Applying the three criteria found in Section 10(b) of the Order, the Assistant Secretary found that the unit sought was not appropriate for the purpose of exclusive recognition. In this regard, he noted that all employees of the Office of the Comptroller of the Currency (Agency) enjoy a common mission and common overall supervision, generally similar classifications, skills and duties, a high degree of interchange and transfer, and uniform personnel policies and practices. Under these circumstances, the Assistant Secretary found that employees in the sought unit do not share a clear and identifiable community of interest separate and distinct from other employees of the Agency. Moreover, noting that labor relations policies, as well as personnel policies and practices, are established and implemented at Agency headquarters, he found that the claimed unit would not promote effective dealings or efficiency of agency operations. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

^{3/} Headquarters, U.S. Army Aviation Systems Command. St. Louis, Missouri,
2 A/SLMR 278, 280, A/SLMR No. 160 (1972)

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SIXTH NATIONAL BANK REGION,
OFFICE OF THE COMPTROLLER OF THE CURRENCY

Activity

and

Case No. 40-7816(RO)

NATIONAL TREASURY EMPLOYEES UNION

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Adam J. Conti. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject case, including the briefs filed by the parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, National Treasury Employees Union, hereinafter called NTEU, seeks an election in a unit composed of all nonprofessional employees of the Sixth National Bank Region, Office of the Comptroller of the Currency, excluding all professional employees, clerical employees, confidential employees, management officials, guards, and supervisors as defined by Executive Order 11491, as amended. ^{1/} The Activity contends that the petitioned for unit is not appropriate for the purpose of exclusive recognition as it would result in fragmentation which would impair efficiency of agency operations and effective dealings. The Activity further contends that the proposed unit is based solely on the extent of organization.

The mission of the Activity is to insure a solvent banking structure and enforce applicable statutes and regulations among the nationally chartered banks within the geographic area of its responsibility. The Office of the Comptroller of the Currency (Agency), headquartered in Washington, D.C., is organized into 14 geographic regions, among which is the Activity, which encompasses the states of Georgia, Florida and South Carolina. The Activity is administratively headed by a Regional Administrator, and is headquartered in Atlanta, Georgia.

^{1/} The claimed unit appears essentially as amended at the hearing.

The Activity achieves its mission by the periodic examination of banks within its jurisdiction utilizing a complement of bank examiners, ^{2/} who work out of their homes and are assigned to examine particular banks by the Activity's headquarters staff. In addition, the Activity contains seven Subregional Offices, which serve primarily as repositories for supplies of blank examination reports and files of past examination reports and correspondence concerning national banks located within the geographic area of the Subregional Office. Each Subregional Office is headed by either a commissioned national bank examiner or a commissioned trust examiner. These Subregional Office heads perform a variety of administrative duties, in addition to their regular examining functions. Thus, they are responsible for insuring that banks located within the geographic area of their subregions are examined at regular intervals and, in this regard, are responsible for making monthly work assignments designating the Examiner-in-Charge (EIC) and the supporting examining staff for each examination within their subregions, and submitting such assignments to their respective Regional Directors for approval.

The record reveals that there are three major types of examinations of banks corresponding to the internal operations of the banks - commercial, trust, and electronic data processing (EDP). All bank examiners employed by the Activity are trained to specialize in one of these three types of bank operations. Thus, Commissioned National Bank Examiners and Assistant National Bank Examiners conduct the examinations of a bank's commercial operations; Commissioned National Trust Examiners and Associate and Assistant National Trust Examiners conduct the examination of a bank's trust operations; and National and Assistant National Bank Examiners conduct the examination of a bank's EDP operations. Each bank examination is conducted by a team of examiners which is headed by a designated EIC.

The Activity's headquarters staff is also organized along these program areas. Thus, under the Regional Administrator, there is a Regional Director for Operations Planning, who is responsible for the monthly work assignments of examiners in the commercial area, checking and approving examination reports of commercial operations, and generally coordinating the various operations of the Activity. In addition, there is a Regional Director for Trust Operations and a Regional Director for Electronic Data Processing, who perform essentially the same duties with regard to their respective program areas.

As indicated above, the examination of an individual bank is conducted by a team of examiners assigned by the Activity, and headed by a designated EIC. The EIC must be a Commissioned Examiner, and he is responsible for the conduct of that examination. All such examinations are conducted pursuant to policies and procedures established by the Agency and implemented nationally. In carrying out his responsibilities, the EIC assigns

^{2/} The parties stipulated that bank examiners are not professional employees. These examiners are classified as either commissioned or noncommissioned bank examiners. Commissioned status is achieved by a combination of experience and successful completion of a commissioning test designed by the Agency and administered by the Activity.

team members to specific tasks in conducting the examination, monitors and coordinates their activities, and checks and signs their reports and forwards them to the appropriate Regional Director. During the conduct of the examination, the EIC has the authority to direct team members, to excuse them from duty in an emergency, to discipline them, and to evaluate their performance.

In addition to the three categories of examinations outlined above, there are more specialized examinations, including examinations of international departments and foreign branches of domestic banks. The Regional Office maintains a list of those individuals interested in and qualified to conduct international examinations. The International Division at the Agency's headquarters determines which banks are to be examined, when the examination is to take place, the number of personnel needed to conduct the examination, and makes the work assignments directly with the individuals. The record reveals that several of the Activity's examiners are qualified to conduct such examinations and have, in fact, been assigned along with examiners from other regions to conduct them. In addition, there are other examinations in which examiners from the Activity work with examiners from other regions. The National Shared Credits Program, wherein banks with loans which are shared or participated in by other banks, are examined by a team of three examiners, one from the region in which the bank is located, and two examiners from other regions. Additionally, the record indicates that, in order to alleviate uneven workloads, examiners from the Activity have been temporarily assigned to other regions, and examiners from other regions have been temporarily assigned to the Activity to perform bank examinations.

The record further reveals that personnel policies and practices are established by the Agency headquarters staff and are generally implemented through the regional headquarters staff. Thus, the Agency establishes and monitors the policies and procedures utilized in recruitment and hiring of new employees, training for all employees, and certification procedures for commissioning bank examiners and trust examiners. In addition, the Agency established a program of referring qualified examiners to promotional opportunities nationwide, and also transferring examiners across regional lines to achieve uniformity of personnel skills and qualifications nationwide. Personnel files of all Agency employees are maintained at its headquarters, and all budgetary policies and financial disbursements, including travel funds, are established and executed by the Agency through its headquarters staff. Finally, all labor relations policies are established and implemented by Agency headquarters staff. The record indicates that there are no management labor relations personnel in any regional office, nor are there any plans to conduct labor relations matters at the regional level.

Based on the foregoing circumstances, I find the sought unit herein is not appropriate for the purpose of exclusive recognition under the Order. In this regard, as noted above, the evidence establishes that the employees in the sought unit enjoy, with other employees of the Agency, a common mission and overall supervision, generally similar classifications, skills and duties, a high degree of interchange and

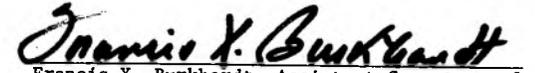
transfer, and uniform personnel policies and practices. Under these circumstances, I find that employees in the sought unit do not share a clear and identifiable community of interest separate and distinct from other Agency employees. Moreover, in my view, the petitioned for unit could not reasonably be expected to promote effective dealings or efficiency of agency operations. In this connection, noted particularly was the fact that all labor relations policies, as well as personnel policies and practices, are established and implemented at the Agency headquarters level.

Accordingly, I shall order that the petition herein be dismissed. ^{3/}

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 40-7816(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 17, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

^{3/} In view of my disposition of the instant petition, I find it unnecessary to pass upon the eligibility questions raised by the parties herein.

January 19, 1978

A/SLMR No. 972

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
CLEVELAND, OHIO
A/SLMR No. 972

UNITED STATES DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
CLEVELAND, OHIO

Respondent

and

Case No. 53-09512(CA)

NATIONAL TREASURY EMPLOYEES UNION AND
NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 37

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and the National Treasury Employees Union, Chapter 37 (NTEU) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to bargain about the substance, impact and implementation of a work evaluation program. The Respondent contended that the Complainant's proposals regarding the work evaluation program were non-negotiable. It further contended that the Assistant Secretary had no jurisdiction to decide the negotiability of the Complainant's proposals as the negotiability issue arose during the course of its negotiations with the Complainant and, therefore, the latter should have appealed the negotiability of its proposals pursuant to Section 11(c) of the Order.

On September 13, 1977, Administrative Law Judge Louis Scalzo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

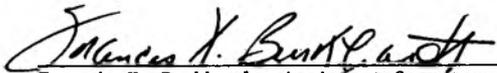
The Administrative Law Judge found that, pursuant to Section 11(d) of the Order, the Assistant Secretary has authority to make negotiability determinations necessary to resolve the merits of the alleged unfair labor practice herein. The Administrative Law Judge further found that the work measurement program, as proposed, necessarily would have involved the formulation of evaluation criteria designed to be used in rating the job performance of affected employees. Thus, as this would involve a basic change in the terms and conditions of employment for such employees, the Respondent had an obligation to negotiate concerning this subject. He concluded that the Respondent, although indicating its uncertainty as to the negotiability of the Complainant's proposals, did, in fact, negotiate in good faith concerning such proposals. The Administrative Law Judge further concluded that the Respondent had acted properly when it implemented the work measurement program. In reaching this conclusion, he noted that an impasse had been declared by the Complainant, that the Respondent provided timely notice of its intention to implement the work measurement program, that the Complainant had not sought the services of the Federal Service Impasses Panel, and that the program as implemented was consistent with the Respondent's proposals during the course of the negotiations. Thus, the Administrative Law Judge found that the Respondent had not violated Section 19(a)(1) and (6) by its conduct during the course of its negotiations concerning the work evaluation program or by the manner in which it was implemented. He recommended, therefore, that the complaint be dismissed.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in this case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 53-09512(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 19, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and dismissed the complaint in its entirety.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding was initiated upon the filing of an unfair labor practice charge on October 19, 1976 by the National Treasury Employees Union and National Treasury Employees Union Chapter 37 (hereinafter referred to as the Complainant or Union), against the Internal Revenue Service, Cleveland District, United States Department of the Treasury (hereinafter referred to as the Respondent). A complaint filed on December 23, 1976 alleges that the Respondent violated Sections 19(a)(1) and 19(a)(6) of Executive Order 11491 as amended (hereinafter referred to as "the Order") by (1) refusing on September 15 and 16, 1976, to bargain concerning methods or procedures Respondent intended to use to implement a work measurement program; (2) refusing on September 15 and 16, 1976, to bargain concerning the impact of the work measurement program on affected employees; (3) unilaterally implementing the work measurement program on October 18, 1976; and (4) by refusing to meet and confer on September 15 and 16, 1976, upon a prior request by the Union to negotiate the substance, impact and implementation of the work measurement program.

A Notice of Hearing on Complaint was issued by the Regional Administrator, Labor Management Services Administration, Chicago Region. Pursuant thereto, a hearing was held in Cleveland, Ohio. Both parties were represented by counsel, and were afforded full opportunity to be heard, adduce evidence, and to examine and cross-examine witnesses. Thereafter the parties submitted briefs.

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 recommendation. 1/

1/ Following the hearing Walter L. Kerr, a representative of the Complainant, was deposed, and an affidavit dated December 3, 1976, executed by Mr. Kerr, together with a letter dated November 2, 1976 addressed to Mr. Kerr by Vincent L. Connery, National President of the National Treasury Employees Union, were offered by counsel for the Complainant, over objection interposed by counsel for the Respondent. These documents are also deemed part of the record.

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In the Matter of :
:
United States Department of :
the Treasury :
Internal Revenue Service :
Cleveland, Ohio :
:
Respondent : Case No. 53-09512 (CA)
:
and :
:
National Treasury Employees Union :
and National Treasury Employees :
Union Chapter 37 :
:
Complainant :
.....
David E. Mills, Regional Counsel
Kenneth P. Dale, Acting Staff Assistant
Office of Regional Counsel
Internal Revenue Service
Central Region, P. O. Box 2059
550 Main Street
Cincinnati, Ohio 45201

For the Respondent

Hayward C. Reed, Assistant Counsel
National Treasury Employees Union
1730 K Street, N. W.
Suite 1101
Washington, D. C. 20006

For the Complainant

Before: LOUIS SCALZO
Administrative Law Judge

Findings of Fact

1. History of Negotiations

During the last week of April 1976, Donald Heidler, Chief of the Audit Division, Internal Revenue Service, Cleveland District, informed Thomas Cozzens, a Labor Relations Specialist in the Cleveland District that there would be a substantial decrease in clerical staff in the District, but that there would be no diminution of work load. It was anticipated that the reduction would impact very heavily upon the Service Branch of the Audit Division of the Cleveland District as the Service Branch was responsible for the performance of clerical functions for the Audit Division. ^{2/}

An analysis of Service Branch operations was then in process in order to initiate labor saving changes and a redistribution of the workload. Mr. Heidler felt that there would be an effect upon the bargaining unit, and for this reason he and Mr. Cozzens made arrangements for representatives of the Respondent to meet with bargaining unit representatives on April 29, 1976. Mr. Heidler, Mr. Cozzens, and Donald Mitgang, an assistant to Mr. Heidler, represented management. The bargaining unit was represented by Walter Kerr, Chairman of the NTEU Joint Council, and John Risacher, the NTEU Steward for the Audit Division Service Branch.

Mr. Heidler advised the Union representatives of the reduction in the clerical staff and of the need for a number of changes. In this regard it was brought out that a work measurement program, involving recordation of time spent on Service Branch cases was being considered for implementation as one proposed change. It was made clear that the Respondent

^{2/} With exceptions not pertinent here, the Union is the exclusive representative of professional and non-professional employees in the Cleveland District.

wanted to bring the Union into deliberations concerning all of the proposed changes at an early point in order to have the benefits of the Union's views and recommendations. The record reflects evidence that at the outset the Respondent expressed willingness to listen to the Union's views relating to the methodology to be employed in implementing the work measurement element of changes proposed.

In response to the announcement the Union requested that they be supplied with specific information concerning all of the changes proposed. Mr. Heidler promised to supply a list. By memorandum dated May 13, 1976, the Union was apprised of the full range of changes in more detail. (Joint Exhibit 1).

The May 13, 1976 memorandum detailed thirty separate proposed changes relating to the entire Audit Division. Only seventeen of those pertained to the Service Branch, and of the seventeen only two (items (6) and (7)) related to the proposed work measurement program. ^{3/}

In response to the many changes outlined in the May 13, 1976 memo, the Respondent was advised by letter dated May 17, 1976, signed by Walter L. Kerr, that the Union wished to negotiate, "the substance, impact, and implementation of the proposed changes...set forth in the memorandum...dated May 13, 1976." The Respondent was also requested to supply additional information. (Respondent Exhibit 1).

On the same day (May 17, 1976) Thomas Cozzens phoned Walter Kerr to discuss the Union's request, and announced a desire to meet with Union representatives concerning all of the proposals although some of them were deemed non-negotiable under the provisions of the Order. On the same date the information requested by the Union was supplied.

^{3/} Item (6) related to the "establishment of specific work guidelines to effectively evaluate clerical operations, and Item (7) pertained to the "establishment of a procedure to record time on cases, primarily related to the closing operation."

On May 19, 1976, another meeting was held. The Respondent was represented by Mr. Heidler, Mr. Mitgang, and Mr. Cozzens. The Union was represented by Mr. Kerr and Mr. Risacher. At this meeting Mr. Heidler went over each of the thirty items listed on the May 13, 1976 memo, and discussed them. Union representatives stated that they would like to have the views of bargaining unit members, and management advised the Union that it planned to hold a meeting of all Audit Division Service Branch employees on May 25, 1976. Mr. Risacher was invited to attend as the Union representative. Mr. Kerr advised that he then had a much better idea of the proposed changes and that he would discuss the changes with Respondent's representatives after conversing with bargaining unit employees. The Union was asked to submit their proposals by May 28, 1976, if they felt formal negotiations were necessary. The Union agreed to do so. During this May 19, 1976 meeting the work measurement program was specifically discussed with the Union.

On May 25, 1976, Mr. Heidler conducted the scheduled meeting with Audit Division Service Branch employees. The May 13, 1976 memorandum was discussed insofar as it related to Service Branch employees. Following the presentation by management, an opportunity for questions, discussion, and comment was provided. This meeting was scheduled so as to conclude at the beginning of the lunch hour so that employees of the Service Branch could discuss the May 13, 1976 memorandum with Mr. Risacher outside the presence of management officials.

On June 2, 1976, another meeting was held. This meeting was attended by Mr. Kerr and Mr. Risacher on behalf of the Union. Mr. Heidler, Mr. Cozzens and Mr. Miller, an assistant to Mr. Heidler, represented management. It was agreed that the Union would negotiate further on the work measurement program and a proposal to install partitions between the desks of certain employees. ^{4/} The Union agreed to all

^{4/} See Joint Exhibit 1. The proposal relating to the installation of partitions and proposals other than the work measurement program are not relevant, except to indicate that the work measurement program was only one of many Service Branch changes advanced for consideration.

other changes proposed for the Service Branch. Confirmation of the agreement reached at this juncture, and residual issues relating to the work measurement program and proposed partitioning is reflected in Respondent Exhibits 2 and 3.

The next meeting occurred on July 13, 1976. Mr. Risacher represented the Union and Mr. Cozzens and Mr. Miller represented management. At this meeting agreement was reached on the issue relating to partitioning, thus leaving the work measurement program as the only area of concern not ironed out in negotiations.

At a July 28, 1976 meeting, the work measurement program was presented to the Union in its final proposed form. (Joint Exhibit 2). Mr. Fox and Mr. Risacher represented the Union at the meeting, and Mr. Heidler, Mr. Mitgang and Mr. Cozzens represented management. Sample copies of the forms to be utilized were made available with the explanation that they were subject to change based upon negotiations with the Union. Again, the Union requested that the views of bargaining unit members be obtained. Management advised that another meeting with Service Branch Employees would be held on August 4, 1976, and that Mr. Risacher would be invited to attend. The Union agreed to this procedure.

As finally presented, the program was designed to obtain the average times needed to perform Service Branch work operations. Statistics sought were to be used to plan work, overtime use, budget requirements, and personnel needs. It was anticipated that the program would locate bottlenecks, determine the need for personnel shifts, develop a records system to help determine the nature of employee performance, and ascertain reasons for employee deficiencies.

On August 4, 1976, a series of separate small group meetings were held with Service Branch employees. A Union representative attended each. Mr. Heidler made a presentation at each meeting, and provided employees with an opportunity to pose questions and make suggestions.

On August 16, 1976 two meetings were held by Audit Division management and the Union. During the morning Mr. Fox, Mr. Kerr, Mr. Risacher met with Mr. Heidler, Mr. Mitgang, Mr. Miller, Mr. Cozzens, and Ms. Betty Nelson, Chief of the Service Branch. During the afternoon Mr. Fox and Mr. Kerr again met with Mr. Cozzens. Management raised questions concerning the negotiability of the work measurement proposal under the order, but agreed to negotiate the issue of how the program would impact upon Service Branch employees.

In this regard the Union objected to the use of names on forms designed to indicate time spent on work performed, and to the utilization of the forms as an element in performance evaluation determinations. The Union also expressed particular concern over the possibility of Respondent imposing work production quotas.

At the meeting on August 16, 1976, and at prior meetings, the Union was informed that the work measurement program would not be utilized to establish specific work quotas or goals, and that Service Branch employees would not be compared to each other on the basis of reports submitted.

As a result of a failure to reach agreement on August 16th, the Union, on August 20, 1976, made a formal request to negotiate "the substance, impact and implementation" of the program. (Joint Exhibit 3). In a letter dated August 23, 1976, addressed to the Union, Respondent requested that the Union forward specific proposals. (Joint Exhibit 4). Mr. Fox and Mr. Cozzens discussed ground rules for the negotiations on the same day. Six specific proposals (articles) all relating to "implementation" of the work measurement program were received by management on September 9, 1976. (Joint Exhibit 7). Arrangements were made to discuss these proposals on September 15, 1976.

2. Union Proposals Negotiated

The meeting on September 15, 1976, was attended by Mr. Reed, counsel for the Complainant, who acted as chief spokesman for the Union. He was accompanied by a number of other Union representatives. Mr. Heidler represented a team of management negotiators.

At the outset of the meeting Mr. Heidler responded to the proposals by stating a general objection of non-negotiability under the provisions of the Order, but he also stated that management was willing to listen to Union representatives and consider each of the proposals.

Article (1) would have modified the purposes of the work measurement program in that the stated purposes of the program were limited by the terms of the article to, (a) establishment of relationships between volume of work done and output of man hours to do the work; and (b) to identify problem areas, and assist employees in overcoming problems. (Compare Joint Exhibits 2 and 7). Article (2) also questioned the basic thrust of the program by requiring a count of work units without inclusion of a report of hours spent on work activities. At the September 15, 1976 meeting Mr. Heidler expressed the view that the basic purposes of the program should remain unchanged.

With respect to Article (3) Mr. Heidler conceded that the phrase, "statistics maintained...will not be used as quotas, allocations or specific amounts of work that must be completed," was not objectionable in principle ^{5/} but that the phrase indicating that statistics would be "maintained by the Employer for the purpose of forecasting and monitoring aspects of work planning control programs" should be deleted as the purpose of the program should instead, be inferred from a revised Article (1).

Article (4), relating to the content of proposed Weekly Reports and Daily Tic Sheets, to be executed by Service Branch employees was designed to delete the requirement that employees identify themselves on such forms, and to

^{5/} This concession was significant in nature in view of the fact that key elements of the program as proposed could easily have been construed as a program designed to develop work quotas.

insure that statistics would "not be accumulated in such a way as to identify the work product of any individual employee." The Respondent insisted that such reports would have to identify specific individuals. This Article became a major continuing area of disagreement due to the Union's insistence upon anonymity. The ultimate failure of negotiations stemmed primarily from disagreement over this point.

Article (5), a statement that production records (weekly and daily reports) would not be used to establish individual quantity performance standards, and further that such records would not be used to compare one employee in the Audit Division Service Branch to another was accepted almost in the form received. By agreement the phrase "production records" would have been changed to "weekly reports and daily tally sheets." Also, in connection with this Article Mr. Heidler again reiterated that documents collected would not be used to establish quantity performance standards. However, the Respondent continued to stress that averages or statistics derived from the program would be used as "indicators" in the evaluation process. Mr. Heidler stated further that he was in agreement with the second sentence of Article (5) which would have operated to prohibit the use of weekly and daily reports to compare one employee in the Service Branch to another.

Article (6), a statement that production records 6/ would not be utilized by the Respondent in making performance evaluations, was questioned by Mr. Heidler in that it was intended that the statistics would be used in the evaluation of employees without comparisons. He admitted that the program was a "motivational tool." Mr. Heidler referred to the inadequacies of the evaluation system being used, and indicated that the work measurement program would provide objective measured indicators of performance for the purpose of employee evaluation.

6/ As was the case with Article 5, the parties agreed to change the term "production records" to "weekly reports and daily tally sheets."

The parties adjourned on September 15, 1976, with the hope that agreement would be reached on the next day. On September 16th, the Union conceded to a degree by agreeing generally that Article (1) conform to the Respondent's view relating to the purposes of the program, and Article (2) was withdrawn. Again, Mr. Heidler articulated the previously stated opinion that all proposals were non-negotiable. However, despite this statement, a draft of a letter to the Union was exhibited to the Union as Respondent's proposal or counterproposal to the six specific articles considered on September 15, 1976. (Joint Exhibit 8). This letter incorporated key elements of the Union's position. The purposes of the program were spelled out in the draft, namely, to provide a system of counting units processed, and recording hours by individual employees in each phase of Service Branch operations; to establish relationships between work output and man-hours; to help Service Branch management in planning; to determine the efficiency of operations; to assist managers in the evaluation of employees; and to inform management of problems that arise in the workflow.

The proposed letter made assurances that statistics derived from the system would not be used as quotas, allocations, or specific amounts of work that must be completed, or to compare one employee in the Audit Division Service Branch to another. It stated: "managers will use the records maintained as one of the many resources to evaluate their employees. The program will help to identify superior performance, as well as performance which requires improvement, and will assist managers in rewarding deserving employees and assisting employees to reach their full potential in the Audit Division Service Branch." Negotiations on September 16, 1976 were concluded with the draft letter being offered as the Respondent's proposal and the Union declaring an impasse in negotiations. At this point the Union left the bargaining table. (Tr. 248). The draft letter was subsequently modified and as modified was sent to Mr. Fox on September 23, 1976. (Joint Exhibit 9). The letter indicated that the work measurement program as presented to the Union, would be implemented on October 18, 1976.

On September 24, 1976, counsel for the Complainant wrote to the Commissioner of Internal Revenue requesting an agency determination of the negotiability of the six proposals. Apparently the Union intended to seek a determination of negotiability under the provisions of Section 11(c) of the Order. This procedure was not pursued further.

3. Implementation

On October 18, 1976, the work measurement program was partially implemented in that employees began submitting data to their group managers. The collection of data was not complete as of the date of the hearing. The program implemented was identical to the one originally proposed, as modified by Union demands incorporated into the Respondent's September 16, 1976 counterproposal.

Although the record reflects that statistics supplied by employees might be used by Service Branch managers to compare one employee in the Service Branch to another, the Respondent introduced evidence that raw statistics would not be utilized in this manner. It was also established that such an abuse would contradict the official position taken by the Respondent, and could as a result, be a basis for the issuance of a reprimand to any supervisor responsible for such a comparison. 7/

7/ The Complainant introduced some evidence to show that such an abuse had in fact occurred in one isolated instance; however the evidence in this regard was inconclusive. Mr. Heidler testified that managers could duplicate the program on their own without the assistance of work measurement reports; and there was no clear showing that the daily or weekly reports submitted actually comprised the basis of the comparison reportedly made.

4. Application of Multi-District Agreements

The parties stipulated that Multi-District Agreement II (Joint Exhibit 13), covering Service Branch clerical employees among others, was in effect from August 3, 1974 through November 7, 1976. Article 9, Section 4 of this agreement provided a general prohibition against maintenance of statistics of the type generated by the work measurement program; however, the prohibition related only to statistics concerning the performance of field enforcement officers. (Joint Exhibit 13, at page 25). 8/ The prohibition was not applicable to Service Branch clerical employees. 9/

8/ Article 9, Section 4 provided:

A. The statistics concerning field enforcement officers' performance maintained by the Employer for the purpose of forecasting and monitoring aspects of work planning control programs will not be used as quotas, allocations or as specific amounts of work that must be completed.

B. The tax enforcement results of individual field enforcement officers (including reviewers and conferees) will not be accumulated and maintained as a regular statistic in such a way as to identify the product of any individual enforcement officer....

C. Enforcement production records will not be used to establish individual quantity performance standards. None of the foregoing will be used to compare one field enforcement officer with another.

9/ Counsel for the Complainant acknowledged that the proposals advanced by the Union in this case were made because of the absence of such coverage, and because of an intent to extend Article 9, Section 4 protections to Service Branch clerical employees.

Evidence in the record reflects that contract renewal negotiations leading to the approval of Multi-District Agreement III involved consideration of Article 9, as set forth in Multi-District Agreement II. Because of this circumstance Respondent also asserts that elements of the work measurement program were involved in negotiations relating to Multi-District Agreement III, and that Respondent should not be compelled to negotiate in two forums. ^{10/} However, the record does not indicate that a purely local work measurement practice involving the Audit Division Service Branch, Cleveland District, was a matter under consideration during negotiations at the national level. Moreover, there was no evidence introduced to show that the Complainant waived the right to bargain over this specific local issue.

Discussion, Conclusions, and Recommendation

1. The Jurisdiction of the Assistant Secretary

The Respondent argues that this case is not in the proper forum, and that Complainant should have appealed to the Federal Labor Relations Council under the provisions of Section 11(c) of the Order in order to obtain a decision on the negotiability of proposals characterized as non-negotiable by the Respondent.

Although it is true that such a procedure is authorized by Section 11(c) and the Rules of the Federal Labor Relations Council, ^{11/} Section 11(d) of the Order provides that the Assistant Secretary may make an initial negotiability determination when required to do so in the context of an

^{10/} As a result of negotiations Article 9 was eventually expanded. The language used in the expanded version does not operate to cover clerical employees of the Audit Division Service Branch.

^{11/} Rules of the FLRC, Section 2411.21 et seq.

unfair labor practice proceeding involving an alleged unilateral change in, or addition to, personnel policies and practices on matters affecting working conditions, where the acting party is charged with a refusal to consult or negotiate as required under the Order.

Respondent claims that since the negotiability issue arose in connection with negotiations, Section 11(c) is applicable, and the exception provided in Section 11(d) inapplicable. Authority cited by the Respondent for the inapplicability of Section 11(d) in this case is not at all persuasive. Moreover, in a relatively recent case involving a quite similar factual situation, the Federal Labor Relations Council refused to permit initial review by the Council under Section 11(c)(4) of the Order and the Council's rules of procedure. National Office, National Border Patrol Council, National I&NS Council, AFGE and Immigration and Naturalization Service, Department of Justice, FLRC No. 76A-47, (September 29, 1976), Report No. 114. The Council noted the following language from the Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491 as Amended, Labor Relations in the Federal Service, January 1975:

Where negotiability issues arise in the context of such unfair labor practice proceedings they are often inextricably intertwined with disputed issues of fact which must be resolved in order to arrive at a conclusion concerning the motivation of the parties. Such disputed issues of fact are best resolved through the adversary process of a formal hearing.

The rule followed by the Council in the cited case is succinctly stated in these terms:

[S]ince the instant case arises out of an alleged unilateral change and involves both claims of a refusal to bargain and

related contentions as to negotiability, the Assistant Secretary is empowered under sections 6(a)(4) and 11(d) to exercise his authority.

The quoted language may be applied with equal force to the facts presented in this case; therefore, it is concluded that the Assistant Secretary has jurisdiction to make such negotiability determinations as are necessary to resolve the merits of this alleged unfair labor practice.

2. The Applicability of Section 11(a) of the Order to Proposals Received by the Respondent on September 9, 1976

Among other purposes, the work measurement program was designed to develop statistics relating to the time utilized by individual employees to perform Service Branch work operations; to provide a data base for striking average time utilized to perform Service Branch work operations; to develop a records system to help determine objective evidence relating to employee performance; to provide management with a "motivational tool"; to develop "indicators" to be used in employee performance evaluation; and to provide data needed to ascertain the reason for employee deficiencies.

Section 11(a) of the Order requires that an agency and a labor organization that has been accorded exclusive recognition shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions of unit employees. It is a well settled principle in both federal and private sector labor law, that an employer may not lawfully change personnel policies, practices, or working conditions without first providing the collective bargaining representative with advance notice of the proposed changes, and allowing it an opportunity to negotiate concerning the proposed changes. A failure to comply with these requirements constitutes a violation of Sections 19(a)(1) and 19(a)(6) of the Order.

It has been held that the institution of changes in time schedules for the processing of work is a matter affecting working conditions within the meaning of Section 11(a), and further that such changes are a proper subject for collective bargaining. National Labor Relations Board, A/SLMR No. 246. Procedure used in evaluating employees also involves a condition of employment, and an activity may not change such a condition without first affording the exclusive collective bargaining representative an opportunity to bargain concerning the change. Federal Aviation Administration, National Aviation Facilities, Experimental Center, Atlantic City, New Jersey, A/SLMR No. 438. See also Department of Agriculture and Office of Investigation, A/SLMR No. 555.

The facts developed in this case clearly reflect that the work measurement program, as proposed, would necessarily have involved the formulation of evaluative criteria designed to be utilized in the rating of job performance of Service Branch clerical employees. In this regard the Respondent acknowledged that statistics gathered would be used to strike time averages for various work activities, and that in due course objective evidence of employee performance would be determined by making reference to such averages. That is, employee performance would be measured against these formulated averages. In fact the Respondent specifically acknowledged that the program was, in Respondent's view, designed to provide "objective" evidence of employee performance.

In a somewhat analagous factual situation involving the imposition of a rule requiring an employee to maintain a log of time away from his duty station on authorized union business, the Assistant Secretary held that the unilateral imposition of such a requirement involved a change in the terms and conditions of employment. United States Air Force, Kingsley Field, Klamath Falls, Oregon, A/SLMR No. 443. On the basis of authorities cited, it must be concluded that the intended use of the work measurement program to strike averages and develop employee evaluation criteria, in the context found in this case, involved a basic change in the terms and

conditions of employment for Service Branch employees. 12/ Accordingly, the Respondent did have a mandatory obligation to negotiate concerning this subject. 13/ Having reached this conclusion, it is also determined that the work measurement program generally, and the proposals received by the Respondent from the Union on September 9, 1976, in particular, may not be classified as a permissive or voluntary topic of bargaining under Section 11(b) of the Order, nor a prohibited topic of bargaining embraced within the retained management rights clause found in Section 12(b) of the Order.

With respect to the contention that Respondent should not be compelled to negotiate the substance of the work measurement program at national level negotiations involving Multi-District Agreement III and, at local level talks in the Cleveland District, it is noted that the record is silent with respect to the specific areas of concern that were pending before national level negotiators, and that the record does not reflect that the specific proposals in question were actually on the bargaining table at the national level. More importantly, there is no evidence that the Complainant waived Section 11(a) rights to bargain over this specific local issue. In Order

12/ Section 11(a) limitations on the obligation to negotiate may not be deemed applicable in the circumstances of this case.

13/ Although the Respondent stressed that the work measurement program would not be used to set production goals or work quotas, the facts brought out do indicate that the program was in fact designed to produce statistics which would be used as a standard to measure employee production. In the absence of other Section 11(a) restrictions on negotiability, union proposals relating to production goals which an agency seeks to enforce are negotiable under Section 11(a) of the Order. Patent Office Professionals Association and U.S. Patent Office, Washington, D. C., 74 FSIP 20, FLRC No. 75A-13 (October 3, 1975), Report No. 85.

to have an effective waiver or limitation restricting the right conferred by Section 11(a) of the Executive Order to negotiate, the waiver must be clear and unmistakable. NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223; U.S. Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400; Veterans Administration, Veterans Administration Hospital, Northport, New York, A/SLMR No. 824.

3. Whether Respondent Violated Sections 19(a)(1) and 19(a)(6) of the Order by Refusing to Negotiate Concerning Proposals Submitted to the Respondent on September 9, 1977

Having determined that the Respondent has an obligation to negotiate in good faith relating to the proposals received from the Union, it is necessary to determine the exact nature of this obligation.

The terms of the Union proposals clearly related to the "implementation of the work measurement program." This fact is evidenced in the complaint itself.

Any measure of management's response to the Union's proposals must be gauged in the light of the fact that the methodology to be used in implementing this program, was placed in issue by the Union's proposals, not the actual decision to institute a work measurement program in the first instance. However, the record reflects the fact that the Union was also afforded opportunities to negotiate concerning the decision to initiate such a program in the first instance. During the early stages of negotiations, Respondent was uncertain of the negotiability of the work measurement scheme, and out of an abundance of caution, and because of interest in the position of the Complainant, as well as individual bargaining unit employees, every effort was made to engage in wide-ranging negotiations relating to the work measurement program.

Initially the concept was brought to the Union's attention. An opportunity for full discussion was provided to the Union on April 29, 1976. Thereafter, at the request of the Union additional information was supplied by the Respondent. An opportunity to negotiate the basic concept involved in the work measurement program was also provided to the Union on May 19, 1976. On May 25, 1976 both the Union and bargaining unit members were afforded an opportunity to discuss the subject in detail, and question Respondent's position. On June 2, and July 13, 1976, additional bargaining sessions occurred. Agreement was reached on a number of change proposals advanced by Respondent, but not on the work measurement program. Up to this point the Union was aware that the program would involve employee recordation of time spent on Service Branch work activities.

On July 28, 1976 complete details relating to the program were presented to the Union together with an opportunity to negotiate in depth concerning the proposal. However, again the Union sought the views of bargaining unit members. On August 4, 1976 Respondent's detailed work measurement proposal was exposed to discussion and questioning at meetings attended by a Union representative and bargaining unit members.

On August 16, 1976 the Union was provided with an opportunity to negotiate concerning implementation. The record also evidences the fact that on this date the Respondent participated in discussions concerning the wisdom of initiating such a program in the first instance. However, the main thrust of the Union's objections related to the methodology to be followed in implementation of the program.

Thereafter, the Union submitted its proposed "Memorandum of Agreement" consisting of six separate articles. Subsequent negotiations on September 15, 1976 resulted in significant concessions by the Respondent, and on September 16, 1976, the Respondent offered a counterproposal in the form of a letter which incorporated these concessions.

Although Respondent indicated uncertainty concerning the negotiability of the Union's proposals at the outset of negotiations, and although on September 16, 1976, Respondent

did declare that the Union proposals were technically non-negotiable, Respondent never refused to negotiate concerning these proposals to the degree demanded by the Union. That is, the Respondent negotiated in good faith on the subject of implementation and impact of the work measurement program.

The complaint filed in this case completely ignores the pattern of negotiations which occurred prior to September 15 and 16, 1976, and it completely ignores the facts with respect to negotiations sought and obtained by the Union on September 15 and 16, 1976. In fact the concessions obtained by the Union on September 16, 1976, in the form of a counterproposal made by the Respondent, were the result of an extended pattern of negotiations which began on April 29, 1976. However, the Respondent's counterproposal was met by the Union declaration of impasse, and by the Union's discontinuance of negotiations. There is no proof that the Union ever submitted a revised agreement of its own setting forth the Union's version of concessions made by the Respondent, and the Union's position; or that it suggested an alternative method of implementation after receipt of the Respondent's counterproposal on September 16, 1976. Moreover, a review of the evidence convinces that whatever Respondent may have said concerning the negotiability of the Union's proposals, and however the parties characterized their own conduct, what actually took place did in fact satisfy Respondent's obligation to negotiate. NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223; United States Department of the Treasury, Internal Revenue Service, Chicago District, A/SLMR No. 711, petition for review denied, FLRC No. 76-126 (February 15, 1977), Report No. 122; Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 251, Decision of Administrative Law Judge at p. 10.

At the conclusion of the September 16, 1976 meeting, the Union did not request another meeting. When a meeting has been held, and the Union asks for no further meeting, because it exhausted all it cared to discuss about the pending subject, it should not be heard to complain that there was insufficient negotiating. Internal Revenue Service, Fresno Service Center, A/SLMR No. 489, Decision of the Administrative Law Judge, pp. 13-14; Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, A/SLMR No. 289.

Based upon the foregoing it is determined that the Respondent did not, as alleged, violate Sections 19(a)(1) and 19(a)(6) of the Order by (1) refusing to bargain concerning methods and procedures Respondent intended to use to implement the work measurement program; (2) refusing to bargain concerning the impact of the program on affected employees; and (3) refusing on September 15 and 16, 1976, to negotiate the substance, impact and implementation of the program.

4. Whether Respondent Violated Sections 19(a)(1) and 19(a)(6) of the Order by Unilaterally Implementing the Work Measurement Program after the Union Declared Negotiations to be at Impasse

The Complainant contends that implementation of the work measurement program on October 18, 1976, after the Union's declaration of impasse, violated Sections 19(a)(1) and 19(a)(6).

The record reflects that the Union's declaration of impasse was followed one week later by a letter addressed to the Union for the purpose of announcing an intention to implement the program on October 18, 1976. (Joint Exhibit 9). As was noted, this letter incorporates certain significant concessions agreed to by management as a result of prior bargaining. The program was implemented as proposed except for the concessions agreed to by the Respondent in the September 23, 1976 letter.

The Assistant Secretary has held that agency management violates its obligation to meet and confer under the Order when it unilaterally changes those terms or conditions of employment which are included within the ambit of Section 11(a) of the Order. 14/ After articulating this general rule the Assistant Secretary noted the following in United States Army Corps of Engineers, Philadelphia District:

However, in my judgement, after bargaining to an impasse, that is after good faith negotiations have exhausted the prospects of concluding an agreement, agency management does not violate the Order by unilaterally imposing changes in terms or conditions of employment which do not exceed the scope of its proposals made in the prior negotiations, so long as appropriate notice is given to the exclusive representative as to when the changes are intended to be put into effect in order to afford the exclusive representative ample opportunity to invoke the services of the (Federal Services Impasses Panel) at a time prior to the implementation of the changes.

The record herein discloses that the parties were engaged in bona fide negotiations concerning, among other things, the matter involved in the May 1974 change and that they had reached an impasse in those negotiations on March 4, 1974, some two months prior to the change. There also is no dispute that the Respondent's change in

^{14/} See e.g., General Services Administration, Region 3, Public Buildings Service, Central Support Field Office, A/SLMR No. 583; United States Army Corps of Engineers, Philadelphia District, A/SLMR 673, petition for review denied, FLRC No. 76A-94 (February 25, 1977), Report No. 122.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY, MILITARY DISTRICT OF
WASHINGTON, FORT MYER, VIRGINIA

Activity-Petitioner

and

Case No. 22-07956(CU)

FEDERAL EMPLOYEES AND TRANSPORTATION
WORKERS UNION, LOCAL 960,
LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO, MTC

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Ralph R. Smith. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

The Activity-Petitioner, hereinafter called MDW, filed a petition for clarification of unit seeking to clarify whether, after a July 1, 1976, reorganization at the MDW, Wage Grade employees at the Fort Myer Commissary, who were administratively transferred intact to the newly created Army Troop Support Agency, hereinafter called TSA, are still included within the exclusively recognized unit represented by the Federal Employees and Transportation Workers Union, Local 960, Laborers International Union of North America, AFL-CIO, MTC, hereinafter called FETWU. 1/ In this regard, the MDW contends that as a result of the 1976 reorganization some 85 TSA Fort Myer Commissary Wage Grade employees are no longer included in the existing exclusive bargaining unit which is composed of some 288 Wage Grade employees at Fort Myer. On the other hand, the FETWU contends that it still represents the employees in question and that the TSA is a "successor" employer.

1/ The FETWU was granted exclusive recognition on September 20, 1965, for a unit of all nonsupervisory MDW Wage Grade employees assigned to Fort Myer, Virginia, with the normal exclusions. Meat cutters and meat cutter helpers also were expressly excluded from the unit.

The mission of the MDW is one of support to various military organizations in the Washington, D. C. area. Among other things, it provides housing, transportation and personnel services. In addition, it is responsible for the defense of the National Capital region.

Pursuant to the 1976 reorganization, the employees assigned to the Fort Myer Commissary were transferred intact to the TSA, which has the mission of managing the commissaries worldwide. The record reveals that the Fort Myer Commissary uses the same grounds and facilities as were used before the reorganization and that, as a result of the reorganization, the Commissary became a tenant organization at Fort Myer.

While most conditions of employment remain the same for the commissary employees subsequent to the reorganization, certain changes were effected. Thus, pursuant to the reorganization, the employees came under the authority of a new command with a different mission, different funding and different manpower allocation. Also changed were the chain of command and labor relations authority. In this latter regard, the Commissary Officer, as a result of the reorganization, now has the authority to hire, fire, promote and negotiate labor-management agreements, with the TSA having approving authority.

However, the record also reveals that after the reorganization the commissary employees continued to perform the same job functions in the same location with no substantial change in their working conditions, immediate supervision and job contacts or personnel policies. Further, the Fort Myer Commissary, as a tenant organization, continues to be serviced by the MDW's Civilian Personnel Office (CPO) at the base which is responsible for all civilian personnel matters, including day-to-day labor-management relations, for all the civilians located at the MDW. In this regard, the CPO is responsible for employee recruiting and the commissary employees are covered by the same MDW regulations, merit promotion plan, and reduction-in-force area of consideration as are other MDW employees. Also, commissary employees are considered for job vacancies at the MDW and are paid by the same payroll office.

Under the circumstances herein, and noting particularly that the evidence establishes that the July 1, 1976, reorganization involved the administrative transfer to the TSA of only a portion of the employees in the existing exclusively recognized unit, I find that no "successorship" relationship has been established by the reorganization. 2/ Rather, I find that, based upon the circumstances herein, the TSA Fort Myer Commissary employees have remained within the FETWU's existing exclusively recognized unit after the administrative transfer of the Fort Myer Commissary of the MDW to the TSA. Thus, the evidence establishes that

2/ See Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, 3 FLRC 789, 802, FLRC No. 74A-22 (1975).

January 27, 1978

after the reorganization the commissary employees continue to perform the same job functions in the same location with no substantial change in their working conditions, immediate supervision and job contacts or personnel policies as before the reorganization. In view of the continuity of most of the employment conditions applicable to these employees, I find that the commissary employees continue, subsequent to the reorganization, to share the same community of interest with other unit employees located at the MDW who are represented by the FETWU.

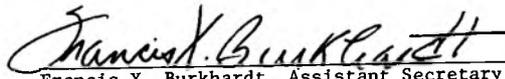
Also, I find that the retention of the commissary employees in the FETWU's exclusively recognized unit will promote effective dealings and efficiency of agency operations. Thus, the evidence establishes with regard to effective dealings that the MDW's CPO also services the TSA commissary employees and is responsible for the day-to-day labor relations program as it applies to all of the civilian employees it services. With respect to the efficiency of agency operations, I note that the continued inclusion of the Fort Myer Commissary employees in the FETWU's exclusively recognized unit will prevent fragmentation of the existing unit, all of whose employees are serviced by the same CPO.

Accordingly, I find that the Wage Grade commissary employees of the Fort Myer Commissary have remained within the FETWU's existing exclusively recognized unit subsequent to the July 1, 1976, reorganization. 3/

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein for which the Federal Employees and Transportation Workers Union, Local 960, Laborers International Union of North America, AFL-CIO, MTC, was accorded recognition as the exclusive bargaining representative in 1965, be, and it hereby is, clarified to include in said unit the Army Troop Support Agency Wage Grade employees located at the Fort Myer Commissary, Fort Myer, Virginia.

Dated, Washington, D. C.
January 19, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

3/ Cf. Army and Air Force Exchange Service, South Texas Area Exchange, Lackland Air Force Base, Texas, 6 A/SLMR 316, A/SLMR No. 669 (1976), FLRC No. 75A-93 (1976), and Department of the Army, Military Traffic Management Command, Military Ocean Terminal, Sunny Point, A/SLMR No. 877 (1977).

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
MILWAUKEE DISTRICT,
MILWAUKEE, WISCONSIN
A/SLMR No. 974

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 1, alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to make available to a union representative the evaluation materials pertaining to an employee who had been selected to be promoted. The materials were sought in order for the NTEU to be able to represent a non-selected employee in a grievance proceeding regarding the promotion action. The Respondent declined to produce the materials in question, contending at various stages of the proceeding that to do so would violate the employee's privacy, and also that the materials were not necessary and relevant to the processing of the grievance.

The Assistant Secretary noted that the Complainant had sought the evaluation materials in connection with the performance of its representational obligations, and found they are clearly necessary and relevant to the effective processing of a grievance which questions the selection herein. Although under the circumstances the mere removal of the candidate's name would not have protected his privacy, it was not established that additional steps could not have been taken to conceal his identity prior to the time the Respondent itself made future confidentiality impossible by release of all the evaluations except that of the selected candidate. Therefore, the Assistant Secretary found that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to produce materials necessary and relevant to the Complainant in performing its representational duties.

The Assistant Secretary noted that a determination that material sought is necessary and relevant, and that it could be sanitized to protect the subject's privacy, normally would result in an order to produce the material. In this case, however, as the Respondent had made it impossible to conceal the subject's identity, the issue was raised as to what weight should be accorded an employee's right to have his personnel records kept private when this right conflicts with other rights, such as an exclusive representative's right to information necessary and relevant to the performance of its representational functions? The Assistant Secretary stated that in his view an individual's right to privacy of his records must be balanced against the conflicting rights in each case.

He noted that, here, the conflicting rights are broad and involve a paramount public interest. In such a case, the mere identification of the subject of certain documents is not a violation of an individual's privacy so significant as to bar disclosure of the material. The identified employee would still have the right to have the documents sanitized so as to omit any sensitive or damaging personal material.

The Assistant Secretary concluded that the instant case involves several rights which are broad enough to warrant disclosure of the subject's identity, including the right of an exclusive representative to adequately perform its representational functions, as well as the broad public interest in having the Federal government operate within its merit promotion system so that qualified candidates are given equitable treatment, while encouraging the use of nondisruptive grievance procedures to resolve employee disputes.

Under these circumstances, the Assistant Secretary ordered the Respondent to cease and desist from the conduct found violative and to take certain affirmative actions.

A/SLMR No. 974

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
MILWAUKEE DISTRICT,
MILWAUKEE, WISCONSIN

Respondent

and

Case No. 51-3506(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 1

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator R. C. DeMarco's Order Transferring Case to the Assistant Secretary of Labor in accordance with Section 203.5(b), 203.7(a)(4) and 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits, and briefs, the Assistant Secretary finds:

The complaint herein alleges that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by refusing to make available to a union representative the evaluation materials pertaining to an employee who had been selected to be promoted. The materials were sought in order for the Complainant to represent a non-selected employee in a grievance proceeding regarding the promotion

action. 1/ The Respondent declined to produce the materials in question, contending at various stages of this proceeding that to do so would violate the employee's privacy, and also that the materials were not necessary and relevant to the processing of the grievance.

The undisputed facts, as stipulated by the parties, are as follows:

On June 16, 1975, a promotion certificate was issued for a GS-12 Revenue Agent position in an Area Office of the Respondent District. Of the five candidates eligible for the position, only one, Gerald Bell, was found highly qualified. He was selected. Thereafter, pursuant to the parties' negotiated agreement, the Complainant was given a copy of the promotion certificate and was informed of the cut-off score for the highly qualified list.

One of the non-selected eligible candidates, Carl J. Konkel, filed a grievance over the selection under the negotiated grievance procedure. The Complainant requested the evaluation materials which had been considered by the ranking panel in connection with the performance of its duty to represent the grievant. The Respondent supplied materials on all individuals considered for the position but the selected candidate. It declined to supply the materials relating to Bell, claiming that the selected candidate's materials could be readily identified even if his name were deleted because the Respondent had been given the cut-off score for the highly qualified list and the selected candidate was the only one listed as highly qualified.

FINDINGS AND CONCLUSIONS

As noted above, the Complainant sought the evaluation materials in connection with the performance of its representational obligations. In my view, such evaluation materials on a selected candidate are clearly necessary and relevant to the effective processing of a grievance which questions the particular selection involved. The Respondent's argument that the instant complaint should be dismissed because the grievance was nevertheless processed without the materials sought hardly rebuts the necessity or relevance of the materials involved. Although, as described above, the mere removal of the candidate's name would not have protected his privacy, it has not been established that additional steps could not have been taken to conceal his identity before the Respondent itself made future confidentiality impossible by release of all the evaluations except

1/ In its brief, the Complainant contended specifically for the first time that the deletion of parts of the evaluative material it received concerning three other non-selected candidates constituted a separate aspect of its unfair labor practice allegation. As this contention was not raised at either the time of the filing of the charge or the complaint in this matter, I find it unnecessary to pass upon such allegation and, therefore, shall limit my decision herein to the allegation concerning the Respondent's refusal to submit any evaluation material concerning the selected candidate, as alleged in the complaint.

-2-

that of the selected candidate. 2/ Therefore, I find that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to produce materials necessary and relevant to the Complainant in performing its representational duties. 3/

A determination that material sought is necessary and relevant, and that it could be sanitized to protect the subject's privacy, normally would result in an order to produce the material. Here, however, it is now impossible to conceal the subject's identity. Thus, the issue is raised as to what weight is to be accorded an employee's right to have his personnel records kept private when this right conflicts with other rights, such as an exclusive representative's right to information necessary and relevant to the performance of its representational functions?

In my view, an individual's right to privacy of his records must be balanced against the conflicting rights in each case. Here the conflicting rights are broad and involve a paramount public interest. In such a case, the mere identification of the subject of certain documents is not a violation of an individual's privacy so significant as to bar disclosure of the material. The identified employee would still have the right to have the documents sanitized so as to omit any sensitive or damaging personal material.

The instant case involves several rights which are broad enough to warrant disclosure of the subject's identity herein. Thus, involved are the right of an exclusive representative to adequately perform its representational functions as well as the broad public interest in having the Federal government operate within its merit promotion system so that qualified candidates are given equitable treatment, while encouraging the use of nondisruptive grievance procedures to resolve employee disputes.

2/ The Respondent's argument that the material cannot be produced even if necessary and relevant because of privacy considerations must be dealt with in determining whether production can be ordered given the present posture of this case. However, in my opinion, it is not a defense to its initial refusal. In its response to the charge, the Respondent conceded that it should have produced the evaluation at issue at the time it produced the others because it had now precluded the possibility of protecting the privacy of the selected employee. Thus, it stated:

Our analysis of the situation reflects that the union steward's request was appropriate and the material. . . should have been provided with the other material on employees who were not selected. I regret this was not done at the time, since to do it now would obviously invade the privacy of the employee who was selected.

3/ The Respondent contended that the instant complaint should be dismissed because the Complainant could have obtained the desired information directly from Bell. The question herein, however, is whether the Respondent was obligated to provide the requested information, not whether the Complainant could have obtained it through some other means.

-3-

In view of the foregoing, I shall order that, upon request, the Respondent make available to the Complainant evaluation materials regarding Gerald Bell used in connection with his selection for promotion pursuant to a June 16, 1975, promotion certificate, which are necessary and relevant to the Complainant's processing of the grievance of Carl J. Konkell, after removing therefrom any personal information of a sensitive or damaging personal nature. ^{4/}

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin, shall:

1. Cease and desist from:

(a) Refusing to permit the National Treasury Employees Union, Chapter 1, access to such documents and materials as are necessary and relevant to the National Treasury Employees Union's processing of a grievance regarding the selection process for the GS-512-12 Revenue Agent vacancy for which Promotion Certificate No. 152-75 was issued.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, permit the National Treasury Employees Union, Chapter 1, access to such documents and materials as are necessary and relevant to the National Treasury Employees Union's processing of a grievance regarding the selection process for the GS-512-12 Revenue Agent vacancy for which Promotion Certificate No. 152-75 was issued.

(b) Post at its facility at the Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director, Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The District Director shall take steps to ensure that notices are not altered, defaced, or covered by any other material.

^{4/} None of the requested material was made part of the record in this case. Therefore, I make no specific finding as to the form in which the material should be submitted.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
January 27, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to permit the National Treasury Employees Union, Chapter 1, access to such documents and materials as are necessary and relevant to the National Treasury Employees Union's processing of a grievance regarding the selection process for the GS-512-12 Revenue Agent vacancy for which Promotion Certificate No. 152-75 was issued.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, permit the National Treasury Employees Union, Chapter 1, access to such documents and materials as are necessary and relevant to the National Treasury Employees Union's processing of a grievance regarding the selection process for the GS-512-12 Revenue Agent vacancy for which Promotion Certificate No. 152-75 was issued.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Federal Building, Room 1060, 230 South Dearborn Street, Chicago, Illinois 60604.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE and
IRS, ATLANTA DISTRICT OFFICE
A/SLMR No. 975

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and its Chapter 26 alleging that the Respondent Agency and the Respondent Activity violated Section 19(a) (1) and (6) of the Order by refusing to furnish information to the NTEU which the latter sought as relevant and necessary for the processing of a grievance filed under the negotiated grievance procedure.

The Administrative Law Judge concluded, with respect to the Respondent's complaint against the Activity, that the information sought was relevant and necessary to the processing of the grievance and, therefore, the Respondent's refusal to furnish the information was violative of Section 19(a)(1) and (6) of the Order. In reaching this conclusion, the Administrative Law Judge found that this matter was not barred by Section 19(d) because the request for information matter was not litigated under the grievance proceeding, and that it was not rendered moot by the production of the information by the Respondent under the Freedom of Information Act subsequent to its refusal. The Administrative Law Judge recommended dismissal of the complaint with respect to the Respondent Agency.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations, noting particularly with regard to the dismissal of the complaint as to the Respondent Agency that it was neither alleged, nor does it appear from the record, that the Respondent Agency by any specific act or conduct violated the Order. Accordingly, he ordered that the Respondent Activity cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE AND
IRS, ATLANTA DISTRICT OFFICE

Respondents

and

Case No. 40-7843(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 26

Complainants

DECISION AND ORDER

On September 19, 1977, Administrative Law Judge David W. Pelkey issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent Activity, Atlanta District Office, had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge further found that the Respondent Agency, Internal Revenue Service, had not engaged in violative conduct and, therefore, recommended that the complaint be dismissed in its entirety with respect to the Respondent Agency. The Respondent Activity filed exceptions and a supporting brief to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent Activity's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 1/

1/ In agreement with the Administrative Law Judge's recommendation, I shall order that the complaint against the Respondent Agency be dismissed. In this regard, I note particularly that the Complainants filed no exceptions to this aspect of the Administrative Law Judge's recommendation and that they neither alleged in the complaint, nor does it appear from the record, that the Respondent Agency, by any specific act or conduct, violated the Order.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Atlanta District Office, shall:

1. Cease and desist from:

(a) Withholding or failing to provide, upon request by the National Treasury Employees Union, Chapter 26, any information relevant to the processing of a grievance, which information is necessary to enable the National Treasury Employees Union, Chapter 26, to discharge its obligation as the exclusive representative to represent the interests of all employees in the exclusively recognized unit.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, make available to the National Treasury Employees Union, Chapter 26, all information relevant to the processing of a grievance, which information is necessary to enable the National Treasury Employees Union, Chapter 26, to discharge its obligation as the exclusive representative to represent the interests of all employees in the exclusively recognized unit. 3/

(b) Post at its facility at the Internal Revenue Service, Atlanta District Office, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed

2/ In view of the finding of a Section 19(a)(6) and 19(a)(1) derivative violation and the remedial order herein, I deem it unnecessary to find an independent 19(a)(1) violation flowing from the same violative conduct by the Respondent Activity.

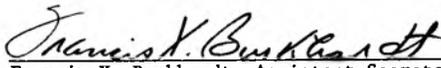
3/ The record reveals that subsequent to the filing of the pre-complaint charge herein the Complainant, NTEU Chapter 26, obtained a copy of the material at issue pursuant to a request under the Freedom of Information Act. Therefore, I find it unnecessary to require production of that specific material in the remedial order herein.

by the Director, Internal Revenue Service, Atlanta District Office, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges that the Respondent Agency violated the Executive Order, be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 31, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT withhold or fail to provide, upon request by the National Treasury Employees Union, Chapter 26, any information relevant to the processing of a grievance, which information is necessary to enable the National Treasury Employees Union, Chapter 26, to discharge its obligation as the exclusive representative to represent the interests of all employees in the exclusively recognized unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Executive Order.

WE WILL, upon request, make available to the National Treasury Employees Union, Chapter 26, all information relevant to the processing of a grievance, which information is necessary to enable the National Treasury Employees Union, Chapter 26, to discharge its obligation as the exclusive representative to represent the interests of all employees in the exclusively recognized unit.

(Agency or 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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300, 1371 Peachtree Street, NE, Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



interfere with, restrain or coerce an employee in the exercise of the right, freely and without fear of penalty or reprisal, to form, to join and to assist a labor organization; or to refrain from any such activity. By its terms, 19(a)(6) provides that an agency's management shall not refuse to consult, confer or negotiate with a labor organization by refusing to meet with, at reasonable times, and to confer with such an organization, in good faith, with respect to personnel policies and practices and matters affecting working conditions.

This matter arises out of Respondents' refusal to supply Complainant with information requested during the course of Complainant's representation of an employee (Employee) in a grievance attending Employee's entitlement to an award.

A Notice of Hearing on Complaint issued on April 8, 1977, and, on May 24, 1977, a hearing on the Complaint was conducted in accordance with the provisions of 5 U.S.C. 554. At that hearing, the parties submitted the following issues for resolution:

- 1) Whether Complainant has standing to bring an unfair labor practice complaint against Internal Revenue Service.
- 2) Whether Complainant raised the request-for-report issue, and the relevance and necessity of the report, under the negotiated grievance procedure.
- 3) Whether, if it be determined that the request-for-report issue was raised under the grievance procedure, Complainant is barred from pursuing that issue under the unfair labor practice procedure by reason of the provisions of Subsection 19(d) of the Order.
- 4) Whether the requested report is relevant and/or necessary to the processing of the grievance involved herein.
- 5) Whether, by refusing to furnish Complainant with information that was requested during the processing of the grievance, Respondent violated Subsection 19(a)(6) in that Respondents refused to consult, confer and/or negotiate in good faith with respect to personnel policies and practices attending employee grievances.
- 6) Whether, by refusing to furnish Complainant with information Claimant requested during the negotiated grievance procedure, Respondents interfered with and restrained Employee in her right to present her-grievance; interfered with her right fairly to be

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 :
 In the Matter of: :
 :
 INTERNAL REVENUE SERVICE; :
 I.R.S. ATLANTA DISTRICT :
 OFFICE, :
 Respondents, : Case No. 40-7843(CA)
 :
 and :
 :
 NATIONAL TREASURY EMPLOYEES :
 UNION (NTEU CHAPTER 26), :
 Complainant. :

STEVEN P. FLIG, ESQUIRE
 Assistant Counsel
 National Treasury Employees Union
 Suite 930
 3445 Peachtree Street, N.E.
 Atlanta, Georgia 30326
 For the Complainant

PHYLLIS MAGRAM, ESQUIRE
 General Legal Services Division,
 Office of Chief Counsel
 Internal Revenue Service
 Washington, D.C.
 For the Respondents

Before: DAVID W. PELKEY
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

In a Complaint filed on February 7, 1977, Complainant alleged that Respondents have engaged in violations of Subsections 19(a)(1) (hereafter 19(a)(1)) and 19(a)(6) (hereafter 19(a)(6)) of Executive Order No. 11491, as amended, (the Order). By its terms, 19(a)(1) provides that an agency's management shall not

represented by Complainant; and interfered with Complainant's obligation fairly to represent Employee.

7. Whether the issues relating to violations under 19(a)(1) and 19(a)(6) are now moot because Employee was mailed a copy of the requested report on the same day that Complainant filed the informal unfair labor practice charge.

Such issues will be discussed and resolved in connection with my consideration of the pertinent facts I find to be established as a result of my examination and evaluation of the entire record established herein. The facts found to be established follow.

Findings of Fact

1) On April 14, 1976, a Multi-District Agreement (MDA) governed relationships between Internal Revenue Service (I.R.S.) representing 56 district offices and National Treasury Employees Union (NTEU) representing chapters holding exclusive recognition in those district offices. I.R.S. Atlanta District Office (ADO) was one such office. Chapter 26 was one such chapter.

2) Article 9, Section 2, of the MDA provided, in pertinent part:

"Where it has been administratively determined that an employee has performed:

- 1. higher graded duties for 50% or more of the previous 12 month period,
- 2. in a manner which fully meets the performance requirements of the higher graded duties, such performance will be recognized by a Special Achievement Award."

3) Article 35 of the MDA covered grievances arising out of interpretation and/or application of the terms of the agreement. Section 3A provided that grievances could be initiated by employees, singly or jointly, or by NTEU on behalf of employees. Section 3G gave grieving employees the right to be accompanied, represented and advised by an NTEU steward at any stage of the proceeding.

4) Among ADO employee positions were Employee Plans Specialists. Such specialists occupied position-grade-levels of GS-9, GS-11, GS-12, or GS-13. Occupants of the positions reviewed profit-sharing, pension or similar employer-taxpayer plans to determine whether, under the Internal Revenue Code, the plans qualified as tax-exempt trusts.

5) Guidelines for assignment of plans (cases) to specialists at the four position-grade-levels were published in I.R.S. Manual Supplement 45G-218 (MS-218), January 24, 1975. Plans were categorized by "probable" case-grade-levels designed to correspond to the position-grade-levels of specialists. Generally, the guidelines contemplated (with decisional control being exercised by specialists' supervisors) assignment of a GS-9 case to a GS-9 specialist. Exceptions, for employee developmental purposes, were contemplated. MS-218 directed that, after a stated period, I.R.S. regions submit reports that would be designed to reflect information that included "the frequency and reasons for any changes in the level of cases after being worked."

6) On January 8, 1976, and pursuant to MS-218, an ADO Employee Plans Reviewer prepared a report for the ADO Employee Plans/Exempt Organizations Division Chief. It covered the period from February through December 1975. The report reflected a review of 1011 cases processed to determine whether plans qualified for tax exemption (determination cases) and 889 cases involving on-site examination of plans (examination cases). All cases had been processed by GS-9 through GS-13 specialists. The reviewer reported "grading changes" in 33 of the 1011 determination cases and in 6 of the 889 examination cases. He reported that 30 of the 39 changes arose out of "errors in initial grading decisions" and that 22 of the 30 changes involved reduction in case grades.

7) Between March 16 and 22, 1976, an ADO GS-9 Employee Plans Specialist (Employee) represented to her Group Manager (supervisor) that, based on her list of plans (cases) that the specialist processed for the 12-month period following March 16, 1975, she had performed duties at a position-grade-level above GS-9 for more than 50 percent of the period. She requested that she be given a Special Achievement Award on the basis of such performance. Her supervisor did not concur in the request.

8) On April 14, 1976, Employee and her union steward filed a grievance (with her supervisor) under Article 35 of the MDA. Therein, they alleged that she had satisfied the performance requirements for a Special Achievement Award under Article 9, Section 2, of the MDA. They asked that she be granted the award. This action constituted Step 1 of the prescribed grievance procedure.

9) Step 1 was concluded by the supervisor's denial of the requested relief. The denial was based, in part, on the Group Manager's examination and "downgrading" of some cases that had been processed during a 12-month period agreed upon by Employee and the supervisor. The Group Manager concluded, in part, that Employee had not performed "higher graded duties" for 50 percent or more of that period.

10) In a May 3, 1976, communication to the Group Manager, Employee and the steward asked that she and/or he be furnished with a copy of a report that had been prepared as required by MS-218 and that the grievance be advanced to Step 3 of the grievance procedure.

11) A May 21, 1976, communication to Employee and the steward from her Division Chief referenced a May 13 Step 3 meeting (attendees at which included Employee and the steward) and a denial of her request for the award. Therein, he mentioned her request for a copy of the MS-218 report and his denial of that request. In connection with the denial, the letter contained the following:

"It was pointed out that the report did not contain any employee identities nor any information as to which grades were changed. It is my opinion the report is a management report and has no bearing or impact in the instant grievance."

12) At a June 1, 1976, Step 4 grievance meeting, Complainant's attorney requested a copy of so much of the report as reflected the number of cases it covered and the number of cases on which case-grade-levels had been changed after the cases were processed. The request was denied in the Assistant District Director's June 16 letter to Employee (through the steward). Therein, the writer stated, in part:

"After serious consideration of this modification of your original request for this report, I indicated that I feel this information should not be released in any form in that this is privileged information and furthermore is not germane to your grievance. This report does not contain any employee or case names nor any information such as how many GS-9 cases were changed to GS-11 or GS-12."

13) On July 23, 1976, and as a result of Employee's May 15, 1976, initiative to obtain a copy of the report under the Freedom of Information Act, Commissioner of Internal Revenue Service sent her a sanitized copy thereof.

Discussion

Issue 1: Whether Complainant has standing to bring an unfair labor practice complaint against Internal Revenue Service (I.R.S)

Resolution of this issue on its merits requires recognition of the fact that, at the close of Complainant's case-in-chief at the May 24, 1977, hearing, Respondents' attorney moved for dismissal of I.R.S. as a party. The motion was bottomed on the submissions that "NTEU has no recognition at the national level of the I.R.S., and, furthermore, it has not sought nor obtained national consultation rights." In view of the fact that the subject-matter of the motion had been incorporated as an issue to be resolved on the merits, I elected to incorporate a ruling on the motion in my determination of the issue on its merits.

On brief, at Page 3 thereof, Complainant describes its status, as follows:

"the Complainant, the National Treasury Employees union is the exclusive representative of employees in separate units located in each of the 56 of I.R.S.' 58 District offices. 2/ The NTEU and I.R.S. have in effect a Multi-District Agreement (herein called M.D.A.) which covers employees in each of the 56 District offices". (Footnotes omitted)

Further, on brief and at Page 24, Complainant acknowledges that, at all pertinent times, it "did not have exclusive recognition with the I.R.S. on a nationwide basis," but submits that the M.D.A. was negotiated at the national level on behalf of the district offices. On the basis of the submission, Complainant proposes that a refusal to furnish information relative to a grievance, the procedures attending which are governed by the M.D.A., properly qualifies I.R.S. as a party.

I find the proposal to be without merit. Rather, I find that Respondents' posture on brief, supported by citation of A/SLMR decisions I consider to be controlling herein, as

dictating the finding that Complainant has no standing to maintain this unfair labor practice litigation against Internal Revenue Service.

Conclusion: Complainant has no standing to bring an unfair labor practice complaint against Internal Revenue Service.

Conclusion: Internal Revenue Service is not a proper party in this matter and must be dismissed therefrom as a Respondent.

Conclusion: Atlanta District Office is the proper party Respondent herein.

Issue 2: Whether Complainant raised the request-for-report issue, and the relevance and necessity of the report, under the negotiated grievance procedure.

Uncontroverted testimony at the hearing and documentation relied on by the parties establish, and I have found, that Complainant repeatedly requested a copy of the MS-218 report. They establish that the requests were made during accomplishment of the first three steps of the grievance procedure followed in connection with Employee's entitlement to the award.

However, I find no probatively persuasive evidence that Complainant's entitlement to a copy of the report was submitted as an issue to be resolved pursuant to the grievance procedure. Rather, I find that it was not so submitted. I consider the following to be supportive thereof:

- 1) The April 14, 1976, grievance alleged that Respondent had violated Article 9, Section 2, of the M.D.A. That section involves the Special Achievement Award. It does not involve the MS-218 report.
- 2) The Group Manager's April 28, 1976, Step 1 denial of the grievance referenced no resolution of a grievance related to MS-218 or the report issued pursuant thereto.
- 3) The May 3, 1976, appeal to Step 3 of the grievance procedure contained a request for the report but it reflected no refusal of a prior request therefor.
- 4) The Division Chief's May 21, 1976, Step 3 denial of the grievance reflected his "consideration of the grievance filed by you on April 14, 1976." That grievance required no resolution of a report issue. The denial specifically noted that Employee

had "grieved under Article 9, Section 2, of the Multi-District Agreement." Further, and with reference to the report, he wrote that it had "no bearing or impact in the instant grievance."

5) The Assistant District Director's June 16, 1976, Step 4 denial of the grievance reflected "the grievance filed by you on April 14, 1976," and specified that "you charged violation of Article 9, Section 2." Whereas the Assistant Director mentioned that a request for the report "had previously been made under the negotiated grievance procedure and the Freedom of Information Act," he stated an opinion that the report was not "germane to your grievance."

The foregoing is among the evidence that convinces me that, during the processing of the grievance through Step 4, no proper person considered the request for the report to be an issue to be resolved under the negotiated grievance procedure.

Conclusion: Complainant did not raise the request-for-report issue under the negotiated grievance procedure.

Conclusion: Complainant raised the request-for-report issue during the negotiated grievance procedure.

I find that the record contains evidence that is sufficient to support adoption of the proposition that Complainant raised the relevance and necessity of the report during the negotiated grievance procedure.

The appeal to Step 3 challenged the Group Manager's undertaking to regrade cases that Employee had processed. It indicated that the requirements of MS-218 had not been followed. It noted that a report generated by MS-218 reflected "the frequency and reasons for any changes in the level of cases being worked." The foregoing was followed by a request for a copy of the report.

The Division Chief's Step 3 denial noted that, in connection with his denial of the request for the report, he had "pointed out that the report did not contain any employee identities nor any information as to which grades were changed." His opinion, that the report was a "management report," not bearing or impacting on the grievance, is read as reflecting his having considered the relevance and necessity of the report contents to resolution of the grievance.

The Assistant District Director's Step 4 denial acknowledged that Complainant's attorney had indicated that he believed that so much of the report as contained "information indicating the number of cases and the number of cases changed by review" was relevant and necessary to proper prosecution of the grievance.

Respondent's Labor-Management Relations Specialist testified that she and the Division Chief discussed the relevance and necessity of the report to proper administration of the Step 3 aspects of the grievance.

Such evidence convinces me that, during the processing of the grievance through Step 4, the relevancy and necessity of the report to proper resolution of the grievance was brought to the attention of Respondent.

Conclusion: Complainant raised the relevance and necessity of the report during the negotiated grievance procedure.

Conclusion: During the negotiated grievance procedure, Respondent was aware that Complainant considered information in the report to be relevant and necessary to proper presentation of Employee's grievance.

Issue 3: Whether, if it be determined that the request-for-report issue was raised under the grievance procedure, Complainant is barred from pursuing that issue under the unfair labor practice procedure by reason of the provisions of subsection 19(d) of the Order.

Resolution of this issue on its merits requires recognition of the fact that, at the close of Complainant's case-in-chief at the May 24, 1977, hearing, Respondent's attorney moved that the Complaint be dismissed because Complainant had then failed to meet the burden of proof to show that the Complaint was not barred by 19(d). I elected to incorporate a ruling on the motion in my determination of the issue on its merits.

In pertinent part, Subsection 19(d) reads, as follows:

"Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures."

In effecting resolution of Issue 2, I concluded that Complainant raised the request-for-report issue during the negotiated grievance procedure and that it did not raise that issue under that procedure. In the context in which I discussed them in connection with Issue 2, I consider the distinction between during and under to be decisively controlling. Accordingly, I find that the request-for-report issue was neither litigated nor resolved pursuant to the grievance procedure. Further, I find that 19(d) does not bar resolution of that issue under an unfair labor practice complaint.

~~The findings have not been made without having evaluated Respondent's position on brief: the issue cannot be considered herein because Respondent's refusal to supply Complainant with requested information "has been raised through the negotiated grievance procedure."~~ Respondent submits that:

"[w]hile it is clear that one of the issues in the grievance was whether Ms. Smith was entitled to a Special Achievement Award, it is equally clear that other issues arose as to * * * and whether the requested reports were relevant and necessary for processing the Smith grievance."

In support of its position, Respondent cites Equal Employment Opportunity Commission, A/SLMR No. 707 (1976), and Department of the Army, U.S. Army Transportation Center and Fort Eustis, Virginia, A/SLMR No. 681 (1976). Whereas each case supports the proposition that the same subject-matter cannot be pursued as a grievance and as an unfair labor practice, neither case presents a factual situation wherein a party challenged the fact that the same subject-matter was so pursued. Herein, the fact of submission of the request-for-report issue under the grievance procedure has been challenged. Herein, I find, consistent with the position of Complainant on brief, that the grievance issue was whether Employee was entitled to a Special Achievement Award and that the unfair labor practice issue is whether Respondent properly refused to give Complainant requested information.

Respondent also references Boston District Office, Internal Revenue Service, A/SLMR No. 727 (1976). The factual situation therein resembles the factual situation herein in that it involved an activity's refusal to furnish a union local with information that the local felt was required properly to represent an employee in an adverse action situation. The Decision and Order states, relative to that request-for-information issue:

" * * * the issue was litigated before the arbitrator at the advisory arbitration proceeding; and the issue was considered by the arbitrator and was the subject of several rulings at the hearing, as well as a written ruling with respect to whether the Complainant was entitled to certain of the material sought.

* * * *

" Thus, the record clearly reflects that throughout the adverse action proceeding the Complainant incorporated with the merits of the case its asserted right to material deemed necessary and relevant to its role as the exclusive representative of Catania."

"Under the particular circumstances" of that case, 19(d) was found to bar pursuit of the request-for-information unfair labor practice complaint.

I consider the "litigated issue" aspect of Boston as so distinguishing it from the instant matter as to render it not controlling herein. I do not find that the request-for-report issue was litigated during the grievance procedure.

Significantly, I find a Decision and Order, issued on the same date Boston issued, to be controlling herein. In Department of the Navy, Long Beach Naval Shipyard, Long Beach, California, A/SLMR No. 728 (1976), it was determined that the evidence established that the matter of access to the requested documents was not made an issue in the grievance involved; that the matter was not incorporated in or decided in the grievance proceeding. Accordingly, 19(d) was found not to bar proceedings under an unfair labor charge complaint.

Conclusion: During the presentation of its case-in-chief, Complainant made a prima facie showing that the Complaint was not barred by Subsection 19(d) of the Order.

Conclusion: Subsection 19(d) of the Order does not bar processing of the request-for-report issue under the unfair labor practice procedure.

Issue 4: Whether the requested report is relevant and/or necessary to the processing of the grievance involved herein.

On brief, Respondent submits that the report is neither relevant nor necessary. Factual support for the submission is based on the proposition that record evidence includes that which establishes that the report: 1) does not show how many of any particular employee's case grades were changed; 2) does not reflect the number of cases that were reviewed; 3) does not cover the period covered by the grievance; 4) does not reflect grade changes according to grade level; 5) does not show how many cases were changed by Group Managers; 6) does not contain accurate statistics; and 7) does not contain information reasonably required to determine whether Employee's Group Manager acted discriminatorily or unjustly in effecting a review of Employee's cases.

Legal support for the submission is based on the holdings in Department of Defense, State of New Jersey, A/SLMR No. 323 (1973), and Agency for International Development, Department of State, A/SLMR No. 676, (1976).

On brief, Complainant submits that the report is relevant and necessary to enable it properly to represent Employee during the grievance procedures. The submission is based on the proposition that the report demonstrates that the grade-levels initially assigned to cases processed by specialists are, percentage-wise, more accurate than is the accuracy of the grade-levels assigned to cases processed by Employee as the result of the Group Manager's grievance - oriented, post-processing, review of Employee's cases. Complainant proposes that the report is relevant and necessary because it is supportive of Employee's claim of entitlement to the Special Achievement Award.

I determine that resolution of this issue requires answers to the following questions:

- 1) Is the nature of the information in the report reasonably related to the subject-matter of the grievance? (Is the report relevant to the grievance?).
- 2) Is the nature of the information in the report reasonably useful in, and properly applied to, resolution of the grievance? (Is the report necessary in processing the grievance?).

Crucial to the Step 3 and Step 4 denials of the grievance was the determination that Employee was not entitled to the Special Achievement Award because she spent but 27.3 percent of her time on "higher graded duties." That percentage resulted, in part, from the downgrading of a number of cases, after they had been processed by Employee, by her Group Manager. The report involves the number and percentage of cases of specialists, including Employee, that were downgraded or otherwise regraded by review personnel after they had been processed. I conclude, therefore, that the nature of the information in the report is reasonably related to the subject-matter of the grievance. The former is relevant to the latter.

Essential to establishment of Employee's position during the grievance procedure is the need to establish, at a minimum, that the regrading action taken by the Group Manager is inconsistent with and/or unsupported by regrading actions taken by other reviewing personnel. I find it reasonable to adopt the proposition that the contents of the report may satisfy that need. I conclude, therefore, that the nature of the information in the report is reasonably useful in, and properly applied to, resolution of the grievance. The former is necessary in the latter.

Whereas I respect the interpretation Respondent attaches to the evidence it references, I do not accept that interpretation. I do not find that it bears on relevance or necessity. Rather, I find that it bears on the reliability and probative value of the information in the report. Further, I read Department of Defense as being supportive of the proposition that a union cannot meet its grievance responsibility if it is refused certain information but I read it as making no meaningful contribution to the resolution of this issue. Still further, I read Agency for International Development as being persuasive herein only if I adopt the opinions of Respondent's personnel as to relevance and necessity. I do not adopt those opinions.

Conclusion: The requested report is relevant and necessary to the processing of the grievance involved herein.

Issue 5: Whether, by refusing to furnish Complainant with information that was requested during the processing of the grievance, Respondent violated Subsection 19(a)(6) in that Respondent refused to consult, confer and/or negotiate in good faith with respect to personnel policies and practices attending employee grievances.

On brief, Respondent proposes that the facts developed in the record dictate a finding that the refusal did not constitute a refusal prohibited by the Order. The proposal is based on the submission that the report is neither relevant nor necessary properly to process Employee's grievance.

Heretofore, I have concluded that the report is relevant and necessary properly to pursue Employee's grievance. Accordingly, I find Respondent's proposal, as based on the submission, to be without merit.

Respondent acknowledges, and Complainant submits, on brief, that Department of State, State of New Jersey, A/SLMR No. 323 (1973); and Agency for International Development, Department of State, A/SLMR No. 676 (1976), stand for the proposition that, if the information is relevant and necessary, management is obligated to honor a union's request therefor so that the representative can police and administer so much of an agreement as relates to representing an employee in a grievance proceeding. Complainant's identification with grievance matters is found in so much of Subsection 10 of the Order as states:

" * * * It is responsible for representing the interests of all employees in the unit * * *. The labor organization shall be given the opportunity to be represented at formal discussions * * * concerning grievances, * * * *".

Conclusion: By refusing to furnish Complainant with information that was requested during the processing of the grievance, Respondent violated Subsection 19(a)(6) of the Order.

Issue 6: Whether, by refusing to furnish Complainant with information requested during the negotiated grievance procedure, Respondent interfered with and restrained Employee in her right to present her grievance; interfered with her right fairly to be represented by Complainant; and interfered with Complainant's obligation fairly to represent Employee.

In its treatment of this issue on brief, Respondent addresses factual, but not legal, considerations. I have heretofore disposed of the merits of Respondent's factual position as to the relevance and necessity of the report. I have rejected it.

Treatment of the legal considerations attending this issue, initially, involves a determination as to whether Respondent's refusal interfered with and restrained Employee in her right to present her grievance. I find controlling guidance in two cases. In Department of the Navy, Long Beach Naval Shipyard, Long Beach, California, A/SLMR No. 728 (1976), a respondent failed to make available documents a committee used in evaluating candidates for an open position. The documents were requested during grievance proceedings. The failure to make the documents available was determined to constitute a violation of Subsection 19(a)(1) of the Order. In General Services Administration, Region 3, A/SLMR No. 734 (1976), a respondent failed to make documents available in a timely manner. The documents were requested in connection with a contemplated grievance. Such a failure was determined to constitute a violation of the subsection.

Controlling guidance in determining whether Respondent's refusal interfered with Employee's right fairly to be represented by Complainant is found in Department of Health, Education, and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 411 (1974). In that case, a respondent refused to make requested machine utilization reports available. It was determined that such action inherently interfered with and coerced the grieving employees in their right to have their exclusive representative act for and represent their interests in the grievances.

Controlling guidance in determining whether Respondent's refusal interfered with Complainant's obligation fairly to represent Employee is found in the cases referenced above and in two additional cases. Department of Navy, Dallas Naval Air Station, Dallas, Texas, A/SLMR No. 510 (1975), involved a Respondent's refusal, during grievance processing, to make requested information available. It was determined that the refusal precluded the union from meeting its responsibility to represent the interests of the grieving employees. Department of Defense, State of New Jersey, A/SLMR No. 323 (1973), held that a labor organization cannot meet its responsibility to represent unit employees' interests if it is prevented from obtaining relevant and necessary information in connection with the processing of grievances.

Conclusion: Respondent's refusal to furnish the requested information interfered with and restrained Employee in her right to present her grievance.

Conclusion: Respondent's refusal to furnish the requested information interfered with Employee's right fairly to be represented by Complainant.

Conclusion: Respondent's refusal to furnish the requested information interfered with Complainant's obligation fairly to represent Employee.

Issue 7 : Whether the issues relating to violations under 19(a)(1) and 19(a)(6) are now moot because Employee was mailed a copy of the requested report on the same day that Complainant filed the informal unfair labor practice charge.

As I read its position on brief, Respondent addresses the issue of whether, in view of the fact that Complainant received a copy of the report, the issues herein have become moot. Respondent submits that they have become moot.

I disagree. The pertinent issues herein are not resolved by receipt of the report. The pertinent issues revolve around the relevance of and the need for the report in connection with the grievance procedure, and the supportability of Respondent's refusal to furnish the report upon request.

Further, Employee obtained a copy of the report as a result of a request therefor under the Freedom of Information Act (FOIA). FOIA obligates agency and department heads to furnish information that is not exempt from disclosure under the statute. FOIA is not concerned with, and it does not govern, refusal to disclose information as an unfair labor practice under the Order. At the same time, entitlement to information under the Order is not governed by the guidelines under FOIA. Representatives are entitled to information under the Order, as I read the Order, if the information is, among other considerations, relevant and/or necessary for the accomplishment of purposes, protection of rights, and/or meeting of obligations under the Order.

On brief, Complainant submits that, if this matter be considered moot, Respondent could refuse to furnish relevant and/or necessary information to a representative and force an individual to seek that information under FOIA. Such, Complainant proposes, could render the representative ineffective in processing grievances and could impede "policing" a collective bargaining agreement. I evaluate the foregoing in connection with so much of Page 17 of Respondent's brief as reads:

"Upon determining, after due consideration, that the union was not entitled to the reports, management informed the union of this and supplied it with reasons and written decisions. It is difficult to see how the reasoned denial of information to which the union was not entitled would be an unfair labor practice."

My evaluation results in my determination that Complainant's submission and proposal have merit and support a finding that neither is this matter now moot nor are the consequences of actions taken by Respondent de minimus in effect.

Conclusion: The issues relating to violations under 19(a)(1) and 19(a)(6) are not now moot.

Recommendations

Upon the basis of the foregoing findings and conclusions, I recommend that the Complaint in Case No. 40-7843(CA) be dismissed as to Respondent Internal Revenue Service.

Having found that Respondent I.R.S. Atlanta District Office has engaged in conduct that is violative of Subsections 19(a)(1) and 19(a)(6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary, to effectuate the purposes and policies of that Order, adopt the following Recommended Order.

Recommended Order

Pursuant to Section 6(a) of Executive Order 11491, as amended, and Section 203.26(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations orders that the Complaint in Case No. 40-7843(CA) be, and the same is hereby, dismissed as to Respondent Internal Revenue Service.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that I.R.S. Atlanta District Office shall:

1. Cease and desist from:
 - a. Withholding or failing to provide, upon request by National Treasury Employees Union (NTEU Chapter 26) any information relative to the processing of a grievance, which information

is necessary to enable National Treasury Employees Union (NTEU Chapter 26) to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

b. Interfering with, restraining or coercing its employees in the exercise of their rights assured by the Executive Order by denying National Treasury Employees Union (NTEU Chapter 26) information necessary to enable such labor organization, as the exclusive representative, to discharge its obligation to represent effectively all employees in the exclusively recognized unit.

c. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

a. Upon request, make available to National Treasury Employees Union (NTEU Chapter 26) all information relevant to the processing of a grievance, which information is necessary to enable National Treasury Employees Union (NTEU Chapter 26) to discharge its obligations as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

b. Post, at its I.R.S. Atlanta District Office facilities, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by I.R.S. Atlanta District Office Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

c. Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.


David W. Pelkey
Administrative Law Judge

Dated: September 19, 1977
Washington, D.C.

NOTICE TO ALL EMPLOYEES

APPENDIX

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services Administration, United States Department of Labor, whose address is: Room, 300, 1371 Peachtree Street, N.E., Atlanta, GA., 30309.

WE WILL NOT withhold or fail to provide, upon request by the National Treasury Employees Union (NTEU Chapter 26) any information relevant to the processing of a grievance, which information is necessary to enable the National Treasury Employees Union (NTEU Chapter 26) to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Executive Order.

WE WILL, upon request, make available to the National Treasury Employees Union (NTEU Chapter 26) all information relevant to the processing of a grievance, which information is necessary to enable the National Treasury Employees Union (NTEU Chapter 26) to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(Agency or 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.

February 2, 1978

A/SLMR No. 976

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION,
REGIONAL OFFICE,
HONOLULU, HAWAII
A/SLMR No. 976

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
REGIONAL OFFICE,
HONOLULU, HAWAII

Respondent

and

Case No. 73-902(CA)

SERVICE EMPLOYEES' INTERNATIONAL
UNION, LOCAL 556, AFL-CIO

Complainant

This case involved an unfair labor practice complaint filed by the Service Employees' International Union, Local 556, AFL-CIO, alleging that the Respondent, Veterans Administration Regional Office, Honolulu, Hawaii, had violated Section 19(a)(1) and (2) of the Order by attempting to restrict employee Maggie M. Sodergren from soliciting authorization cards on behalf of a labor organization, and by reassigning her to a new position in reprisal for her union activities.

The Chief Administrative Law Judge concluded that the Respondent had not engaged in conduct violative of the Order. He noted that the Respondent's decision to reassign Sodergren was not motivated by anti-union animus, but, rather, was based on a Grievance Examiner's finding that she should be transferred, and on Sodergren's own request for a transfer as part of that grievance remedy. He further found that the allegation that the Respondent had attempted to restrict Sodergren from soliciting authorization cards was not contained in the pre-complaint charge and, thus, was not properly a part of the complaint, but that, in any event, the Complainant had failed to prove more than a de minimus violation in this regard. Accordingly, the Chief Administrative Law Judge recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Chief Administrative Law Judge and ordered that the complaint be dismissed.

DECISION AND ORDER

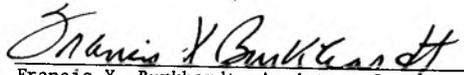
On October 27, 1977, Chief Administrative Law Judge H. Stephan Gordon issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Chief Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Chief Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Chief Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Chief Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 73-902(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 2, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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 In the Matter of :
 :
 VETERAN'S ADMINISTRATION :
 REGIONAL OFFICE :
 HONOLULU, HAWAII :
 Respondent :
 :
 and :
 :
 SERVICE EMPLOYEES INTERNATIONAL :
 UNION, LOCAL 556, AFL-CIO :
 Complainant :

Case No. 73-902(CA)

ERIC A. SEITZ, Esquire
 3049B Kalihi Street
 Honolulu, Hawaii 96819
 For the Complainant

ALBERT J. PFALTZGRAFF, Esquire and
 FREDERICK LEE HALL, III, Esquire
 District Counsel
 VA Regional Office
 Honolulu, Hawaii
 For the Respondent

Before: H. STEPHAN GORDON
 Chief Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding arises under Executive Order 11491, as amended (hereinafter referred to as the Order) pursuant to a Notice of Hearing issued by the Regional Administrator, U.S. Department of Labor, San Francisco Region.

The proceeding was initiated by the filing of a complaint on November 8, 1976 by Service Employees' International Union Local 556 (hereinafter referred to as the Union or Complainant) against the Veterans Administration

Regional Office in Honolulu, Hawaii (hereinafter referred to as VARO or the Activity). This complaint was amended on January 25, 1977.

The amended complaint alleges that the Activity violated Sections 19(a)(1) and (2) of the Order when it unlawfully restricted employee Maggie M. Sodergren's solicitation activities on behalf of a labor organization and when it reassigned her to another division within VARO without prior consultation with the Union and in reprisal for her Union activities.

At the hearing all parties were afforded a full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses and to make oral argument. Post-hearing briefs, received from both parties, have been given careful consideration.

Based on the entire record in this case, including my observation of the witnesses and their demeanor, and all the testimony and evidence adduced at the hearing, I make the following findings, conclusions, and recommendations:

Findings of Fact

Background

The Honolulu Regional Office of the Veterans Administration is organizationally divided into several divisions under the supervision of a central director. At all times material herein, most of the 100 GS employees working at VARO were located at 680 Ala Moana Boulevard in Honolulu. However some divisions, including the Loan Guaranty Division, were located in the Hawaiian Life Building, some two-and-a-half miles away.

Ms. Sodergren first began work with the Activity as a secretary in the Adjudication Division. From May 1974, until January 1976, she worked under the direct supervision of the Adjudication Officer, Mr. Jess D. Johnson. Mr. Johnson was transferred to a different duty station on January 22, 1976. The new adjudication officer, Mr. Jim H. Shepherd, supervised Ms. Sodergren until she was transferred to the Loan Guaranty Division on November 7, 1976. Mr. William C. Oshiro has been the Activity's director throughout the entire period of Ms. Sodergren's employment at VARO.

Employee's Union Activities

Ms. Sodergren first attempted to organize her fellow employees in April 1976. At this time her efforts were on behalf of the American Federation of Government Employees (hereinafter referred to as AFGE). On April 28, 1976 VARO's director issued a memorandum to all employees and supervisors explaining employee rights with respect to union organizing activities. Among other things, the memorandum stated that employees could attend union organizing meetings and participate in other organizing activities only while they were in "non-duty status." This portion of the memo was revised at Ms. Sodergren's request. The revision, issued on May 7, 1976, explained that participation in union organizing activities was also permissible during employee rest periods, coffee breaks, and the half-hour lunch break in addition to other non-working periods.

AFGE's organizing drive proved unsuccessful. However in May 1976, Ms. Sodergren began organizing again, this time on behalf of the Complainant. On June 3, 1976 an RO petition was filed by the Union with the Department of Labor seeking an election at VARO. On July 30, 1976, the Union was certified as the exclusive bargaining agent for VARO employees.

The President of Local 556 appointed Ms. Sodergren Employee Union Representative on August 13, 1976, and VARO's director was informed of this action by letter on this same date. Ms. Sodergren's duties as Union Representative include helping employees during lunch and break times, with grievances and misunderstandings.

Mr. Oshiro testified that he was fully aware of Ms. Sodergren's union activities.

Employee's Work Performance

Ms. Sodergren stated that she worked as a secretary (stenography) in the Adjudication Division and as an Administrative Aide (typing) in the Loan Guaranty Division. Both positions were at the GS-5 level. Complainant's charge letter indicates she received a notice of unsatisfactory work performance from her supervisor on June 23, 1976. Apart from this incident, however, the record is devoid of any reference to unsatisfactory work performance.

Accordingly I find that her work performance was completely satisfactory at all other times relevant to these proceedings.

Employee's Grievances 1/

During the course of her tenure in the Adjudication Division, Ms. Sodergren filed several grievances complaining of the behavior of various employees. On September 23, 1975 she filed a grievance with her supervisor, Jess D. Johnson, alleging indecorous conduct and harassment toward her by other employees in the Adjudication Division. She requested that these employees be disciplined and controlled. On October 24, 1975 she wrote a memorandum to Mr. Oshiro complaining that the Adjudication Officer was unable to handle the situation there and requested reassignment to another office in the Agency. In a memorandum to VARO's Personnel Officer dated October 28, 1975, Ms. Sodergren emphasized that she wanted her reassignment to be made "constructively...that it be a learning reassignment leading to a managerial position in the Agency." 2/

Grievant's designated representative reiterated her demand for disciplinary action against specific employees in a memorandum to VARO's director dated November 3, 1975. This memorandum also requested disciplinary action against her supervisor, Jess D. Johnson and stated that grievant would drop all actions against management "if a permanent reassignment elsewhere in the Agency ... will be undertaken immediately." 3/ Before her grievance could be resolved, however, Mr. Johnson was transferred to a new duty station in Lincoln, Nebraska. A grievance was then filed against Mr. Oshiro complaining that the time limits for the processing of grievances had not been met with respect to her grievances against Mr. Johnson.

Another, unrelated grievance was filed on March 5, 1976 regarding the director's decision to charge grievant with two hours leave without pay because of an absence from the office on January 25, 1976. This grievance was filed

1/ This section relies substantially on the summary set forth in the Grievance Examiner's Report and Findings, issued August 23, 1976.

2/ Grievance Examiner's Report and Findings at 1.

3/ Id.

jointly against the director, the new Adjudication Officer, and Ms. Kathy Morgan, the Acting Adjudication Officer on February 25, 1976. The grievance was amended on March 8, 1976 to include Ms. Asako Watanabe, VARO's Personnel Officer. In addition, a grievance was filed against Mr. Ray E. Smith, Field Director, Area 4, VARO, Washington, D.C., and his Assistant, Ray T. Miller, Jr., for failing to satisfactorily and timely respond to grievant's complaints against Mr. Oshiro and others at VARO.

The Grievance Examiner's Report

The Grievance Examiner's Report and Findings on Ms. Sodergren's grievances was issued on August 23, 1976. In it, the Examiner found (1) that the grievances against Mr. Johnson and other employees in the Adjudication Division, filed prior to January 29, 1976, became moot on that date by virtue of Mr. Johnson's transfer to another station; (2) that Management's failure to timely resolve Ms. Sodergren's grievances was partly due to their attempts to amicably resolve the dispute and did not violate the spirit of the guidelines; and (3) that grievant should not have been charged with two hours leave without pay on February 25, 1976.

In making his recommendation, the Examiner first determined that disciplinary action against other agency officials or employees was not an appropriate remedy for redress of personal grievances. He also found that the grievant "is still convinced she is the object of unwarranted bias and prejudice, emanating from her supervisor, the current Adjudication Officer." 4/ Therefore, he recommended that efforts be made to transfer grievant from Adjudication to another division at VARO.

By letter dated September 15, 1976, Ray Smith advised Ms. Sodergren that he was accepting the Examiner's findings and recommendations. Specifically, he stated that he had asked the director to reassign her to another division at VARO and to amend her time card for February 26, 1976, restoring two hours of pay. On November 3, 1976 Mr. Oshiro notified Ms. Sodergren that he had reassigned her to the Loan Guaranty Division. This reassignment became effective on November 7, 1976.

4/ Id. at 4.

Position of the Parties

The Complainant alleges that Ms. Sodergren's reassignment was initiated in reprisal for her union activities, and was conducted without prior consultation with the Union, in violation of Sections 19(a)(1) and (2) of the Order. Complainant also alleges that the Activity violated these sections when it restricted Ms. Sodergren's circulation and solicitation of union authorization cards during AFGE's organizing drive.

Complainant primarily relies on the Activity's unlawful restrictions on union organizing activity, the treatment of Ms. Sodergren's grievances, and the timing and manner of her reassignment as evidence these actions were taken in response to Ms. Sodergren's union activities. Complainant also points to Ms. Sodergren's statement that she no longer wished to be reassigned after January 1976, as further evidence of the Activity's bad faith.

In contrast, the Activity argues that Ms. Sodergren's reassignment was solely the result of the implementation of the Grievance Examiner's recommendations. The Activity relies heavily on the Examiner's finding of a continuing conflict to support their contention that the reassignment was justified by business considerations. In addition, the Activity argues that the Complainant has failed to demonstrate anti-union animus in connection with the reassignment.

Further, the Activity argues that the resolution of personal grievances is not a proper subject for an unfair labor practice complaint.

Finally, the Activity argues that the Complainant's amended complaint raises new matter not mentioned in the charge letter and not timely filed, in violation of the Secretary's regulations.

Conclusions of Law

The procedures for filing an Unfair Labor Practice Complaint are clear. Before a complaint may issue, a written charge must be filed with the charged party specifically enumerating the unfair practices. The parties then have 30 days to informally resolve the dispute, after which a complaint may be filed limited to the matters raised in the charge.

Complainant's amended complaint alleges violations of Section 19(a)(1) and (2) of the Order based on the Activity's restriction of Ms. Sodergren's right to circulate and solicit union authorization cards. Yet there is no mention of any such incident in Complainant's charge letter of October 7, 1976. Nor can the allegations in Complainant's charge letter be read so broadly as to include such a violation. The letter is concerned with alleged violations of the Order based on the processing and resolution of Ms. Sodergren's grievances. The charges concerning restraint of union organizing activity are unrelated to the processing of these grievances. Therefore, I conclude that this portion of the complaint was not raised in a timely charge letter and therefore is barred from consideration in the Unfair Labor Practice complaint. See 29 CFR §203.2(a)(2) and §203.2(b). See also Defense General Supply Center, A/SLMR No. 821 (April 7, 1977).

Furthermore, the Complainant failed to prove more than a de minimus violation of the Order. The only evidence of an improper restriction of union organizing activity occurred in connection with an April 28, 1976 memorandum during AFGE's campaign. However, Mr. Oshiro testified that this memorandum was corrected on May 7, 1976 at Ms. Sodergren's request. Absent a showing of further restrictions on employee rights to organize, I find that the Activity engaged in no more than a de minimus violation of the Order in connection with management's April 28, 1976 memorandum, which violation was adequately remedied by a May 7, 1976 correction.

Ms. Sodergren's reassignment

I further conclude that Ms. Sodergren's reassignment to another division within the agency did not interfere with the exercise of any employee rights under the Order nor did it discriminate against her in violation of the Order.

Ms. Sodergren's reassignment arose in connection with the implementation of a non-negotiated grievance procedure. Section 19(d) of the Order prohibits raising issues in an unfair labor practice complaint which previously been the subject of such a procedure. However, the issues in the case sub judice involve alleged violations in the processing and resolution of those grievances, issues not before the Examiner and not discussed in his report. Therefore, this section constitutes no bar to raising these issues in an unfair labor practice complaint. Long Beach Naval Shipyard, Long Beach, California, A/SLMR No. 728 (October 13, 1976).

That the Order reserves to management officials the right to transfer and reassign employees cannot be disputed. However this right is not unlimited: in exercising its prerogatives management may not interfere with, restrain, or coerce an employee in the exercise of rights assured by the Order or encourage or discourage membership a labor organization by discrimination in hiring, tenure, promotion, or other conditions of employment.

However, Complainant has failed to prove by a preponderance of the credible evidence in this case that the Activity interfered with, restrained, or coerced any employee in the exercise of his rights under the Order. Testimony indicated that as a result of the physical separation between the Loan Guaranty Division and the bulk of the GS unit employees, Ms. Sodergren's job as Union representative has been made more difficult. On the other hand, testimony also indicated that management made efforts to alleviate these difficulties. With Ms. Sodergren's help, a memorandum was drafted informing employees that transportation would be provided should they ever want to consult with their representative. Furthermore, the employees remained within easy telephone and travel distance of Ms. Sodergren. Finally, the Director testified that the separation was to be only temporary, until all divisions could be moved into a new Federal Building sometime in 1977. Indeed, this consolidation has already taken place, and any objections to her transfer based on her physical separation from the bulk of the GS unit employees can now be regarded as moot.

The evidence indicates that Ms. Sodergren's reassignment made her union duties difficult, but not impossible. There was no evidence that a single employee was, in fact, interfered with, restrained, or coerced in the exercise of his or her rights. Ms. Sodergren testified that she gets "[h]ardly any phone calls" at her new place of employment, but there is no evidence that this was the result of management coercion. Accordingly, I am constrained to conclude that Ms. Sodergren's reassignment did not interfere with, restrain, or coerce any employee in the exercise of rights assured by the Order.

Furthermore, the mere coincidence of an employee's union activity and that employee's reassignment will not support a charge of discrimination. In addition, there must be a finding of anti-union animus. EEOC, A/SLMR No. 802

(February 18, 1977). However, no such animus appears on the face of the present record. To the contrary, the record reveals management has been sensitive to union concerns. Management moved quickly to correct its April 22, 1976 memorandum on union organizing activities when errors were brought to its attention. Mr. Oshiro testified that he remained scrupulously neutral during Complainant's organizing campaign and counselled his staff members to do likewise. In addition, management attempted to alleviate the disruption of Ms. Sodergren's union activities, by issuing a memorandum, partly drafted by her, indicating when and where she could be reached for consultation with individual employees. By contrast, no evidence was introduced indicating any anti-union animus by management.

The coincidence between Ms. Sodergren's designation as Union representative and her reassignment is indeed striking, but not remarkable. The fact remains that Ms. Sodergren requested reassignment several times and failed to inform management of any change in disposition. Under these circumstances, I cannot find that Ms. Sodergren reassignment was motivated by any feelings of animus toward Complainant.

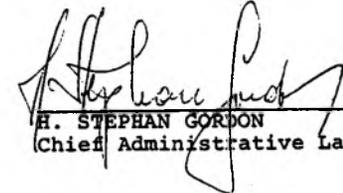
Moreover, I conclude that Complainant has failed to prove that the Activity in fact discriminated against Ms. Sodergren with respect to hiring, tenure, promotion, or other conditions of employment. The Complainant adduced much evidence as to the differences between her present and former positions. However Complainant failed to show that the two differ markedly in promotion prospects or other conditions of employment. Both positions are listed at the GS-5 level. Both positions are primarily secretarial, with administrative functions as well. An alleged difference in "growth potential" was adequately explained by Mr. Oshiro as a misunderstanding stemming from a job reclassification proposal which was rejected in 1970.

Claimant's charges of discrimination must also be evaluated in the light of Ms. Sodergren's repeated requests for permanent reassignment out of the Adjudication Division. While her transfer to the Loan Guaranty Division may not have been ideal from her viewpoint, it was a transfer to a position consistent with her skills and background. The Activity has supplied adequate substantiation of its position that the transfer was motivated solely by business needs.

Mr. Oshiro testified that his decision was based on a review of staff requirements, and that this division was most in need of additional help. Consequently I cannot conclude that Ms. Sodergren's reassignment was designed to either promote or discourage her union activities.

RECOMMENDATION

Having found that the Activity has not engaged in conduct violative of Sections 19(a)(1) and (2) of the Order, I recommend that the complaint herein, as amended, be dismissed in its entirety.


 H. STEPHAN GORDON
 Chief Administrative Law Judge

Dated: *October 27, 1977*
 Washington, D.C.

WB:yw

February 2, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF AGRICULTURE,
OZARK - ST. FRANCIS NATIONAL FORESTS,
RUSSELLVILLE, ARKANSAS
A/SLMR No. 977

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1075 (Complainant) alleging that the Respondent violated Section 19(a)(1) of the Order when its supervisor, after being approached by a steward to discuss a grievance, threatened the steward with physical harm, invited the steward to hit him, and called the steward a "troublemaker" in the presence of other employees.

The Administrative Law Judge found that despite evidence of the supervisor's "sense of frustration" with the steward, he could not excuse the supervisor's conduct which interfered with, restrained, or coerced the steward while he was engaged in activity protected by Section 1(a) of the Order. Moreover, he found that such threats against a union steward, made in the presence of numerous employees, had a "chilling effect" on all employees, and showed disdain for the Complainant's representative which would, itself, discourage employees from exercising rights protected by Section 1(a) of the Order.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge, and ordered the Respondent to cease and desist from the conduct found violative of the Order and to take certain affirmative actions.

A/SLMR No. 977

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE,
OZARK - ST. FRANCIS NATIONAL FORESTS,
RUSSELLVILLE, ARKANSAS

Respondent

and

Case No. 64-3636(CA)

LOCAL 1075, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On November 16, 1977, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Ozark - St. Francis National Forests, United States Department of Agriculture, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended, by threatening physical force or by disciplining or threatening to discipline employees for exercising their right assured by the Order to assist a labor organization.

(b) Interfering with, restraining, or coercing its employees by preventing a steward of Local 1075, National Federation of Federal Employees, or any other individual acting as a representative of said labor organization, from presenting and processing grievances and otherwise carrying out lawful duties as a steward or representative of a labor organization, by physical force or threats of physical force, by verbal abuse, or by demeaning and/or disdainful treatment.

(c) Adversely criticizing or taking any adverse action against Alfred Webb, or any other employee, for the filing or processing of grievances pursuant to the terms of a negotiated agreement.

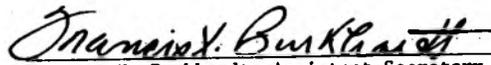
(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Post at the Ozark - St. Francis National Forests, Russellville, Arkansas, and at the Work Center at Fifty Six, Arkansas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Ranger, or other individual in charge of the Ozark - St. Francis National Forests, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Ranger, or other person in charge of the Ozark - St. Francis National Forests, shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
February 2, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

-2-

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended, by threatening physical force or by disciplining or threatening to discipline employees for exercising their right assured by the Order to assist a labor organization.

WE WILL NOT interfere with, restrain, or coerce our employees by preventing a steward of Local 1075, National Federation of Federal Employees, or any other individual acting as a representative of said labor organization, from presenting and processing grievances and otherwise carrying out lawful duties as a steward or representative of a labor organization, by physical force or threats of physical force, by verbal abuse, or by demeaning and/or disdainful treatment.

WE WILL NOT adversely criticize, or take any adverse action against Alfred Webb, or any other employee, for the filing or processing of grievances pursuant to the terms of a negotiated agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 911 Walnut Street, Room 2200, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



July 19, 1977, alleging a violation of Section 19(a)(1) only. Notice of Hearing on the 19(a)(1) allegation issued July 26, 1977, pursuant to which a formal hearing of record was duly held before the undersigned on September 29, 1977, in Mountain View, Arkansas.

The violation alleged concerns certain statements made and actions taken by a foreman against a union steward on December 1, 1976, at the Forest Service Work Center in Fifty Six, Arkansas.

All parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on issues involved. At the request of the parties, November 10, 1977, was fixed as the date for submission of briefs but neither party has submitted a brief. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations:

FINDINGS OF FACT

1. Alfred Webb, a WG-3 employee of Respondent at its Fifty Six, Arkansas, Work Center, was a union steward of Local 1075, National Federation of Federal Employees (hereinafter also referred to as "Union") in 1976 and by the time the hearing had become the Union's Chief Steward.

2. Mr. Webb had begun employment with Respondent in about 1962. Prior to 1976 Mr. Webb had worked in Security as a Forestry Technician and in April, 1976, was transferred to Timber Stand Improvements under the supervision of Hale Mitchell. Mr. Webb's immediate supervisor was Eugene Shipman, a GS-4 Forestry Technician. Mr. Webb, throughout his employment by Respondent, had gained a reputation as a profane and contentious individual who had difficulty getting along with his supervisors.

3. Mr. Webb became a Union Steward after his transfer to Timber Stand Improvements in April, 1976, and, although the date of his becoming a steward was not shown, Mr. Mitchell testified that from about October, 1976, Mr. Webb would confront him each morning or each evening, with some complaint the "the boys" had; that "you couldn't even make out what he [Webb] was talking about"; that he [Mitchell] even called his immediate supervisor, Mr. Jack Griswald, out to try to find out what was going on, to see if he could straighten it out and all the men on the crew said "we haven't got no complaints whatever"; but Mr. Webb continued to present "one gripe right after another."

In the Matter of

U.S. DEPARTMENT OF AGRICULTURE :
OZARK - ST. FRANCIS NATIONAL FORESTS :
RUSSELLVILLE, ARKANSAS :
Respondent :

and

LOCAL 1075, NATIONAL FEDERATION :
OF FEDERAL EMPLOYEES (NFFE) :
Complainant :

Case No. 64-3636 (CA)

Mr. Bill E. Baker
National Representative
National Federation of Federal
Employees
3803 Cherry Avenue
Lawton, Oklahoma 73505
For the Complainant

Claude W. Skelton, Esquire
Office of the General Counsel
United States Department of Agriculture
Room 328
U.S. Courthouse and Post Office
Building
Little Rock, Arkansas 72201
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended (hereinafter also referred to as the "Order") and was initiated by a charge filed on, or about, January 27, 1977. A Complaint was filed on April 20, 1977, alleging violations of Sections 19(a)(1) and (4) of the Order and an Amended Complaint was filed

4. Mr. Mitchell testified that on November 30, 1976, he had told Mr. Webb that if he had any complaints to take them to Mr. Griswald "because he is the boss and he [Webb] had already come to me enough"; but on the following morning, December 1, 1976, when Mr. Mitchell arrived at the Work Center, Mr. Webb called Mr. Mitchell over to where Mr. Webb and Mr. T.C. Newcomb, then Chief Steward, were standing and Mr. Mitchell testified:

"I got loud, but yet I couldn't get a word in because he had been on my back for several days and I was getting tired of it.

"I also told him to hit [me]. The reason I wanted him to hit me was because I knew if he did hit me I would have a way out of this thing ... I told him he wasn't nothing but a troublemaker and I wanted him to stay off my back." (Tr. 68-69)

"... he [Webb] called me, as usual, and started in on me, swinging his arms in a nervous position.

"Then that is why I ... A person can just take so much. It just went on for so long until you can take it for so long.

"But I didn't have in mind at any time hitting Webb. I was trying to force him to hit me. That is the only thing I could figure.

"He didn't hit me and so we hadn't had any cross words since." (Tr. 75) (Emphasis supplied.)

* * * *

"When I first walked up to him, I hadn't been there but about two minutes when he started cursing.

* * * *

"... I said, 'There will be a 15 til 5 some-time and we can settle this.'

"I did tell him, I said, 'Hit me.' I was wanting him to hit me.

"Like I said, I felt that if I could get him to hit me, it would be a lot better than me hitting him, and that is what I had in mind." (Tr. 87-88)

5. On November 3, 1976, it had been raining prior to the commencement of work and there was no indication that the weather would improve. Mr. Mitchell called Assistant Ranger Hurlburt and asked if he had any inside work for the crew and Mr. Hurlburt called back and told Mr. Mitchell he had no inside work. Mr. Mitchell then told Mr. Shipman that the only work available for temporary employees was in the woods and if they did not want to work in the rain there was no work for them (Mr. Mitchell told Mr. Shipman that he had enough inside work for the three or four regular employees); however, by the time Mr. Hurlburt had called back it was about 8:10 a.m. and the temporary employees had worked about 10 minutes cleaning up the Work Center when they were sent home as they did not want to work in the woods in the rain. On, or about, November 15, 1976, Mr. Shipman called Mr. Mitchell to say that Mr. Webb was filing a grievance because the temporary employees had been sent home on a rainy day. Mr. Hurlburt agreed to pay the employees sent home on November 3, 1976, for one hour's work which, presumably, settled the matter.

6. On Thursday, November 11, 1976, it had snowed and the members of Mr. Mitchell's crew asked Mr. Mitchell for time off the next day to go deer hunting. Mr. Mitchell had no objection and said he would like to go deer hunting also, so they agreed to go deer hunting, on Friday. Mr. Webb had been assigned to the Engineers for several days and was working with the Engineers on Thursday and was not present when this decision was made by Mr. Mitchell and his crew to go deer hunting. As Mr. Mitchell was leaving the Work Center Thursday evening, Mr. Webb met him at the gate and said "The Engineers won't need me tomorrow" whereupon, Mr. Mitchell told him "me and the crew decided to go deer hunting tomorrow and there won't be a TSI crew." The following morning Mr. Mitchell called Mr. Webb to tell him there was inside work if he wanted it but Mr. Webb was not at home and Mr. Mitchell was subsequently informed by Mr. Pat Tripp, Mr. Webb's supervisor on the Engineers Crew, that he had asked Mr. Webb to take cement samples to Little Rock.

7. On December 1, 1976, Mr. Webb, on the way to work, met Chief Steward Newcomb at Balentine's Grocery and asked Mr. Newcomb to sign a Union Complaint (Grievance) Form to represent Mr. Webb. Mr. Newcomb told Mr. Webb that it was not necessary that he sign it; that if he (Mr. Webb) wanted him (Mr. Newcomb) to represent him, just put his name on it. However, to placate Mr. Webb, Mr. Newcomb signed the form. Mr. Webb then told Mr. Newcomb he would like him, "... hear him tell Hale that he was going on to the next step and that he would not give him the list of

names that he had requested." (Tr. 59). At the Work Center, Mr. Webb called Mr. Mitchell over and told him that he was going on to the next step in this, that he hadn't got an answer on it and Mr. Mitchell said"

"Well, Webb, I didn't send you home."

* * * *

"Hale said he thought that he deserved to know who was complaining.

"He [Mr. Webb] said, 'I will if Jack [the Ranger] asks me to give them, I will.'" (Tr. 56-57)

8. Curiously, Mr. Webb testified that there was no list; that the "list" was Alfred Webb. Nor was it wholly clear, even at the hearing, what Mr. Webb's grievance involved. He made it clear that the grievance concerned him personally. Although he stated that "bad weather was what the whole thing was about, that we would work regardless. That is what the grievance was about -- if it was bad weather or rain or snow or whatever, not to send the guys home ... I was the one that signed the grievance because he had sent me home and I signed it." (Tr. 39), Mr. Webb also made it clear that he wasn't sent home but had been told on Thursday (November 11) not to report on Friday (November 12) and admitted that, in any event, he had been called to work with the engineers on that Friday (November 12). Moreover, the record shows that Mr. Mitchell told Mr. Webb on November 11 that he and the crew had decided to go deer hunting the next day and there would not be a TSI crew.

9. The testimony of Mr. Mitchell concerning his inviting Mr. Webb to hit him, calling Mr. Webb a troublemaker, etc., as set forth in Paragraph 4, was fully corroborated by the testimony of Messrs. Webb, Newcomb and Shipman. There is no support whatever for Mr. Webb's assertion that Mr. Mitchell, after they entered the office, walked into Mr. Webb, scooted him back on the desk, pushed Mr. Webb, or touched Mr. Webb in any manner. The wholly credible testimony of Mr. Mitchell is to the contrary, as was the equally credible testimony of Mr. John J. Mitchell. Not only was Mr. John J. Mitchell a most credible witness but he was virtually "caught in the middle" of the confrontation as he was sitting on a desk in the office when Mr. Webb came in and sat next to him. In addition to Mr. John J. Mitchell's specific denial that Mr. Hale Mitchell ever touched Mr. Webb in any manner, he further stated that Mr. Hale Mitchell had his hands in his pockets.

10. There is no dispute whatever that in the course of the confrontation Mr. Webb, after Mr. Mitchell told him "There will be a 15 till 5 one of these days and we will settle it", had called Mr. Webb a troublemaker, and had invited Mr. Webb to hit him, said he was going to call the Ranger; that Mr. Mitchell told him "to go ahead and call the Ranger"; that Mr. Webb did so but the Ranger was not in and he talked to Mr. Von Ward; and that after Mr. Webb talked to Mr. Ward, Mr. Mitchell also talked to Mr. Ward. After talking to Mr. Ward both Mr. Webb and Mr. Mitchell calmed down and Mr. Webb left the office.

CONCLUSIONS

The record shows that Mr. Webb, on December 1, 1976, demonstrated little knowledge of, or appreciation for, the grievance concept. Success in grievance processing begins with a clear statement of the issue. Mr. Webb had every right to assert a personal grievance, or, as a Union Steward, he might have asserted a grievance for violation of the Union's agreement, or he might have filed a grievance, as a Steward, on behalf of individual employees; but whatever the grievance asserted, adjustment of it mandated that the particular dispute, or claim asserted, be stated. The Union Complaint (grievance) Form prepared by Mr. Webb was not produced or offered at the hearing nor does it appear on the record that Chief Steward Newcomb, to whom Mr. Webb delivered the form, ever presented the form to Mr. Mitchell or to any other representative of Respondent. Mr. Webb's contrived and staged position about a list, in view of his assertion that the grievance was personal and concerned only himself; and his assertion that he was grieving because he was sent home because of inclement weather, in view of the fact that on the occasion about which he was complaining he had not been sent home, inclement weather was not involved, and he had, in fact, worked, without more, well illustrates the accuracy of Mr. Mitchell's statement that "you couldn't even make out what he [Webb] was talking about."

Indeed, I found Mr. Mitchell a most forthright and credible witness and, based on Mr. Webb's conduct on December 1, 1976, it seems highly probable that Mr. Webb, who had a reputation for being a profane and contentious person, became even more contentious after he became a steward; but, while I understand Mr. Mitchell's sense of frustration, it can neither obscure nor excuse Mr. Mitchell's conduct.

However inept Mr. Webb's statement of his grievance and whatever its merit, there is no possible doubt that Mr. Webb, in the course of presenting a grievance, was called a troublemaker by Mr. Mitchell, his foreman; was threatened by Mr. Mitchell; and that Mr. Mitchell quite deliberately tried to induce Mr. Webb

to strike him in order to give Mr. Mitchell an excuse to fire him. Nor can there be any doubt that Mr. Webb was fully justified in being "... pretty scared. I thought I was about to lose my job." All of this occurred in the presence of a number of employees and whether Mr. Webb is viewed merely as an employee presenting a grievance or as a Union Steward presenting a grievance, Mr. Mitchell's conduct clearly and unmistakably interfered with, restrained, or coerced Mr. Webb in the exercise of his rights assured by the Order in violation of Section 19(a) (1) of the Order. Department of Transportation, Federal Aviation Administration, Indianapolis Air Route Traffic Control Center, Weir Cook Airport, Indianapolis, Indiana, A/SLMR No. 812 (1977); National Labor Relations Board, Region 17, and National Labor Relations Board, A/SLMR No. 671, 6 A/SLMR 333 (1976); U.S. Small Business Administration, Central Office, Washington, D.C., A/SLMR No. 631, 6 A/SLMR 158 (1976); Miramar Naval Air Station Commissary Store, San Diego, California, A/SLMR No. 472, 5 A/SLMR 29 (1975). Moreover, such threats against a union steward in the presence of numerous employees had a chilling effect on all employees who would assert a grievance or act as a representative; and, in addition, showed disdain for a union representative which would, itself, discourage employees from exercising their rights granted under Section 1(a) of the Order. Department of Transportation Federal Aviation Administration, Indianapolis Air Route Traffic Control Center, supra; Miramar Naval Air Station, supra; Department of The Navy, Puget Sound Naval Shipyard, Bremerton, Washington, A/SLMR No. 582, 5 A.SLMR 699 (1975); U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242, 3 S/SLMR 60 (1973).

RECOMMENDATION

Having found that Respondent has engaged in conduct violative of Section 19(a)(1) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Executive Order:

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, 29 C.F.R. § 203.26(b), the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Ozark - St. Francis National Forest, United States Department of Agriculture shall:

1. Cease and desist from:

- a. Interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended, by threatening physical force, by disciplining or threatening to discipline employees for exercising their rights assured by the Order to assist a labor organization.

- b. Interfering with, restraining, or coercing its employees by preventing a steward of Local 1075, National Federation of Federal Employees, or any other individual acting as a representative of such labor organization, presenting and processing grievances and otherwise carrying out lawful duties as a steward or representative of a labor organization, by physical force or threats of physical force, by verbal abuse, or by demeaning and/or disdainful treatment.

- c. Adversely criticizing, or taking any adverse action against, Alfred Webb, or any other employee, for the filing or processing of grievances pursuant to the terms of a negotiated agreement.

- d. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

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

- a. Post at the Ozark - St. Francis National Forests, Russellville, Arkansas, and at the Work Center at Fifty Six Arkansas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Ranger, or other individual, in charge of the Ozark - St. Francis National Forests and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Ranger, or other person in charge of the Ozark - St. Francis National Forests, shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

b. Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary of Labor for Labor-Management Relations in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 16, 1977
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended, by threatening physical force, by disciplining or threatening to discipline employees for exercising their rights assured by the Order to assist a labor organization.

WE WILL NOT interfere with, restrain, or coerce our employees by preventing a steward of Local 1075, National Federation of Federal Employees, or any other individual acting as a representative of said labor organization, presenting and processing grievances and otherwise carrying out lawful duties as a steward or representative of a labor organization, by physical force or threats of physical force, by verbal abuse, or by demeaning and/or disdainful treatment.

WE WILL NOT adversely criticize, or take any adverse action against, Alfred Webb, or any other employee; for the filing or processing of grievances pursuant to the terms of a negotiated agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights assured by Section 1(a) of the Executive Order.

(Agency or Activity)

Dated: _____ By _____

(Signature)

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.

Appendix (cont'd)

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrative, Labor-Management Services Administration, United States Department of Labor, whose address is: 911 Walnut Street, Room 2200, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. CUSTOMS SERVICE, REGION VIII,
TREASURY DEPARTMENT,
SAN FRANCISCO, CALIFORNIA
A/SLMR No. 978

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by (1) unilaterally implementing a change in working conditions when it announced a decision to conduct a 24-hour surveillance, with 12-hour shifts and mandatory overtime, of all suspects arriving from a specified geographical area, and (2) failing to afford the NTEU an opportunity to be present at the meeting in which the alleged change was announced.

The Administrative Law Judge noted that there had been surveillance operations of this type in the past, and that the Patrol Policy Statement which had been negotiated by the parties included matters relating to the impact and implementation of policy concerning overtime, tours of duty and assignments. Thus, he concluded that the Respondent had no further obligation to negotiate those issues. Moreover, he found that the subject meeting was not a formal discussion within the meaning of Section 10(e) of the Order and, thus, the Respondent was not obligated to afford the Complainant the opportunity to be present.

The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. CUSTOMS SERVICE, REGION VIII,
TREASURY DEPARTMENT,
SAN FRANCISCO, CALIFORNIA

Respondent

and

Case No. 71-4179(CA)

NATIONAL TREASURY EMPLOYEES UNION,
WASHINGTON, D. C.

Complainant

DECISION AND ORDER

On September 23, 1977, Administrative Law Judge Edward C. Burch issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Respondent filed an answering brief to the Complainant's exceptions and supporting brief.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and supporting brief and the Respondent's answering brief thereto, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation. 1/ Thus, I find that there is insufficient evidence to establish that the Respondent's instructions to employees at an October 8, 1976, meeting

1/ On page 7 of his Recommended Decision and Order, the Administrative Law Judge inadvertently referred to Section 11(d) of the Order rather than Section 11(b). This inadvertence is hereby corrected.

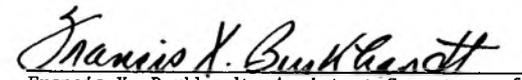
concerning Custom Patrol Officers' overtime assignments in an impending operation constituted a change from past practices in the implementation of overtime policy as set forth in the Respondent's Patrol Policy Statement and, therefore, further proceedings in this matter are not warranted.

Moreover, in agreement with the Administrative Law Judge, I find that the October 8th meeting was not a "formal discussion" within the meaning of Section 10(e) of the Order. In my view, the subject meeting was primarily a briefing session concerning an impending surveillance operation and was not called for the purpose of discussing with unit employees personnel policies and practices or other matters affecting general working conditions. 2/ As the meeting was not within the parameters of Section 10(e), the Respondent's failure to notify the Complainant and afford it the opportunity to be present was not violative of the Order. Accordingly, I shall order that the instant complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 71-4179(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 2, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

2/ I do not find that the discussion of a telephone standby changed the essential nature of the meeting or warrants a different conclusion. It was noted that this requirement was suggested by a mid-level supervisor and was withdrawn almost immediately by the chief supervisor. Cf. Department of Health, Education and Welfare, Social Security Administration, BRST, Northeastern Program Service Center, A/SLMR No. 957 (1977).

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RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed by the National Treasury Employees Union ("the Union") February 14, 1977, under Executive Order 11491, as amended, against the U. S. Customs Service, Region VIII, Treasury Department ("respondent"), a Notice of Hearing on Complaint was issued by the Regional Administrator for the San Francisco Region June 21, 1977.

The union alleged respondent violated sections 19(a)(1) and 19(a)(6) of the Executive Order when, on October 8, 1976, Supervisory Customs Patrol Officers (SCPO's) advised bargaining unit Customs Patrol Officers (CPO's), in the Seattle, Washington office, that they would have to work mandatory overtime in order to maintain 24-hour surveillance of certain foreign suspects. The exclusive representative of Region VIII was not afforded the opportunity to be present at the October 8, 1976, meeting.

Respondent admits the meeting was held and admits the exclusive representative was not specifically invited to be present. Respondent also concedes the bargaining unit patrol officers' working hours, schedules and shifts were temporarily affected. Respondent denies the meeting had the effect of changing personnel policies and denies the exclusive representative of the bargaining unit had a need or right to be present.

A hearing was held in Seattle, Washington, on July 8, 1977, at which time exhibits were received and witnesses examined.

Upon the basis of the entire record the following findings of fact, conclusions and recommendation are made.

Findings of Fact

July 6, 1972, respondent and the union ^{1/} entered into a Basic Agreement which, in part, provided, Article V, management rights, that management reserve the right to:

^{1/} Actually, the union's predecessor, whose rights and responsibilities the current union has assumed.

In the Matter of)

U. S. CUSTOMS SERVICE, REGION VIII,)
 TREASURY DEPARTMENT,)
 SAN FRANCISCO, CALIFORNIA)

Respondent)

and)

NATIONAL TREASURY EMPLOYEES UNION,)
 WASHINGTON, D. C.)

Complainant)

CASE NO. 71-4179 (CA)

Carl D. Cammarata, Esquire
 211 Main Street, Suite 1010
 San Francisco, California
 For the Respondent

Mike Gaide, Esquire
 209 Post Street, Suite 1112
 San Francisco, California
 For the Complainant

Before: EDWARD C. BURCH
 Administrative Law Judge

(e) Determine the methods, means and personnel by which such operations are to be conducted;

(f) Take whatever other actions may be necessary to carry out the mission of the bureau and emergency situations; and

(g) Establish hours of work and tours of duty.

In addition, however, Article VI provided for meetings between management and the union, and:

Matters appropriate for discussion hereunder shall include ... the criteria for the assignment of work shifts or tours of duty (and) ... assignments to overtime work ...

The mission of the customs officers was redefined in 1973 to be more responsive to drug smuggling attempts. With the patrol working in a more flexible manner, grievances and complaints arose concerning changes in shift assignments, overtime and temporary duty. Union and management then met, beginning August of 1974, several times, to resolve the differences.

It was agreed management would issue a Patrol Policy Statement.

October 24, 1974, the Regional Commissioner of respondent wrote to the union vice president, enclosing a proposed draft of the Patrol Policy Statement and inviting comments. The union requested additional time to consider the draft, and this request was granted.

November 20, 1974, the union national vice president responded with suggested changes. The Patrol Policy Statement was then revised to reflect several of the suggested changes, and was sent to the union December 18, 1974.

January 12, 1975, the union responded with further suggestions. Some suggestions were accepted and a counter-proposal was sent to the union January 22, 1975, with the request that if the union wished to comment further to please do so by February 7, 1975. When nothing additional was heard from the union, a final revised policy statement was sent to the union March 25, 1976, advising that respondent proposed to effectuate the statement April 19, 1976. There was no response from the union.

The Patrol Policy Statement effectuated April 19, 1976, was in effect October of 1976. One of the purposes was (testimony of Regional Director of patrol) to:

... assure the flexibility needed by the patrol division in establishing tours of duty, in changing tours of duty, in changing shift assignments; and it was done so that it wouldn't then be necessary in the future to negotiate with the union each and every time that it was necessary to change a tour or an assignment.

The Patrol Policy Statement in effect October of 1976 provided, in part, as follows:

The U. S. Customs Patrol is first and foremost committed to a viable, flexible, highly mobile and responsive effort operating in a tactical interdiction mode ... tours of duty will be changed when operational requirements demand it. Last minute changes will occur relatively infrequent as required by an intensified enforcement operation, TDY assignments or similar emergency situations. Every patrol officer will, as directed, participate in all patrol activities whether land, sea, or air.

The nature of the patrol mission requires AVO and FEPA assignments and all CPO's are expected to participate ...

Administratively uncontrollable overtime (AVO) is the only form of reimbursement for overtime requirements that is generally unknown in advance, cannot be covered by the normal periodic changes in tours of duty, and is often in response to an immediate customs need. AVO may be scheduled and directed to the extent that an officer may be directed a day or more in advance to provide certain coverage ... however, AVO often results from an individual officer's ... responsibility to extend his tour ...

To illustrate the conclusion of SCPO Bauchaud that the policies and procedures in the October 10 to 12, 1976, surveillance in question were no different than they had been for three and a half years, it was shown that in the prior month, September, as well as in August, there had been 24-hour surveillance on similar suspects with the CPO's compensated under the AVO program for time in excess

of regular shifts. Meetings similar to the October 8, 1976, meeting were held prior to the August and September periods of surveillance, except that there were no objections voiced in August and September.

One distinguishing characteristic of the October operation was its size. As a result, it was expected that greater manpower would be required than in the August and September and earlier operations. In the past, with not as great a demand for manpower, respondent had attempted to comply with individual CPO's desires to work or not to work overtime surveillance. At the October 8, 1976, meeting the CPO's were advised they would be working overtime on a mandatory basis. As SCPO Bauchaud testified:

... while we respected the fact that these people would and had volunteered in the past, that because of the extensive coverage and not knowing then how many suspects we were talking about, that AUO would probably not get enough people to cover all those suspects; and if we didn't, it would have to be directed in accordance with the Region policy.

He further testified that it had in the past been necessary to direct overtime.

As a result of the decision to conduct 24-hour surveillance on all suspects arriving from one geographical area outside the United States, the monthly schedule for the CPO's was changed and employees were rescheduled for 12-hour shifts. If a suspect arrived in Seattle, those CPO's scheduled had to report for the 12-hour shift. The CPO's were also advised at the October 8, 1976, meeting that they should be available to a phone so they could be advised if they were to report to work.

Several CPO's objected, stating they were being placed on standby. As the opposition became more vociferous, management rescinded the telephone availability requirement and stated the CPO's would be advised before the end of their shift whether they would or would not be required to report for work.

The CPO's were advised that once on duty they were to remain until given permission to leave.

Payment for overtime was to be on the basis of administratively uncontrollable overtime (AUO). AUO is provided

by Congress for law enforcement agencies, and is used when overtime must be flexibly applied. 2/

Respondent's Motion to Dismiss

At the outset respondent moved to dismiss for lack of jurisdiction, contending the negotiated basic agreement "before the parties provides for the grievance procedure as the exclusive remedy for resolving disputes of the type alleged in the complaint." The basic agreement provides, Article IV, paragraph 1:

When presenting a grievance under the negotiated grievance procedure, which is the exclusive procedure available to the participants and the employees in this unit for resolving grievances over the interpretation and application of this agreement ...

Section 19(d) of the Executive Order provides, however:

Issues which can be raised under a grievance procedure may, in the discretion of the grieved party, be raised under that procedure or the complaint procedure under this section ...

A like motion was made in General Services Administration Region 5, A/SLMR No. 528. The agreement between the parties there had like language that the grievance procedure shall be the exclusive procedure available. The Assistant Secretary adopted without exception the Administrative Law Judge's recommended decision, which stated, in part:

... a breach of contract can be an unfair labor practice. When it is, it may be presented either as a grievance under the grievance procedure or it may be presented as an unfair labor practice under the Executive Order. That is exactly what is provided in section 19(d) of the Order.

See also Department of the Navy, Portsmouth Naval Shipyard, A/SLMR No. 508.

On the basis of section 19(d) of the Executive Order and the above authority, respondent's motion to dismiss is denied.

2/ Whether overtime payment was properly AUO or FEPA is not here an issue. That question is before another forum.

Discussion, Further Findings of Fact and Conclusion

Respondent is here charged with violations of section 19(a) (1) and (6) of the Executive Order. It is contended:

(1) That changes in working conditions were implemented at the October 8, 1976, meeting without affording the union the opportunity to negotiate, and

(2) That the meeting of October 8, 1976, was a formal discussion and under section 10(e) of the Executive Order the labor organization had the right to be represented.

The evidence conclusively establishes that 24-hour surveillance, schedule changes and 12-hour shifts had occurred in the past. The requirement, during 24-hour surveillance, that CPO's could not leave until obtaining a supervisor's permission, was also not a new requirement. While admitting that management had the right to assign overtime (Tr. 43) the union contends that here the situation was different, for the reason there was not an identified specific suspect, but rather, an overall plan to observe all arrivals from one foreign geographical area.

This attempted distinction is not impressive. The mission of respondent is to prevent smuggling. There is no change in policy or practice because a group rather than an individual is observed.

Section 11(d) of the Executive Order provides:

... the obligation to meet and confer does not include matters with respect to the mission of an agency.

Under Article VI of the Basic Agreement, however, overtime, tours of duty and assignments are matters appropriate for discussion. Put another way, management had an obligation to bargain on the implementation and impact of overtime. Alabama National Guard, A/SLMR No. 660.

Those discussions (or negotiations) occurred during the formation of the policy patrol statement. As in NASA, Kennedy Space Center, A/SLMR No. 223, we are dealing not with waiver, but rather, with actual negotiations at an earlier time.

In that very similar case, just as in the instant case, the parties met and exchanged letters concerning

changes in a medical and health program. The respondent there also requested suggestions from complainant. The Assistant Secretary concluded:

In the context of these events, it is clear that the proposed revision was discussed fully by both parties and that as a practical matter--regardless of what the parties consider their correspondence, proposals and discussions concerning revision to be--the parties did, in fact, engage in negotiations regarding the proposed KMI revision. Under these circumstances, I find that the respondent satisfied its obligation to negotiate with the complainant on the proposed revision.

When the letter of March 25, 1976, advised the union management proposed to effectuate the negotiated Patrol Policy Statement on April 19, 1976, the union was required to respond further if additional changes were desired. See Department of the Navy, Portsmouth Naval Shipyard, A/SLMR No. 508 at page 253. When there was no response from the union the Patrol Policy Statement became effective April 19, 1976.

Finally, it is concluded the meeting of October 8, 1976, was not a formal discussion under section 10(e) of the Executive Order.

A good analysis of what constitutes a formal discussion appears in Department of Health, Education and Welfare, Social Security Administration, A/SLMR No. 419, where it was said:

... it is the nature and significance of the discussion that is determinative.

Here a meeting was not held to discuss or negotiate working conditions or policies. That had already been accomplished by the Patrol Policy Statement. This meeting was called to advise and brief the employees concerning an upcoming operation. It was not anticipated there would be discussions concerning personnel availability, shifts and hours worked. Thus, there was no intent to deal or negotiate directly with unit employees. As stated in Department of the Navy, Naval Airstation, Fallon, Nevada, FLRC No. 74A-80 (October 24, 1975):

In determining whether a communication is violative of the Order, it must be judged

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

independently and a determination made as to whether that communication constitutes, for example, an attempt by agency management to deal or negotiate directly with unit employees ... In reaching this determination, both the content of the communication and the circumstances surrounding it must be considered.

So viewing the instant case, there was no obligation the exclusive representative be represented at the meeting.

A possible exception to the above conclusion was the decree CPO's would have to stand by a phone to determine if they would work. This requirement was not, in my opinion, covered by the Patrol Policy Statement. If implemented, it would have constituted standby duty and a change in working conditions.

Because the subject was discussed (negotiated) at the October 8, 1976, meeting, this one subject could have cast the discussion into the "formal" category under section 10(e) of the Executive Order, requiring union representation. However, the very quick retreat of management makes this issue de minimus, not warranting the finding of a violation. Vandenberg Airforce Base, California, FLRC No. 74A-77 (August 8, 1975).

Hence, it is concluded there was no violation of sections 19(a)(1) and 19(a)(6) of the Executive Order.

Recommendation

Having found that respondent has not engaged in conduct violative of sections 19(a)(1) and 19(a)(6) of the Order, I recommend that the complaint herein be dismissed in its entirety.


EDWARD C. BURCH
Administrative Law Judge

Dated: September 23, 1977
San Francisco, California

ECB:vag

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS
A/SLMR No. 979

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3615 (Complainant) alleging that the Respondent failed to negotiate with the Complainant prior to making the final decision to use a revised form utilized in initiating grievances under the agency grievance procedure.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (6) of the Order. In this regard, he found that revision of the form used to initiate a grievance under the agency grievance procedure did not change personnel policies and practices or other matters affecting working conditions. In his view, the Respondent owed no obligation under Section 11(a) of the Order to meet and confer with the Complainant prior to issuing the revised agency grievance form because the revision did not materially affect, or have a substantial impact on, personnel policies and practices or matters affecting general working conditions. He further found that use of the form, both before and after the revision, was not mandatory, and, accordingly, there was no change in any existing practice or procedure.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions, and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS

Respondent

and

Case No. 22-7581 (CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3615

Complainant

.....
In the Matter of :
:

SOCIAL SECURITY ADMINISTRATION :
BUREAU OF HEARINGS AND APPEALS :
Respondent :

and

AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, LOCAL 3615 :
Complainant :
.....

Case No. 22-7581 (CA)

Mr. Albert B. Carrozza
Representative, AFGE Local 3615
Post Office Box 147
Arlington, Virginia 22210
For the Complainant

Edwin C. Satter, III, Esquire
6421 Eppard Street
Falls Church, Virginia 22044
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION AND ORDER

On November 4, 1977, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions, 1/ and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-7581(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 3, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1/ On page 7 of his Recommended Decision and Order, the Administrative Law Judge implied that a change in an agency's grievance procedure could violate 19(a)(6) and (1) of the Order. In reaching the disposition herein, I do not adopt this apparent conclusion.

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a case under Executive Order 11491, as amended (hereinafter also referred to as the "Order") which was initiated by a charge filed on, or about, October 1, 1976 (Asst. Sec. Exh. 1) and a complaint filed on November 8, 1976 (Asst. Sec. Exh. 2). Notice of Hearing issued March 14, 1977 (Asst. Sec. Exh. 3), pursuant to which a formal hearing was duly held before the undersigned on April 27, 1977, in Washington, D.C. At the hearing, June 15, 1977, was fixed, by agreement of the parties, as the date for the filing of briefs; however, at the request of Respondent for good cause shown, and

with the agreement of Complainant, the date for the filing of briefs was extended on June 9, 1977, to July 1, 1977. Briefs were timely filed by the parties and have been carefully considered.

The charge had alleged violations of Section 19(a)(1), (2) and (6) of the Order but the complaint alleged violations of Sections 19(a)(1) and (6), only, and the Notice of Hearing issued only as to the 19(a)(1) and (6) allegations. The issue in this case 1/ is the narrow question as to whether

1/ By letter dated April 18, 1977, the Acting Regional Administrator, Mr. Hilary M. Sheply, denied the request for official time for the appearance of Mr. Albert B. Carrozza as the representative of Local 3615. Mr. Carrozza renewed the request for official time for himself at the hearing and the request was, again, denied, inter alia, for the reasons that § 203.16(a) pertains to authority of the Administrative Law Judge to "(a) Grant requests for appearances of witnesses ...", and does not constitute authority to grant requests for appearance of an individual to appear in a representative capacity; and Sections 203.16(n) and 204.76(n) do not contemplate thereunder the approval of official time for an individual appearing in a representative capacity. Complainant has renewed the request for official time for Mr. Carrozza, who appeared solely in a representative capacity at the hearing, in its brief. The request is denied.

In, Department of the Navy and The U.S. Naval Weapons Station, A/SLMR No. 139, 2 A/SLMR 134 (1972), the Assistant Secretary, while holding that Respondent violated Section 19(a)(1) of the Order by refusing to grant official time to necessary witnesses in a unit determination hearing, specifically found that agencies "are not obligated to make available on official time any employees who appear solely as union representatives... an employee who represents a union ... is, in effect, working for the union and agencies should not be obligated to grant official time to such an employee." (2 A/SLMR 134, p. 138) (emphasis supplied). See, also, Department of the Army, Reserve Command Headquarters, Camp McCoy, Sparta, Wisconsin, 102nd Reserve Command, St. Louis, Missouri, A/SLMR No. 256, 3 A/SLMR 150 (1973); U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 281, 3 A/SLMR 315 (1973). The Council, in FLRC No. 72A-20 (A/SLMR No. 139), 1 Decisions and Interpretations of the Federal Labor Relations Council (hereinafter cited as "FLRC" preceded by the volume number and followed by the page (Continued)

Respondent violated Section 19(a)(6) of the Order, and, derivatively of Section 19(a)(1) (Complainant's assertion of union animus having been wholly unsupported), by changing its grievance form, for use in filing grievances under Respondent's unilateral grievance procedure, to provide blocks for designation of the capacity of a grievant's representative, if any, i.e., whether the representative appeared "in a personal capacity" or "on behalf of the exclusive representative, AFGE Local 3615."

All parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved. Upon the basis of the entire record, I make the following findings of fact, conclusions and recommendations:

FINDINGS OF FACT

1. This case concerns only Respondent's unilateral grievance procedure and specifically revision of the grievance form by Respondent on September 10, 1976, although the parties from some date in 1975 engaged in collective bargaining which resulted in an agreement containing a negotiated grievance procedure effective in January, 1977. Until the negotiated grievance procedure became effective, all grievances were processed under Respondent's non-negotiated, or unilateral, grievance procedure.

2. The processing of grievances under Respondent's grievance procedure was, and is, governed by HEW Instruction 771-3.

Footnote 1 continued from page 2.

number of the bound Report) 490 (1973) and FLRC No. 73A-18 (A/SLMR No. 256), 1 FLRC 497 (1973), set aside the Assistant Secretary's finding in A/SLMR Nos. 139 and 256 concerning the grant of official time for witnesses for the reason that "... there is no obligation under the Order to grant official time to union witnesses. ..." A fortiori, the Order imposes no obligation on agencies to grant official time to employees who appear solely as union representatives.

The Council went on to state that it would be consistent with the Order for the Assistant Secretary, "to promulgate a regulation requiring that necessary witnesses be on official time for the period of their participation at formal hearings. ..." (1 FLRC at 495) (emphasis supplied). This, of course, the Assistant Secretary has done (See, § 206.7(g) of the Regulations (29 C.F.R. 206.7(g)); but, official time is authorized only for employees determined to be necessary as witnesses.

internally with the instruction that management ensure that "your supervisors are informed of this change and receive copies of the enclosed material." (Comp. Exh. 5). Nevertheless, Mr. Robert M. Whitehead, Chief of Employee Relations, testified that Respondent's grievance form, both before and after September 10, 1976, was merely a sample and its use was not mandatory, which was fully confirmed by all other testimony and evidence. For example, Respondent's Exhibit 1 is a grievance filed May 28, 1976, where Complainant did not use the HEW form at all; Respondent's Exhibit 2 is a grievance filed September 13, 1976, where Complainant used the "old" form; and Mr. Mosley testified that after September 10, 1976, he did not indicate the capacity in which he appeared as representative of the grievant, whereas he had generally done so before September 10, 1976.

8. The record affirmatively shows that there is no difference in the amount of official time allowed the representative whether he appears in an individual capacity or as representative of Local 3615. A second stage official may, pursuant to Instruction 771-3 restrict the employee representative, based upon workload, when the same individual has handled an excessive number of grievances whether the representative acted in his union capacity or in an individual capacity. The revision of Respondent's grievance form on September 10, 1976, reflected no change in this policy and practice. Indeed, except for revision of the grievance form, Instruction 771-3 was not changed in any respect on September 10, 1976.

9. The Director's insistence on immediate action on certification of representation (Comp. Exhs. 9, 10) and/or the comment, for internal information only, concerning litigation (Comp. Exh. 11) utterly fails to establish any basis for asserted union animus. Nor is there any basis on the record to indicate any possible harassment of Complainant. To the contrary, the record shows that Respondent's concern about compliance with Section 10(e) notice was bona fide; was well understood by Complainant; that Respondent discussed the problem informally with Complainant as early as December, 1975, or January, 1976; that, whatever Respondent's initial position with regard to its desire for a separate "Certificate of Representation", Respondent abandoned its insistence on such certification; that, on August 19, 1976, Complainant suggested modification of the grievance form; and that Respondent adopted Complainant's suggestion and added spaces to the prior form to be checked to indicate the capacity in which the representative appeared.

CONCLUSIONS

Agency management violates its obligation to meet and confer under the Order when it unilaterally changes those terms or conditions of employment which are included within the ambit of Section 11(a) of the Order. U.S. Army Corps of Engineers Philadelphia District, A/SLMR No. 673, 6 A/SLMR 339 (1976); Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 828 (1977). On September 10, 1976, the only grievance procedure available to employees represented by Local 3615 was the grievance procedure established unilaterally by Respondent. Although an agency grievance procedure does not result from any rights accorded to individual employees or to labor organizations under the Order, Office of Economic Opportunity Region V, Chicago, Illinois, A/SLMR No. 334, 3 A/SLMR 668 (1973), it is a condition of employment. Failure of an agency to properly apply the provisions of its own grievance procedure, in the absence of discriminatory motivation or disparity of treatment based on union membership considerations - which is wholly absent in this case - is not a violation of the Order, Office of Economic Opportunity, supra; General Services Administration, Region 7, Fort Worth, Texas, A/SLMR No. 416, 4 A/SLMR 490 (1974); United States Navy, Navy Air Station (North Island, San Diego, California, A/SLMR No. 422, 4 A/SLMR 527 (1974). It is assumed, but not decided, that a change of an agency's grievance procedure is a change of a condition of employment and that a unilateral change of a grievance procedure would violate 19(a)(6) and, derivatively, would violate Section 19(a)(1), notwithstanding that a violation of a unilaterally established grievance procedure, in the absence of discriminatory motivation or disparity of treatment based on union membership considerations, would not violate the Order. It is not necessary to decide, and, therefore no decision has been made or is to be inferred, as to whether Respondent would have violated Sections 19(a)(6) and (1) of the Order had it unilaterally changed its grievance procedure since, on the record, it is clear that Respondent neither changed its grievance procedure nor any condition of employment.

First, Respondent's change of its grievance form did not change the right of any representative to freely designate the capacity in which he appeared for a grievant. To the contrary, the revised form merely provided blocks for entry of the representative's name, the appropriate block being selected by the representative depending on whether the representative wished to appear "in a personal capacity" or "on behalf of the exclusive representative, AFGE Local 3615"; and was wholly in accord with existing practice. The fact that lines for signature were provided on an agency form for the name of the representative, if any, whereas the prior agency form had not provided such lines for signature, certainly constituted no change in Respondent's

February 3, 1978

grievance procedure and no change in any condition of employment, i.e., did not change "personnel policies and practices and matters affecting working conditions".

Second, use of Respondent's form was not mandatory, either before or after September 10, 1976, and, accordingly, there was no mandated change in any existing practice or procedure.

Third, Section 11(a) "is not intended to embrace every issue which is of interest to ... exclusive representatives and which indirectly may affect employees. Rather, Section 11(a) encompasses those matters which materially affect, and have a substantial impact on, personnel policies, practices, and general working conditions." Department of Defense, Air National Guard, Texas Air National Guard, Camp Mabry, Austin, Texas, A/SLMR No. 738, 6 A/SLMR 591 (1976). While the record in this case in my view shows that the revision of Respondent's grievance form had no effect whatever on personnel policies, practices or working conditions, by no standard can it be said that the revision of Respondent's grievance form "materially" affected or had a "substantial impact on, personnel policies, practices, and general working conditions" and, accordingly, Respondent owed no obligation under Section 11(a) of the Order to notify, and, upon request, to meet and confer with Complainant prior to issuance of its revised grievance form. Department of Defense, Air National Guard, Texas Air National Guard, Camp Mabry, Austin, Texas, supra.

Since the Complainant failed to prove a violation of Section 19(a)(6) or (1) of Executive Order 11491, as amended, the complaint should be dismissed.

RECOMMENDATION

The complaint herein should be dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 4, 1977
Washington, D.C.

WBD/mm1

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION HEALTH
CARE FACILITY,
MONTROSE, NEW YORK
A/SLMR No. 980

This case involved a representation petition filed by the American Federation of Government Employees, Local 1119 (AFGE) seeking an election in a unit of all professional and nonprofessional General Schedule employees of the Veterans Administration Health Care Facility, Montrose, New York. The petitioned for unit is coextensive with the unit for which the National Federation of Federal Employees, Local 1119 (NFFE) is the incumbent exclusive representative. The Activity and the NFFE took the position that their negotiated agreement which became effective on September 12, 1972, and which provided for automatic renewal biannually until modified or terminated, constituted a bar to the subject petition, and that, therefore, the AFGE's petition, which was filed on April 11, 1977, was not timely filed.

The record revealed that in June 1976, the NFFE requested to meet with the Activity for the purpose of revising the parties' negotiated agreement. Following the agreement's anniversary date of September 12, 1976, the parties commenced negotiations for a new agreement. In the Assistant Secretary's view, when the parties commenced negotiations following the anniversary date of the agreement, it became unclear as to whether the parties intended to negotiate a new agreement with a new term, continuing the old agreement indefinitely pending completion of the negotiations, or intended to renew their prior agreement for a new, fixed term. In this ambiguous setting, third parties wishing to challenge the representative status of the NFFE had no way of ascertaining the appropriate time for the filing of a petition. In the Assistant Secretary's view, such a situation might also give the NFFE an unfair advantage in being able to negotiate a completely new agreement after its prior agreement had expired and yet retain protection from challenges by third parties while the negotiations continued. Under these circumstances, the Assistant Secretary determined that the agreement became one of indefinite duration after September 12, 1976, lacking a clearly fixed term, and that it, therefore, could not serve as a bar to the AFGE's petition which was timely filed.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HEALTH CARE FACILITY, MONTROSE, NEW YORK

Activity

and

Case No. 30-7713(RO)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1119

Petitioner

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1119

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Raymond Wren. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the Petitioner, the American Federation of Government Employees, Local 1119, hereinafter called AFGE, and the Intervenor, the National Federation of Federal Employees, Local 1119, hereinafter called NFFE, the Assistant Secretary finds:

- 1. The labor organizations involved claim to represent certain employees of the Activity.
2. The AFGE seeks an election in a unit consisting of all professional and nonprofessional General Schedule (GS) employees, including Canteen Service employees, of the Veterans Administration Health Care Facility, Montrose, New York, excluding all Wage Grade (WG) employees, employees engaged in Federal personnel work in other than a purely

clerical capacity, management officials and supervisors as defined by the Order. 1/ The petitioned for unit is coextensive with the unit for which the NFFE is currently the incumbent exclusive representative. 2/

The Activity and the NFFE take the position that their negotiated agreement, which became effective on September 12, 1972, and which provides for automatic renewal biannually until modified or terminated, constitutes a bar to the instant petition. 3/ Thus, the Activity and the NFFE contend that the agreement renewed itself on September 12, 1974, and again on September 12, 1976, and that the AFGE's petition, which was filed on April 11, 1977, was not filed during the "open

1/ The unit appears essentially as amended at the hearing.

2/ The NFFE was granted exclusive recognition in the aforesaid unit in 1965. In 1974, a timely representation petition was filed by another labor organization. As a result of that petition, the Assistant Secretary directed an election in a unit of all professional and nonprofessional GS employees, excluding, among others, guards, in Veterans Administration Hospital, Montrose, New York, 5 A/SLMR 108, A/SLMR No. 484 (1975). The NFFE won the election and was certified as the exclusive representative on April 7, 1976. Thereafter, the Assistant Secretary, in Veterans Administration Hospital, Montrose, N.Y., A/SLMR No. 872 (1977), dismissed a petition seeking to represent the guards who had been excluded from the unit description contained in the certification issued to the NFFE in 1976, finding that the unit description had inadvertently excluded the guards and that the guards continued to be included in the NFFE's unit.

3/ The agreement provides, in pertinent part:

ARTICLE 45 - DURATION OF AGREEMENT AND MODIFICATION

SECTION I. This agreement shall . . . remain in effect for a period of two (2) years from its effective date and be automatically renewable every two (2) years on the second anniversary date thereafter until modified or terminated as provided herein. Each new 2 year period will be a new duration period with a new effective date.

SECTION II. Once each calendar year, either party may request modification of this agreement by notifying the other, not less than 60 days prior to the anniversary date of this agreement, that a conference is desired to consider the need for revising this agreement. If either party indicates its intention to modify or make changes during the aforesaid periods, this agreement shall remain in full force and effect until such changes are negotiated . . .

period." 4/ On the other hand, the AFGE contends, among other things, that, even assuming the agreement was renewed in 1974, the NFFE had served timely notice to modify, which acted to prevent the renewal of the agreement for bar purposes in 1976. It further argues that, even assuming the agreement continued beyond September 12, 1976, by its terms it became one of indefinite duration and, therefore, could not serve as a bar to the instant petition.

The record reveals that in June 1976, the NFFE requested to meet with the Activity for the purpose of revising the parties' negotiated agreement. Both parties stipulated that negotiating sessions were held from December 1976, to February 1977, and that, while the parties agreed on several articles, they did not agree to all terms of a new agreement. No negotiations were held subsequent to February 1977. Thereafter, on April 11, 1977, the AFGE filed the instant petition.

Under the foregoing circumstances, I find that there was no agreement bar to the filing of the subject petition. It has been previously held that in order for an agreement to constitute a bar to the processing of a petition, it should contain a clearly enunciated fixed term or duration from which employees and labor organizations can ascertain, without having to rely on other factors, the appropriate time for the filing of representation petitions. Thus, it has been found that to permit agreements of unclear duration to constitute bars to elections would, in effect, be granting protection to parties who have entered into ambiguous commitments and could result in the abridgement of the rights of employees under the Executive Order. 5/

As noted above, the NFFE gave notice of its desire to revise the existing negotiated agreement in June 1976. Following the agreement's anniversary date of September 12, 1976, the parties commenced negotiations for a new agreement. At this point, it became unclear as to whether the parties would negotiate a new agreement with a new term, continuing the old agreement indefinitely pending completion of the

4/ Section 202.3(c)(1) of the Assistant Secretary's Regulations provides that:

When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows: (1) Not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed and dated by the activity and the incumbent exclusive representative; . . .

5/ See Treasury Department, United States Mint, Philadelphia, Pennsylvania, 1 A/SLMR 236, A/SLMR No. 45 (1971).

negotiations, or would renew their prior agreement for a new, fixed term. In this ambiguous setting, third parties wishing to challenge the representative status of the NFFE had no way of ascertaining the appropriate time for the filing of a petition. In addition, this created an unfair advantage for the incumbent labor organization in that it could negotiate for a completely new agreement at a time when its prior agreement had expired and yet retain a protection from challenges by third parties while the negotiations continued.

Thus, under the particular circumstances herein, I find that the extended agreement was one of indefinite duration after September 12, 1976, lacking a clearly fixed term, and that such agreement could not serve as a bar to the AFGE's petition which was filed on April 11, 1977. 6/ In my view, such a temporary, stopgap arrangement does not constitute a final, fixed term agreement and lacks the stability sought to be achieved by the agreement bar principle. 7/

Accordingly, I shall direct an election in the following unit which I find appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All professional and nonprofessional General Schedule employees, including Canteen Service employees, of the Veterans Administration Health Care Facility, Montrose, New York, excluding all Wage Grade employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Order.

As noted above, the unit found appropriate includes professional employees. However, the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in any unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such unit. Accordingly, the desires of the professional employees must be ascertained. I shall, therefore, direct separate elections in the following groups:

Voting Group (a): All professional General Schedule employees, including professional employees of the Canteen Service, of the Veterans Administration Health Care Facility, Montrose, New York, excluding all nonprofessional employees, Wage Grade employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Order.

6/ Cf. Veterans Administration Hospital, Leech Farm Road, Pittsburgh, Pennsylvania, 1 A/SLMR 483, A/SLMR No. 104 (1971).

7/ See U.S. Department of the Air Force, Holloman Air Force Base, Alamogordo, New Mexico, 3 A/SLMR 23, A/SLMR No. 235 (1973).

Voting Group (b): All nonprofessional General Schedule employees, including nonprofessional employees of the Canteen Service, of the Veterans Administration Health Care Facility, Montrose, New York, excluding all professional employees, Wage Grade employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the AFGE, by the NFFE, or by neither.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the AFGE, the NFFE, or neither. In the event that a majority of the valid votes of voting group (a) is cast in favor of inclusion in the same unit as the nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) is cast for inclusion in the same unit as the nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether the AFGE, the NFFE, or neither was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional General Schedule employees, including Canteen Service employees, of the Veterans Administration Health Care Facility, Montrose, New York, excluding all Wage Grade employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

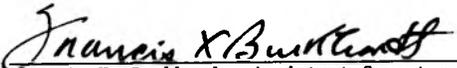
(a) All professional General Schedule employees, including professional employees of the Canteen Service, of the Veterans Administration Health Care Facility, Montrose, New York, excluding all nonprofessional employees, Wage Grade employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Order.

(b) All nonprofessional General Schedule employees, including nonprofessional employees of the Canteen Service, of the Veterans Administration Health Care Facility, Montrose, New York, excluding all professional employees, Wage Grade employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit, or were discharged for cause, since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 1119; by the National Federation of Federal Employees, Local 1119; or by neither.

Dated, Washington, D.C.
February 3, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

February 3, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

PICATINNY ARSENAL AND
THE PROJECT MANAGER FOR
NUCLEAR MUNITIONS,
DOVER, NEW JERSEY
A/SLMR No. 981

This case involved three unfair labor practice complaints filed by the Complainants, Local Union 1437, National Federation of Federal Employees, Ind. (NFFE); Local Union 142, Office and Professional Employees International Union, AFL-CIO (OPE); Federal Employees Council 270 (Council 270); and Local Union 169, Federal Uniformed Firefighters, AFL-CIO (Firefighters) alleging that the Respondents violated Section 19(a)(1) and (6) of the Order by failing to bargain with the Complainants prior to a change in competitive areas and levels.

As a result of a major reorganization of the Department of the Army armaments community, the Respondent Picatinny Arsenal (Arsenal) was essentially disestablished, and its functions were distributed between two new commands. One of the new commands, U.S. Army Armament Research and Development Command (ARRADCOM), was established on January 31, 1977, at the Arsenal site, Dover, New Jersey, and was made a party Respondent in this proceeding. In the summer of 1976 the Complainants had requested the Arsenal to bargain with them on a change in the competitive areas, which the Arsenal refused asserting that the matters involved were non-negotiable.

The Assistant Secretary, noting particularly that no exceptions had been filed by the NFFE, adopted the Administrative Law Judge's finding in Case No. 32-04800(CA) that the Respondent Arsenal had not violated Section 19(a)(1) and (6) of the Order by establishing new competitive levels without first meeting and conferring with the Complainant NFFE, and ordered that the complaint in that case be dismissed.

The Assistant Secretary concurred also in the Administrative Law Judge's finding in Case Nos. 32-04793(CA) and 32-04838(CA) that the Arsenal had violated Section 19(a)(1) and (6) of the Order by changing competitive areas without first meeting and conferring with the Complainants regarding the decision to effectuate such a change. However, noting that the Arsenal has been disestablished, the Assistant Secretary concluded

that the issuance of a remedial order would be inappropriate at this time as before there could be an appropriate remedial order, the question of whether the ARRADCOM and/or the Project Manager for Nuclear Munitions (an alleged successor to a tenant activity of the Arsenal) have become successor activities must be established prior to ordering them to remedy their predecessors' unfair labor practices. He ordered, therefore, that if a final determination is made in the pending subsequent representation proceedings that these Respondents meet the test of successorship and the Complainants are found to remain the exclusive representatives in appropriate units of employees located at the Dover site, such exclusive representatives must be notified by the appropriate respondent-activity of any intended change in the competitive areas affecting employees within the unit, and afforded the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such a change. Conversely, if successorship was not established, he ordered the Regional Administrator to close Case Nos. 32-04793(CA) and 32-04838(CA) without issuance of a remedial order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PICATINNY ARSENAL AND THE PROJECT
MANAGER FOR NUCLEAR MUNITIONS

Respondents

and

Case No. 32-04793(CA)

LOCAL UNION 1437, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES, IND.

Complainant

PICATINNY ARSENAL,
DOVER, NEW JERSEY

Respondent

and

Case No. 32-04800(CA)

LOCAL UNION 1437, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES, IND.

Complainant

PICATINNY ARSENAL,
DOVER, NEW JERSEY

Respondent

and

Case No. 32-4838(CA)

LOCAL UNION 1437, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES, IND.

and

LOCAL UNION 142, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL-CIO

and

FEDERAL EMPLOYEES COUNCIL 270

and

LOCAL UNION 169, FEDERAL UNIFORMED
FIREFIGHTERS, AFL-CIO

Complainants

On July 22, 1977, Administrative Law Judge Robert L. Ramsey issued his Recommended Decision and Order in the above-entitled consolidated proceeding, finding in Case No. 32-04800(CA) that the Respondent Picatinny Arsenal, Dover, New Jersey, (Arsenal) had not violated the Order and recommending dismissal of that complaint. In Case Nos. 32-04793(CA) and 32-04838(CA) he found that the Respondents, the Project Manager for Nuclear Munitions and the Arsenal had violated Section 19(a)(1) and (6) of the Order and recommended that they cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Headquarters, U.S. Army Materiel Development and Readiness Command (DARCOM), as the major command to which the Respondents report, filed exceptions and a supporting brief in behalf of the Respondents 1/ with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject cases, including the exceptions and supporting brief filed by the DARCOM, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The record indicates that as a result, in part, of a major reorganization of the Department of the Army armaments community which, among other things, affected employees located at Picatinny Arsenal, the Arsenal was essentially disestablished and its functions distributed between two new commands. One of the new commands, the ARRADCOM, was established on January 31, 1977, and its headquarters were located at the Dover, New Jersey, site. The planning and implementation of such reorganization resulted in the transfer of some employees located at the Arsenal to other duty stations, and in the transfer of other employees at duty stations other than the Arsenal to the Dover site.

The record herein indicates that sometime during the summer of 1976 the Complainants, Local Union 1437, National Federation of Federal Employees (NFFE); Local Union 142, Office and Professional Employees International Union, AFL-CIO (OPE); Federal Employees Council 270 (Council 270); and Local Union 169, Federal Uniformed Firefighters,

1/ It is noted that, at the hearing, the Administrative Law Judge granted the Complainants' motion to amend the complaints to include the U.S. Army Armament Research and Development Command (ARRADCOM) as a party Respondent in this proceeding.

AFL-CIO (Firefighters) 2/ requested the Respondent Arsenal 3/ to bargain with them on proposed changes in competitive areas [Case Nos. 32-04793(CA) and 32-04838(CA)]. Case No. 32-04800(CA) involved a request of the Arsenal in June 1976, by the NFFE to participate in the determinations with regard to the competitive levels. The Arsenal refused these bargaining requests asserting that the matters involved were non-negotiable. The Complainants herein contended that there was an obligation on the part of the Respondents to negotiate with the exclusive representatives concerning the establishment of the new competitive areas and levels and their adverse impact on unit employees.

As indicated above, the Administrative Law Judge found that no violation of the Order occurred in Case No. 32-04800(CA). 4/ He found, however, in Case Nos. 32-04793(CA) and 32-04838(CA), that the Respondent Arsenal and the Respondent Project Manager for Nuclear Munitions had violated Section 19(a)(1) and (6) of the Order "when they established new competitive areas without first meeting and conferring or negotiating with the named Complainants on the establishment of these competitive areas and/or their impact on the Complainants." I concur in that finding insofar as the Arsenal was found to have violated the Order. 5/

2/ These Complainants were the exclusive representatives of the following employees employed at the Arsenal: NFFE represented all professional employees employed by the Arsenal and its tenant activities serviced by the Arsenal; OPE represented employees in the Micro Data Branch; Council 270 represented uniformed guards; and the Firefighters represented the firefighters.

3/ The Project Manager for Nuclear Munitions was included as a Respondent by the NFFE in Case No. 32-04793(CA) based on its contention that, subsequent to the reorganization, the Project Manager for Nuclear Munitions became the successor to the Project Manager for Safeguard Munitions, a tenant activity which was serviced by the Arsenal and whose employees were included in the unit at the Arsenal represented by the NFFE. The record indicates that the Project Manager for Safeguard Munitions was phased out prior to the establishment of the Project Manager for Nuclear Munitions. The Respondents deny that the Project Manager for Nuclear Munitions became the successor to the Project Manager for Safeguard Munitions.

4/ Noting particularly that no exceptions were filed by the NFFE to that conclusion, I hereby adopt the Administrative Law Judge's finding and recommendation, and I shall order that the complaint in that case be dismissed.

5/ With regard to the violation found against the Project Manager for Nuclear Munitions, I note that at the time of the violation its alleged predecessor activity, the Project Manager for Safeguard Munitions, was not an entity separate and apart from the Arsenal unit represented by the NFFE. However, as indicated hereafter, if the Project Manager for Nuclear Munitions is found in a subsequent proceeding to be a successor entity to part of the Arsenal unit, it will be ordered to remedy those violations for which it is responsible.

The Assistant Secretary has held that while agencies are not obligated to bargain on the decision to effectuate a reduction in force, they are obligated to bargain on the establishment of new competitive areas for the purpose of a reduction in force. 6/ In its review of A/SLMR No. 679, the Federal Labor Relations Council (Council) noted (FLRC No. 76A-101) that agency management is obligated to negotiate with a labor organization accorded exclusive recognition with respect to personnel policies and practices and matters affecting working conditions of employees in the bargaining unit, and that where changes in established personnel policies and practices, such as competitive areas, are to be made, an agency has the obligation to provide the exclusive representative adequate notice and an opportunity to request negotiations concerning the proposed change insofar as it affects employees within the unit of recognition. The Council further stated that an agency must notify the labor organization representing employees who are to remain in the competitive area of the decision to remove other employees and, upon request, negotiate concerning the impact of such removal on those remaining employees.

While, as indicated above, I agree with the Administrative Law Judge's finding that the Respondent Arsenal violated Section 19(a)(1) and (6) of the Order by failing to bargain on the change in competitive areas, I am unable, under the particular circumstances herein, to issue an appropriate remedial order at this time. Thus, at the time the improper actions herein occurred, the Arsenal was the employer-activity of the employees represented exclusively by the Complainants. Subsequent to the filing of the complaints herein, and the phasing out of the Project Manager for Safeguard Munitions, the Arsenal was disestablished, and the Project Manager for Nuclear Munitions, as well as the ARRADCOM, were separately established at the Dover site. Thus, there is a question as to whether the ARRADCOM has become the successor to the Arsenal, and/or the Project Manager for Nuclear Munitions has become the successor to the Project Manager for Safeguard Munitions.

In Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, 3 FLRC 787, FLRC No. 74A-22(1975), the Council set forth the criteria necessary to establish successorship, i.e., (1) the recognized unit is transferred substantially intact to the gaining employer; (2) the appropriateness of the unit remains unimpaired in the gaining employer; and (3) a question concerning representation is not timely raised as to the representative status of the incumbent labor organization. Further, it stated that "the gaining employer (whether by inter or intra agency transfer) takes the place of the losing agency or employing entity as a 'successor' under [Section] 10(a) when the substantive elements of recognition continue without material change after the subject reorganization."

6/ Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey, 6 A/SLMR 365, A/SLMR No. 679 (1976).

In my opinion, therefore, before there can be an appropriate remedial order in this matter, it must be established that the Respondent ARRADCOM is a successor to the Arsenal and/or the Respondent Project Manager for Nuclear Munitions is a successor obligated to bargain with the Complainants and to remedy the predecessors' unfair labor practices. The record herein is insufficient to establish that the ARRADCOM and the Project Manager for Nuclear Munitions meet the successor criteria set forth above. Accordingly, I find that the Administrative Law Judge's proposed remedial order is inappropriate at this time. Rather, if a final determination is made in any subsequent proceeding 7/ that the ARRADCOM is a successor to the Arsenal and/or the Project Manager for Nuclear Munitions is a successor Activity, and the Complainants in Case Nos. 32-04793(CA) and 32-04838(CA) are the representatives of appropriate units located at the Dover, New Jersey, facility, the following remedial order would be appropriate with the appropriate designations of the respondents and exclusive representatives therein. 8/ Further, since the Picatinny Arsenal has, in effect, been disestablished, unless successorship is established in subsequent proceedings and the Complainants are found to remain the exclusive representatives in appropriate units of employees located at the Dover, New Jersey, site, I find that it would not effectuate the purposes of the Order to issue a remedial order against the Picatinny Arsenal and/or the Project Manager for Nuclear Munitions in Case Nos. 32-04793(CA) and 32-04838(CA). 9/

ORDER 10/

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor

7/ I have been administratively advised that a number of RA petitions have been filed relative to the successor issue.

8/ Cf. Department of Agriculture and Office of Investigations, 5 A/SLMR 580, A/SLMR No. 555 (1975).

9/ In such circumstances, the appropriate Regional Administrator would close the above cited cases without a remedial order.

10/ Cf. Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 808 (1977), in which the Acting Assistant Secretary held, in applying the principles enunciated by the Council in FLRC No. 74A-52, that a status quo ante remedy with respect to the reestablishment of prior competitive areas was inappropriate where the Activity unilaterally established new competitive areas for the purpose of reduction-in-force insofar as the issue sought to be resolved in an unfair labor practice proceeding (i.e., reevaluation of layoffs and reinstatement of employees improperly laid off) could have properly been invoked under an appeals procedure. In the Council's view, such appeals procedure precluded the Assistant Secretary under Section 19(d) of the Order from disposing of such issue or fashioning such attendant remedies under Section 19 in an unfair labor practice proceeding.

(CONTINUED)

for Labor-Management Relations hereby orders that (respondent-activity), Dover, New Jersey, shall:

1. Cease and desist from:

(a) Changing the composition of the competitive areas without notifying (exclusive representative) of any intended change in competitive areas affecting employees within its unit and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such a change.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Notify (exclusive representative) of any intended change in the competitive areas affecting employees within its unit, and afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such a change.

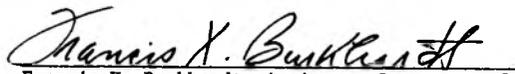
(b) Post at its Dover, New Jersey, facility, copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commander, or other appropriate official in charge, of the (respondent-activity) and they shall be posted for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

10/ In my opinion, the principles enunciated by the Council in the Yuma case are equally applicable herein and I have, therefore, modified the Administrative Law Judge's recommended order accordingly.

IT IS FURTHER ORDERED that the complaint in Case No. 32-04800(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 3, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS .

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change the composition of the competitive areas without notifying the (exclusive representative) of any intended change in competitive areas affecting employees within its unit and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such a change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify the (exclusive representative) of any intended change in the composition of the competitive areas affecting employees within its unit and, upon request, meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such a change.

(Agency)

Dated: _____ By: _____
(Signature)

Steven R. Weinstein, Esquire
U. S. Army Armament Research
& Development Command
Dover, New Jersey 07801
For the Respondents

Irving I. Geller, Esquire
1016 - 16th Street, N. W.
Washington, D. C. 20036
For the Complainants

Before: ROBERT L. RAMSEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case originated as three separate complaints. Case No. 32-04793(CA) was initiated by the filing of a complaint on October 14, 1976, by Local 1437, National Federation of Federal Employees against Picatinny Arsenal and the Project Manager for Nuclear Munitions. The agency's response was dated October 29, 1976. Case No. 32-04800(CA) was instituted by the filing of a complaint dated November 1, 1976, by Local Union 1437, National Federation of Federal Employees against Picatinny Arsenal, Dover, New Jersey. The agency's response to this complaint was dated November 12, 1976. Case No. 32-04838(CA) was initiated by the filing of a complaint dated December 2, 1976, by Local 1437, National Federation of Federal Employees; Local Union 142, Office and Professional Employees International Union, AFL-CIO; Federal Employees Council 270; and Local Union 169, Federal Uniformed Firefighters, AFL-CIO. The agency's response was dated December 15, 1976. Thereafter under date of March 11, 1977, amended complaints in each of these cases were filed.

Though the cases vary slightly as to allegations and complaints, they arise out of a common set of facts which are set forth below. Basically, Case No. 32-04793(CA) charges the Activities with establishing new competitive areas without prior negotiation with the Complainant in violation of section 19(a)(1) and (6) of Executive Order 11491, as amended. The amended complaint in Case No. 32-04800(CA) charges the Activity with the creation of new competitive levels without prior negotiation with the

Complainant in violation of section 19(a)(1) and (6) of Executive Order 11491, as amended. The amended complaint in Case No. 32-04838(CA) charges the Activity with the creation of new competitive areas without prior negotiation with the Complainants in violation of section 19(a)(1) and (6) of Executive Order 11491, as amended.

Under date of April 14, 1977, Benjamin B. Naumoff, Regional Administrator, New York Region, Labor-Management Services Administration, entered an order consolidating the above cases for hearing and noticed the same for hearing on April 28, 1977.

Hearings were held in the consolidated cases on April 28, 1977, April 29, 1977, May 2, 1977, and May 3, 1977, at Dover, New Jersey. All parties were afforded and took advantage of the opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Thereafter the record was left open for the submission of briefs and the same have been received.

Findings of Fact

At all times pertinent hereto, the Complainant Unions were the exclusive bargaining representatives for their membership with regard to the named Activities.

For a considerable length of time prior to the filing of charges by the union herein, the Department of the Army was in the process of a major nation-wide reorganization of its armaments community. The object of this reorganization was to increase the efficiency of operations by separating the logistics or supply functions from the research and development functions of existing operations. At the same time, it was hoped to increase efficiency by eliminating any wasteful duplication of effort which may have existed under the prior fragmented system. The idea, then, was to bring all research and development activities together under one command. In late 1975, as part of this reorganization, the U. S. Army Materiel Development and Readiness Command (DARCOM) undertook a review of its subordinate command, the U. S. Army Armament Command (ARMCOM). This review was directed toward consolidating ARMCOM's research and development functions under one command and its logistics functions under another. Obviously, this was no small project. To the contrary, it was a major nation-wide effort involving high-level executive decisions, Congress, large numbers of state and local officials in many localities, as well

as consideration for the individual employees involved. The decisions at the early stages involved conceptual realignments of structure, mission and function. Later decisions involved locations, placement of buildings and equipment, and the establishment of a research and development headquarters. Ultimately, the decision was made by the Department of the Army to locate the headquarters of the U. S. Army Armaments Research and Development Command (ARRADCOM) at Dover, New Jersey. At that time, there was located at Dover an installation called Picatinny Arsenal which was a subordinate installation to the Armaments Command located at Rock Island, Illinois.

As a result of the reorganization, the Armaments Command (ARCOM) was to be disestablished. Further, the functions of its various installations were to be reshuffled, and placed either under the Armaments Materiel and Readiness Command (ARRCOM) to be located at Rock Island, or under ARRADCOM at Dover. Picatinny was one of those installations so affected. Under the reorganization plan, Picatinny was to be essentially disestablished and its appropriate functions distributed between the two commands. Under the reorganization plan, it was intended that as the functions moved, so would the positions accomplishing those functions and the people in those positions. Among the changes to be made in the tenant Activities which comprised Picatinny Arsenal, the most germane to this case were:

- (1) The transfer of the Project Manager's Office for Cannon Artillery Weapons Systems (PM CAWC) from Rock Island to Picatinny,
- (2) The supplanting at Picatinny of the Project Manager's Office for Safeguard Munitions with the Project Manager's Office for Nuclear Munitions (PM NM),
- (3) The enlargement of the Picatinny Base Support Activity and its renaming to ARRADCOM Support Activity, and
- (4) The transfer of the U. S. Army Armament Readiness Command (ARRCOM) Detachment from Rock Island, Illinois to Picatinny.

Under the reorganization plan, the actual work of accomplishing the movement of functions, equipment, positions and people became the responsibility of an ad hoc group known as the ARRADCOM Implementation Task Force (AITF). In particular, the task of effectuating the

numerous personnel actions was to be the responsibility of the AITF. This task likewise was no small undertaking, as the actions taken by AITF would impact on the rights of diversified and widely separated groups of employees. In particular, it is noted that there was to be geographical dispersion in five different locations (Exhibit R. 3-102). In those locations were twenty-one separate and distinct established bargaining units, represented by a total of fifteen locals of nine national labor organizations (Exhibit R. 3-103). Of the twenty-one units, NFFE Local 1437 represented but one (Exhibit R. 3-108). The same is true of the remaining Complainants and of the other organization comprising the Picatinny Arsenal Labor Council (PALC).

Obviously, the reorganization, being on a national scale, would involve a considerable realignment in positions, job descriptions, relocation of personnel, questions of seniority, and the like.

When it became known to NFFE Local 1437, that the reorganization was imminent, the president of NFFE Local 1437, on more than one occasion, requested AITF to negotiate with respect to the impact of the proposed reorganization on the rights of members of the Local. These requests were refused; however, it should be noted that in the summer of 1976, Mrs. Ruth Nicolaides and Mrs. Renee Stone, both members of NFFE Local 1437, were called to a brief meeting held by Mr. Cavanaugh, the laboratory chief at Warhead Special Projects, a part of Picatinny Arsenal. The purpose of this meeting was to review the competitive levels for various technical positions.

It is the position of the Complainants in each of these cases that there was an obligation on the part of the Respondents, through AITF, to negotiate with the respective unions concerning the impact of the proposed reorganization on the employees. Specifically, the Complainant Unions feel that the Respondents, through AITF, had an obligation to negotiate the establishment of competitive areas (Case No. 32-04793(CA) and Case No. 32-04838(CA)), and further, that there was an obligation to negotiate the establishment of competitive levels (Case No. 32-04800(CA)). It is the position of the Respondents that no such obligation existed for two reasons: (1) that the Complainants involved in these cases represented certified units of Picatinny Arsenal only and were not certified to, nor did they have representational rights with the AITF, and (2) that the establishment of competitive areas and the establishment of competitive levels

are not subject to negotiation because they involve the right to assign work, and the right to assign work is a right reserved to management under section 11(b) of Executive Order 11491.

I reject the first argument proposed by the Respondents, namely that since the Complainant Unions were not certified to, nor did they have representational rights with the AITF, there was no obligation on the part of the Respondents to negotiate. It is abundantly clear from the record that the Complainants were the duly certified representatives of various employees at Picatinny Arsenal and, as such, had exclusive representational rights with the tenant Activities at Picatinny. It is further clearly demonstrated by the record that AITF was created solely for the purpose of accomplishing or effectuating the changes made necessary by the reorganization and was the "clearinghouse" for problems arising from the implementation of the reorganization. In short, insofar as the reorganization was concerned, AITF was the spokesman for the Department of the Army and its subordinate organizations. To argue that this ad hoc group established by the Department of the Army owed no obligation to the Complainants to negotiate on the impact of the proposed reorganization is to ignore the obvious. Assuming, arguendo, that there was a duty on the part of the various Respondents to meet and confer or negotiate (the terms are here used interchangeably) with the Complainants on the impact of the reorganization, it follows that the AITF, as the agent or representative of the Respondents, would be bound by the obligation to negotiate. It is a play on words to say that where a principal is bound to negotiate with a party, the agent of the principal is not so obligated, simply by reason of the fact that the agent does not have the same name or identity as the principal. Thus, I find the Respondents' first argument without merit and hold that if there was a duty on the part of the Respondents to negotiate with the Complainants on the impact of the reorganization, that duty was transferred to and binding on the AITF as the duly designated representative of the Respondents during the period of the reorganization.

We now turn to the second argument put forth by the Respondents, namely that there was no obligation to negotiate the establishment of competitive areas or the establishment of competitive levels during the reorganization, as the establishment of competitive areas and the establishment of competitive levels are not subject to negotiation because they involve the right to assign work

and that the right to assign work is a right reserved to management under Executive Order 11491. I agree with this argument as it applies to the establishment of competitive levels, but reject it as to the establishment of competitive areas.

A competitive level is a grouping of all positions in a competitive area and in the same grade or occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions, so that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program. (See 5 C.F.R. § 351.403(a)). It is axiomatic that the establishment of a competitive level involves an examination and evaluation of qualification requirements, duties, responsibilities, pay schedules, and working conditions involved in a given position as well as an examination of those items in another position which may be interchangeable with those of the first position. Quite obviously, these considerations are paramount in the establishment of position descriptions and relate directly to the ultimate interchangeability of positions in any reduction-in-force. The interchangeability flows directly from the skills and knowledge required by various positions and whether the incumbent in one position could perform without deleterious effect the duties of another position on the same level. In the absence of true interchangeability, it is obvious that the mission and functions of the agency involved could be seriously inhibited. From what has been said, I find that the establishment of competitive levels ultimately determines the methods, means and personnel by which an agency's mission and function will be accomplished, and, as such, falls within those items which are excepted from the obligation to bargain under section 11(b) of Executive Order 11491, and on which no duty to meet and confer or negotiate exists. Absent any modification of this reserved right in the agreement between the parties, the reservation is absolute. Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 814.

Competitive areas, on the other hand, specify which geographical or organizational areas will be grouped together in determining which employees compete for retention during a reduction-in-force. Federal Personnel Manual 351-17 (Exhibit R-7) states in part: "(2) Field Service. In the field service, a competitive area ordinarily should not be smaller than the field installation

When, however, a field installation includes activities in more than one commuting area, a separate competitive area may be established for each of the commuting areas." Further, Title 5 of the Code of Federal Regulations provides as follows:

Section 351.402 Competitive Area.

(a) Each agency shall establish competitive areas in which employees compete for retention under this part.

(b) The standard for a competitive area is that it include all or that part of an agency in which employees are assigned under a single administrative authority. A competitive area in the departmental service meets this standard when it covers a primary subdivision of an agency in the local commuting area. A competitive area in the field service meets this standard when it covers a field installation in the local commuting area.

Obviously, the decision to establish new competitive areas as alleged in Case No. 32-04793(CA) and Case No. 32-04838(CA) would have a significant impact on the Complainants' members and would seriously affect their retention rights in the event of a reduction-in-force. By reason of such, I find that the Respondents in Cases Nos. 32-04793(CA) and 32-04838(CA) were obligated to meet and confer or negotiate with the Complainants in those cases with regard to the establishment of new competitive areas, and that the failure of the Respondents in those cases to so negotiate constitutes a violation of section 19(a)(1) and (6) of Executive Order 11491. In this regard see Department of the Army, U. S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 679 (July 26, 1979) and Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 808 March 1, 1977).

Conclusions

From the foregoing, I conclude that in Case No. 32-04793(CA) and Case No. 32-04838(CA) the named Activities were guilty of a violation of section 19(a)(1) and (6) when they established new competitive areas without first meeting and conferring or negotiating with the named Complainants on the establishment of these competitive areas and/or their impact on the Complainants.

With respect to Case No. 32-04800(CA), I find that the named Activity was not guilty of a violation of section 19(a)(1) and (6) of Executive Order 11491 when it established new competitive levels without first meeting and conferring or negotiating with the named Complainant, because the establishment of competitive levels comes with the ambit of powers reserved to management under section 11(b) of Executive Order 11491.

Recommendation

1. Having found that the named Respondent in Case No. 32-04800(CA) has not engaged in conduct violative of section 19(a)(1) and (6) of Executive Order 11491, I recommend that the complaint in that case be dismissed in its entirety.

2. Having found that the named Respondents in Case No. 32-04973(CA) and Case No. 32-04838(CA) have engaged in conduct violative of section 19(a)(1) and (6) of Executive Order 11491, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purposes of Executive Order 11491.

Recommended Order

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Picatinny Arsenal and the Project Manager for Nuclear Munitions and the Picatinny Arsenal, Dover, New Jersey, shall:

1. Cease and desist from:

(a) Refusing to negotiate on the establishment of new competitive areas and on the impact of changes in competitive areas pursuant to any reorganization or realignment of the labor force at the Picatinny Arsenal site.

(b) In any like or related manner interfering with, restraining or coercing its employees represented by Local 1437, National Federation of Federal Employees; Local 142, Office and Professional Employees International Union, AFL-CIO; Federal Employees Council 270 and Local 169, Federal Uniformed Firefighters, AFL-CIO, in the exercise of rights assured by Executive Order 11491, as amended.

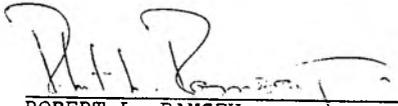
2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, promptly negotiate on the impact of changes in competitive areas and insure that any settlement arrived at shall be effective as of the date of the original request to negotiate or the date the Respondent Activities should have begun negotiations, whichever is earlier.

(b) Establish procedures to insure that all proposed changes in personnel policies, practices and working conditions are transmitted to the appropriate unions in order that they may be negotiated prior to the implementation of any such changes.

(c) Post at its facilities at the Picatinny Arsenal site, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained by him for sixty consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

(d) Pursuant to section 203.27 of the Regulations, notify the Assistant Secretary in writing within thirty days from the date of this order as to what steps have been taken to comply herewith.


ROBERT L. RAMSEY
Administrative Law Judge

Dated: July 22, 1977
San Francisco, California

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to negotiate on the establishment of new competitive areas and on the impact of changes in competitive areas pursuant to any reorganization or realignment of the labor force at the Picatinny Arsenal site.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees represented by Local 1437, National Federation of Federal Employees; Local 142, Office and Professional Employees International Union, AFL-CIO; Federal Employees Council 270 and Local 169, Federal Uniformed Firefighters, AFL-CIO, in the exercise of rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Suite 3515, 1515 Broadway, New York, New York 10036.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PICATINNY ARSENAL AND THE PROJECT
MANAGER FOR NUCLEAR MUNITIONS

Respondents

and

Case No. 32-04793(CA)

LOCAL UNION 1437, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES, IND.

Complainant

PICATINNY ARSENAL,
DOVER, NEW JERSEY

Respondent

and

Case No. 32-04800(CA)

LOCAL UNION 1437, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES, IND.

Complainant

PICATINNY ARSENAL,
DOVER, NEW JERSEY

Respondent

and

Case No. 32-4838(CA)

LOCAL UNION 1437, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES, IND.

and

LOCAL UNION 142, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL-CIO

and

FEDERAL EMPLOYEES COUNCIL 270

and

LOCAL UNION 169, FEDERAL UNIFORMED
FIREFIGHTERS, AFL-CIO

Complainants

SUPPLEMENTAL DECISION AND ORDER TO A/SLMR No. 981

On February 3, 1978, the Assistant Secretary issued his Decision and Order in the above-entitled consolidated proceeding, finding, among

other things, in agreement with the Administrative Law Judge's Recommended Decision and Order, and in the apparent absence of exceptions by the Complainant, Local Union 1437, National Federation of Federal Employees, Ind., herein called NFFE, that the Respondent had not engaged in the unfair labor practices alleged in the complaint in Case No. 32-04800(CA), i.e., that the Respondent Picatinny Arsenal, herein called the Arsenal, had refused to bargain on the establishment of new competitive levels and their adverse impact on unit employees. Accordingly, he ordered that the complaint in that case be dismissed.

On February 14, 1978, the NFFE filed a motion with the Assistant Secretary requesting that A/SLMR No. 981 be reopened and reconsidered on the basis that the NFFE had filed timely exceptions together with a supporting brief with the Assistant Secretary to the Administrative Law Judge's Recommended Decision and Order in Case No. 32-04800(CA). Thereafter, the Respondent U.S. Army Armament Research and Development Command, herein called ARRADCOM, requested that the motion be denied. Having duly considered the NFFE's motion and the ARRADCOM's opposition thereto, and the record indicating that such exceptions had, in fact, been timely filed by the NFFE, I hereby grant the motion filed by the NFFE, and make the following supplemental findings and conclusions:

The Administrative Law Judge found, and I agree, that the establishment of competitive levels is not a negotiable matter within the ambit of Section 11(a) of the Order. However, such determination does not necessarily mean that there was no bargaining obligation involved herein. Thus, it is well established in the Federal sector that in the context of a non-negotiable management decision, there is no bar to negotiations on procedures, to the extent consonant with law and regulations, which management will observe in reaching the decision involved and on the impact of the decision on unit employees. 1/ The evidence herein establishes that the NFFE requested bargaining on impact and that the Respondent Arsenal rejected such request. Under these circumstances, I find that the Respondent's conduct constituted a refusal to bargain in violation of Section 19(a)(1) and (6) of the Order. 2/ Therefore, I shall modify the Order and Appendix issued in A/SLMR No. 981 in accordance with my finding herein.

1/ See Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC No. 227, FLRC 71A-31 (1972), and Naval Public Works Center, Norfolk, Virginia, 1 FLRC No. 431, FLRC No. 71A-56 (1973).

2/ On page 5 of his Recommended Decision and Order, the Administrative Law Judge noted that two members of the NFFE "were called to a brief meeting held by Mr. Cavanaugh, the laboratory chief at Warhead Special Projects, a part of Picatinny Arsenal. The purpose of this meeting was to review the competitive levels for various technical positions." The record indicates that these employees were summoned to the meeting as experts in their fields, and not as members or representatives of the NFFE. Consequently, in my view, such a meeting did not fulfill the Respondent's bargaining obligation under the Order.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that (respondent-activity), Dover, New Jersey, shall take the following action:

1. Redesignate paragraph (b) as paragraph (c) and insert the following paragraph as 1(b):

(b) Changing the composition of the competitive levels without notifying Local Union 1437, National Federation of Federal Employees, Ind., the exclusive representative, of any intended change in competitive levels affecting employees within its unit and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact which the modification of the competitive levels will have on the employees it represents.

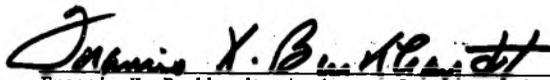
2. Redesignate paragraphs 2(b) and (c) as paragraphs 2(c) and (d) and insert the following as paragraph 2(b):

(b) Notify Local Union 1437, National Federation of Federal Employees, Ind., the exclusive representative, of any intended change in the competitive levels affecting employees within its unit, and afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact any such change will have on the employees it represents.

3. Substitute the attached notice marked "Appendix" for that in A/SLMR No. 981 issued by the Assistant Secretary on February 3, 1978.

IT IS FURTHER ORDERED that the order dismissing the complaint in Case No. 32-04800(CA) be, and it hereby is, vacated.

Dated, Washington, D.C.
May 9, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

3/ As noted in A/SLMR No. 981, at page 5, the remedial order herein is operative only if the Respondent ARRADCOM is determined in any subsequent proceeding to be the successor to the Arsenal and the Complainants involved, including the NFFE, are determined to be the exclusive representatives of appropriate units located at the Dover, New Jersey, facility.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A SUPPLEMENTAL DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change the composition of the competitive areas without notifying the (exclusive representative) of any intended change in competitive areas affecting employees within its unit and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such a change.

WE WILL NOT change the composition of the competitive levels without notifying Local 1437, National Federation of Federal Employees, Ind., the exclusive representative, of any intended change in competitive levels affecting employees within its unit and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact which the modification of the competitive levels will have on the employees it represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify the (exclusive representative) of any intended change in the composition of the competitive areas affecting employees within its unit, and upon request, meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such a change.

WE WILL notify Local 1437, National Federation of Federal Employees, Ind., the exclusive representative, of any intended change in the composition of the competitive levels affecting employees within its unit and, upon request, meet and confer, to the extent consonant with law and regulations, on the impact any such change will have on the employees it represents.

(Agency)

Dated: _____

By: _____

(Signature)

February 6, 1978

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Relations, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515 - 1515 Broadway, New York, New York 10036.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

SOCIAL SECURITY ADMINISTRATION
BRANCH OFFICE,
ANGLETON, TEXAS
A/SLMR No. 982

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1823 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally instituting a program for mandatory overtime without first affording the Complainant the opportunity to bargain over the impact and implementation of such program.

The Assistant Secretary concluded, contrary to the Administrative Law Judge, that the Respondent had fulfilled its obligation to meet and confer on the impact and implementation of its decision to institute mandatory overtime. He noted that the Respondent had informed the Complainant's Vice-President, the ranking union representative of the Complainant at the facility, of its decision to institute mandatory overtime and sought the Complainant's comments on implementation; the Complainant's Vice-President went to the unit employees and solicited their comments on mandatory overtime, met with the Respondent, and made proposals; and the Complainant's proposals were considered before the method of implementation was announced to unit employees.

The Assistant Secretary found that the meeting between the Complainant and the Respondent, prior to the time the method of implementation was announced to unit employees, was more than a meeting to decide whether or not to institute mandatory overtime but, in fact, dealt extensively with the Complainant's proposals on the method of implementing the imposition of mandatory overtime. Under the particular circumstances, he concluded that the Respondent had fulfilled its obligation to bargain on the impact and implementation of its decision to institute mandatory overtime before it met with the unit employees to inform them of how the program would operate and before the Complainant's President returned to the facility and requested bargaining on the impact and implementation of the Respondent's decision.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION
BRANCH OFFICE,
ANGLETON, TEXAS

Respondent

and

Case No. 63-7128(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1823

Complainant

DECISION AND ORDER

On July 28, 1977, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations, only to the extent consistent herewith.

This case arose as a result of a complaint filed by the National Federation of Federal Employees, Local 1823 (Complainant) alleging that the Respondent Activity violated Section 19(a)(1) and (6) of the Order by unilaterally instituting a program for mandatory overtime without first affording the Complainant the opportunity to bargain over the impact and implementation of such program.

During August 1976, the Respondent's District Manager concluded that mandatory overtime was necessary to handle the Respondent's case load and decided to exercise his authority under the parties' negotiated agreement to order such overtime. 1/ On August 16, the Respondent contacted the Complainant's Vice-President, who was the ranking union representative present that day, informed the Vice-President of his decision and granted him official time to consider and discuss the matter with unit employees. 2/ On or about August 18 or 19, the Respondent again discussed the matter with the Complainant's Vice-President and received the Complainant's comments on the matter. The Complainant's Vice-President testified that with respect to this latter meeting, "Management listened to me, and we discussed my proposals. Management said that they would be considered." (Tr. p. 14) On August 19, the Respondent's District Manager informed the Complainant's Vice-President of the decision to institute mandatory overtime during certain hours and in the afternoon on that date he met with the employees and informed them of his decision with respect to the manner in which the mandatory overtime would be worked.

1/ In this regard, Article X of the parties' negotiated agreement provides:

The parties to this agreement agree that to the extent possible it is desirable to reduce overtime. In this regard, the Employer shall, whenever possible, schedule overtime on a voluntary basis, but it is understood that the Employer maintains the right to mandate overtime to complete the mission of the Agency when circumstances beyond his direct control would preclude voluntary overtime.

2/ The record reveals that the Complainant's Vice-President went to the members for their comments. He testified that:

Well, the ideas as told to me by members of the staff that I could meet with and discuss with was overtime was determined to be necessary by all the people that I talked to, in view of our work situation, but that overtime should be (sic) worked five hours per week as proposed by management, but instead, twenty hours per month per individual. It was also proposed by union members that, in addition to being allowed to work after normal working hours, in other words, after 4:30, that overtime be worked before opening at 7:45, and rather than working just one-half day Saturday, in other words, from 8:00 to 1:00, that all day Saturday be reserved as open for overtime. (Tr. p. 21)

On August 20, the Complainant's President returned to the Respondent's facility from a field trip. He was informed by the Complainant's Vice-President of the events which had occurred during his absence. That same day, August 20, the President requested negotiations with the Respondent with respect to the impact and implementation of the Respondent's decision on instituting the mandatory overtime. The Respondent took the position that, as overtime was covered in the agreement, further negotiation on the matter was not necessary. That afternoon, the Respondent issued a memorandum stating that mandatory overtime would begin on August 23. Overtime, in fact, began on August 23, and continued until September 27 when it was permanently halted.

The Administrative Law Judge found that the Respondent's conduct violated Sections 19(a)(1) and (6) of the Order. He concluded that Article X of the parties' negotiated agreement did not constitute a clear and unmistakable waiver of the Complainant's right to meet and confer on the impact and implementation of a management decision to invoke mandatory overtime and that the Respondent's meetings with the Complainant's Vice-President on August 16, 18, and/or 19, while touching on the manner and method of instituting overtime, were in the main confined to the issue of whether or not mandatory overtime should be instituted and did not fulfill the Respondent's obligation under the Order to meet and confer on the impact and implementation of the decision to institute mandatory overtime. Therefore, he concluded that the Respondent's failure to accede to the request of the Complainant's President on August 20, to negotiate on the impact and implementation of its decision, was violative of Section 19(a)(1) and (6) of the Order. I disagree.

Under the particular circumstances of this case, I find that the Respondent fulfilled its obligation to meet and confer on the impact and implementation of its decision to institute mandatory overtime. As noted above, the evidence establishes that the Respondent informed the Complainant's Vice-President, the ranking union representative of the Complainant present at the facility, of his decision to institute mandatory overtime and sought the Union's comments on implementation; the Complainant's Vice-President went to the unit employees and solicited their comments on mandatory overtime, met with the Respondent, and made proposals; and the Complainant's proposals were considered before the method of implementation was announced to employees on August 19. ^{3/}

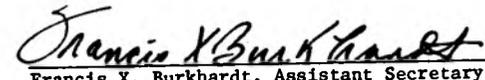
^{3/} The Respondent testified that changes in the method of implementing the plan were, in fact, adopted after its meeting with the Complainant and before its August 19 meeting with employees.

It is clearly evident from the record testimony, cited above, that the meeting on August 18 or 19 between the Respondent and the Complainant was more than a meeting to decide whether or not to institute mandatory overtime but, in fact, dealt extensively with the Complainant's proposals on the method of implementing the imposition of mandatory overtime. Thus, regardless of how the parties characterized the meeting of August 18 or 19, ^{4/} in my view, the Respondent fulfilled its obligation to negotiate with the Complainant on the impact and implementation of its decision to institute mandatory overtime before it met with the unit employees, on August 19, to inform them of how the program would operate beginning on August 23. Accordingly, I find that the Respondent had fulfilled its obligation to bargain on impact and implementation by the time the Complainant's President returned to the Respondent's facility on August 20. Consequently, its failure to accede to the Complainant's President's request for bargaining was not violative of Section 19(a)(1) and (6) of the Order and I shall, therefore, dismiss the complaint herein.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-7128(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 6, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor Management Relations

^{4/} Cf. NASA, Kennedy Space Center, Kennedy Space Center, Florida,
2 A/SLMR 566, A/SLMR No. 223 (1975).

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
 In the Matter of :
 :
 SOCIAL SECURITY ADMINISTRATION :
 BRANCH OFFICE :
 ANGLETON, TEXAS :
 :
 Respondent :
 :
 and :
 :
 NATIONAL FEDERATION OF FEDERAL :
 EMPLOYEES, LOCAL 1823 :
 :
 Complainant :

Case No. 63-7128(CA)

WILSON SCHUERHOLZ
 Labor Relations Specialist
 Office of Management
 Office of Program Operations
 Social Security Administration
 6401 Security Boulevard
 211 West High Rise Building
 Baltimore, Maryland 21235
 For the Respondent

ROY K. SINCLAIR
 President, Local 1823
 National Federation of Federal
 Employees
 P.O. Box 545
 Angleton, Texas 77515
 For the Complainant

Before: BURTON S. STERNBURG
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on December 3, 1976,
 under Executive Order 11491, as amended, by Local 1823,

National Federation of Federal Employees (hereinafter called NFFE or the Union) against the Social Security Administration, Branch Office, Angleton, Texas (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Regional Administrator for the Kansas City Region on March 10, 1977.

The complaint alleges that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in unilaterally instituting a program of mandatory overtime without first affording the Union the opportunity to bargain over the impact and implementation of such program.

A hearing was held in the captioned matter on May 10, 1977, in Galveston, Texas. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

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

The Union and the Respondent are parties to a collective bargaining agreement covering the Galveston District, which includes the Angleton Branch Office. Article X, of the collective bargaining agreement reads as follows:

Overtime

The parties to this agreement agree that to the extent possible it is desirable to reduce overtime. In this regard, the Employer shall, whenever possible, schedule overtime on a voluntary basis, but it is understood that the Employer maintains the right to mandate overtime to complete the mission of the Agency when circumstances beyond his direct control would preclude voluntary overtime.

According to the record, in the negotiations leading up to the execution of the current contract, the

Union, in an attempt to cut down on the large amount of overtime being worked by unit employees, submitted various proposals on overtime. The proposals, while recognizing the need for overtime work, made overtime voluntary rather than mandatory. Subsequently, following an impasse and the aid of a federal mediator, the parties reached agreement on the overtime provision quoted above. There was no evidence indicating that any discussion had taken place between the parties concerning the impact and/or implementation of any possible future decision made by the Respondent to exercise the powers set forth in Article X, Overtime.

During early August 1976, Gordon Gonzalez, the District Manager of the Galveston District, who was deeply sensitive to Congressional criticism of the Social Security Administration's various programs and operations, became concerned about the backlog of work in the Angleton Branch Office. Following a conversation with Carol Martinez, operations supervisor for the Angleton Branch, and a study of the work flow therein, Mr. Gonzalez decided to exercise the powers set forth in Article X of the contract and order mandatory overtime. According to Mr. Gonzalez, without overtime, it would be impossible to clear up the case backlog by December, 1976, the date he understood to have been established by Congress for the completion of such work.

On August 16, Mr. Gonzalez instructed Mrs. Martinez to contact the Union and talk to its representatives about his decision to establish mandatory overtime. Mrs. Martinez, in turn, spoke to Mr. DeVries, the union Vice president and ranking union official present, and conveyed Mr. Gonzalez' proposal. Mrs. Martinez granted Mr. DeVries official time to consider and discuss the matter with unit employees.

On or about August 18 or 19, 1976, Mrs. Martinez again discussed the matter with Mr. DeVries and received the Union's comments on the matter. Thereafter, Mrs. Martinez and Mr. Gonzalez further discussed the matter and decided to institute mandatory overtime during certain hours. On August 19, Mr. Gonzalez informed Mr. DeVries of his decision with respect to the matter and his intention of talking to the unit employees as a group. That afternoon, Mr. Gonzalez

met with the employees and informed them of his decision with respect to the manner in which the mandatory overtime was to be worked.

The next day, Friday, August 20, Mr. Roy Sinclair, President of the Union, returned to the office from a field trip. Upon being informed by Mr. DeVries of the above described events, Mr. Sinclair immediately met with Mr. Gonzalez to discuss the matter. According to Mr. Sinclair during a discussion of the Respondent's action relative to mandatory overtime, he, Mr. Sinclair, requested negotiations with respect to the impact and implementation of Respondent's decision. According to Mr. Sinclair, Mr. Gonzalez declined to negotiate the impact taking the position that the matter was covered by the contract. Mr. Gonzalez, on the other hand, acknowledges meeting with Mr. Sinclair and discussing the right of Respondent under the contract to institute mandatory overtime. Mr. Gonzalez does not recall any specific discussion of impact or implementation or a request to negotiate thereon. However, Mr. Gonzalez further stated that he was not denying that implementation and impact were discussed. Lastly, Mr. Gonzalez acknowledged that in the discussion with Mr. Sinclair he took the position that since overtime was covered in the contract, "it was implemented in the contract itself and further negotiations on that the matter was not necessary." Based upon the foregoing, I find that Mr. Sinclair made it clear that he desired to bargain concerning the impact and manner in which Respondent's decision on overtime was to be implemented.

On Friday afternoon, August 20, 1976, Respondent issued a memorandum which stated that mandatory overtime was to begin on August 23, 1976. The following Monday, August 23, overtime began and continued until September 27, when it was permanently halted.

Discussion and Conclusions

The sole issue presented for resolution is whether or not the Respondent was under an obligation to bargain with the Complainant with respect to the impact and implementation of its decision to institute mandatory overtime. The Complainant contends that Respondent is so obligated. Respondent on the other hand takes the alternative positions that (1) in view of the provision on overtime included in the collective bargaining agreement it was not obligated to bargain

thereon, (2) it did in fact bargain with the Complainant, and (3) that in any event it was not obligated to bargain since no demand for bargaining on impact and implementation was ever made by the Union.

An Agency or Activity is obliged to afford exclusive representatives a reasonable opportunity to meet and confer concerning the impact and implementation of decisions taken within the ambit of Section 11(b) of the Executive Order. United States Air Force Electronics Systems Divisions (AFSC) Hanscom Air Force Base A/SLMR No. 571. The obligation to bargain with respect to impact and implementation of any such decision falling within the ambit of Section 11(b) arises only upon the request therefor timely presented by the exclusive representative. U.S. Air Force, Norton A.F.B., Cal. A/SLMR No. 761.

In the instant case unless the right to bargain on the impact and implementation of mandatory overtime had been waived by the Union by virtue of the inclusion of Article X, Overtime, in the collective bargaining contract, Respondent was obliged to bargain with the Union following the request therefor presented by Mr. Sinclair. The record indicates that the only discussions or negotiations concerning Article X, Overtime, dealt exclusively with the right of the Respondent to mandate overtime without consultation with the exclusive representative. No discussion of the impact or the manner of implementation of any such decision appears to have occurred. In these circumstances it can hardly be argued that there was a clear and unmistakable waiver of the Union's right to negotiate concerning impact and implementation. Cf. NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 233; U.S. Department of Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400. In the absence of a waiver, I find that Respondent was obliged to bargain with the Union with respect to its decision on mandatory overtime.

I further find that Respondent's earlier discussions with the Union, and in particular Mr. DeVries on August 16, 18 and 19, while touching on the manner and method of instituting overtime, were in the main confined to the issue of whether or not mandatory overtime should be instituted. Accordingly, contrary to the contention of Respondent, I do not find that the August 16, 18 and 19 discussions fulfilled the obligations imposed

by the Executive Order with respect to bargaining over impact and implementation.

On the basis of the foregoing, I find and conclude that the Respondent failed to consult and confer with the Union, as required by Section 19(a)(6) of the Executive Order when it failed to accede to the Union's request for bargaining over the impact and implementation of its decision to institute mandatory overtime. Additionally, I find that such conduct had a concomitant coercive effect upon, and interfered with, the rights assured employees by the Executive Order in violation of Section 19(a)(1).

Having found that the Respondent Activity engaged in conduct which violated Sections 19(a)(1) and (6) of the Executive Order, I shall recommend that the Assistant Secretary adopt the following recommended Order designed to effectuate the policies of Executive Order 11491, as amended.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Social Security Administration, Branch Office, Angleton, Texas shall:

1. Cease and desist from:

(a) Instituting a policy of mandatory overtime without first affording Local 1823, National Federation of Federal Employees an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating such policy and on the impact of such policy on adversely affected employees.

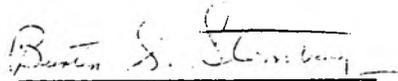
(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Post at its Galveston and Angleton, Texas facilities, copies of the attached notice marked "Appendix"

on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Manager and they shall be posted at the Galveston and Angleton, Texas facilities and maintained by the District Manager for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Manager shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.


 BURTON S. STERNBURG
 Administrative Law Judge

Dated: July 28, 1977
 Washington, D.C.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE
 ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a policy of mandatory overtime without affording Local 1823, National Federation of Federal Employees an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating such policy and on the impact of such policy on adversely affected employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

 (Activity or Agency)

Dated: _____ By: _____
 (Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, 911 Walnut Street, Kansas City, Missouri 64106.

February 6, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
FRESNO SERVICE CENTER
A/SLMR No. 983

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and NTEU, Chapter 97, IND. (NTEU) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally implementing a change in the quality review system without giving the NTEU the opportunity to meet and confer concerning the impact of the change on unit employees and the procedures for implementing the change. The Respondent contended that the complaint should be dismissed as two grievances concerning the quality review system barred the complaint under Section 19(d) of the Order; the matter in dispute involved contract interpretation and, therefore, should have been pursued through the grievance procedure; the change in procedure was, in fact, an attempt to implement the previously agreed upon contract policy of uniformity and that by agreeing to such policy, the NTEU had waived its right to bargain further over quality review matters pertaining to uniformity; and that the change involved no impact on the terms and conditions of employment of employees in the unit.

The Administrative Law Judge concluded that Respondent violated Section 19(a)(1) and (6) by unilaterally altering the method of selecting samples of the work product of unit employees for quality review purposes without first notifying and affording the NTEU an opportunity to bargain over the impact and implementation of such change. In this regard, he rejected the Respondent's arguments that Section 19(d) of the Order barred the complaint and that the gravamen of the complaint involved a matter of contract interpretation. Thus, he noted that the grievances referred to by the Respondent were filed by individual employees rather than by the NTEU in its institutional capacity, and that the allegations of the complaint raised issues involving rights accorded by the Order, and not rights established by the terms of a negotiated agreement.

In reaching his conclusion, the Administrative Law Judge found that the negotiated agreement established a requirement for uniformity of application of the quality review system, and did not diminish the Respondent's obligation, nor constitute a waiver of the NTEU's right to bargain over the impact and implementation of changes in the procedures implementing the contractually established requirement. Finally, the Administrative Law Judge concluded that the Respondent's changes in procedures did, in fact, have an impact on the bargaining unit employees.

Adopting the Administrative Law Judge's findings, conclusions and recommendations, the Assistant Secretary ordered that the Respondent cease and desist from conduct found violative of the Order and that it take certain affirmative actions.

A/SLMR No. 983

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
FRESNO SERVICE CENTER

Respondent

and

Case No. 70-5473(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU, CHAPTER 97, IND.

Complainant

DECISION AND ORDER

On September 6, 1977, Administrative Law Judge Steven Halpern issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, as modified herein.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Fresno Service Center shall:

1. Cease and desist from:

- (a) Instituting changes in the system used for review of the quality of the work of its employees represented exclusively by the National Treasury Employees Union, Chapter 97, without first notifying the exclusive representative and affording it

the opportunity to meet and confer, to the extent consonant with law and regulations, on the implementing procedures and impact of the new system used for review of the quality of the work of its employees outlined in the April 5, 1976, memorandum to employees of the Accounting Branch.

- (b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

- (a) Upon request by the National Treasury Employees Union, Chapter 97, the exclusive representative of its employees, meet and confer, to the extent consonant with law and regulations, on the implementing procedures and impact of the new system used for review of the quality of the work of its employees outlined in the April 5, 1976, memorandum to employees of the Accounting Branch.
- (b) Post at all Department of Treasury, Internal Revenue Service, Fresno Service Center, Fresno, California, facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Fresno Service Center and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.
- (c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
February 6, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute changes in the system used for review of the quality of the work of unit employees represented exclusively by the National Treasury Employees Union, Chapter 97, without first notifying the exclusive representative and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the implementing procedures and impact of the new system used for review of the quality of work of unit employees outlined in the April 5, 1976, memorandum to employees of the Accounting Branch.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights assured by the Executive Order.

WE WILL, upon request by the National Treasury Employees Union, Chapter 97, the exclusive representative of our employees, meet and confer, to the extent consonant with law and regulations, on the implementing procedures, and impact of the new system used for review of the quality of work of unit employees outlined in the April 5, 1976, memorandum to employees of the Accounting Branch.

(Agency or Activity)

DATED _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036

211 Main Street, Suite 528

San Francisco, California 94105



(202) 653-5092
(415) 556-0555

DEPARTMENT OF THE TREASURY)
INTERNAL REVENUE SERVICE)
FRESNO SERVICE CENTER)

Respondent)

and)

NATIONAL TREASURY EMPLOYEES UNION)
and NTEU, CHAPTER 97, IND.)
Complainant)

CASE NO. 70-5473(CA)

Merle Meyers, Esquire
Office of Regional Counsel
Internal Revenue Service
Suite 9, Two Embarcadero Center
San Francisco, California 94111

Juda Levie, Esquire
Labor Relations Specialist
Fresno Service Center
5310 North Roosevelt Avenue
Fresno, California 93704
For the Respondent

Bob McDonough, Esquire
Assistant Counsel
National Treasury Employees Union
209 Post Street, Suite 1112
San Francisco, California 94108
For the Complainant

Before: STEVEN E. HALPERN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding under Executive Order 11491, as amended, was initiated by Complaint filed September 30, 1976, with an amended complaint having been filed March 3, 1977. On March 17, 1977, the Regional Administrator, United States Department of Labor, San Francisco Region issued a Notice of Hearing pursuant to which hearing was held at Fresno, California, on April 19, 1977.

The essence of the complaint is set forth therein as follows:

On or about April 6, Mr. James L. Anderson, Acting Chief, Accounting Branch, issued a memorandum dated April 5 to all employees in the Accounting Branch. This memorandum established a new system by which an employee's work would be quality reviewed...

... The method by which an employee's work is quality reviewed has a direct impact on the employee's evaluation. Both classes of employees, measured and unmeasured, are evaluated as to the quality of their work ... The employee's quality of work is largely determined by errors or lack thereof, charged by quality review. NTEU was not consulted or given the opportunity to meet and confer prior to the issuance of this memorandum and the implementation of the quality review system.

These allegations having been made, Respondent is charged with violation of section 19(a)(1) and (6) of the Executive Order.

At the hearing the parties were afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses and to make oral argument.

1/ Upon joint motion of the parties made at hearing the time for filing briefs was extended to thirty days from receipt of transcript. It later having been represented by counsel that transcripts were not received until

Based upon the preponderance of the evidence of record in this case, having observed the witnesses and assessed their credibility, I make the within findings, conclusions and recommendation.

Preliminary Matters

Section 19(d) of the Executive Order provides, in effect, that issues which can be raised under a grievance procedure or as an Unfair Labor Practice having been raised in one by "the aggrieved party" may not later be raised in the other.

Article 33 of the parties' collective bargaining agreement sets forth the grievance procedures agreed upon by the parties and at Section 3 provides, in effect, that if employees' rights are involved a grievance may be filed by the employees or by the Union on their behalf; if the Union's rights are involved it may file a grievance on its own behalf.

An inspection of the grievances (M. Ex. #1 and M. Ex. #5) upon which Respondent bases its contention that this Unfair Labor Practice action is barred reveals that none was filed by the Union on its own behalf as an "aggrieved party". It is only by a grievance so filed that the Union may pursue its institutional rights under the parties agreed upon grievance machinery; and, correspondingly, it is only the prosecution of such a grievance, in

1/ (continued) June 29, 1977, notwithstanding continuing efforts to obtain such, the record was ordered closed on July 29, 1977. Only Respondent has filed a timely brief. Subsequent to the closing of the record, the undersigned was advised that the attorney who appeared at the hearing on behalf of Complainant was no longer its counsel and there appeared to be some degree of confusion as to who, if anyone, was handling the matter in his stead. Under the applicable Rules and Regulations of the Assistant Secretary (29 C.F.R. § 203.22) any request for additional time in which to file a brief after the hearing "shall be made to the Chief Administrative Law Judge, in writing ... not later than three (3) days before the date such briefs are due." Complainant, not having contacted the Office of Administrative Law Judges until after the date on which briefs were due, and Respondent having demanded strict compliance with the Rules, Complainant is foreclosed from filing a brief.

which the Union raises, on its own behalf, its institutional right to negotiate implementation and impact, that would bar the Union's right to bring this unfair labor practice action. No such grievance having been filed there is no impediment to the bringing of this action.

Noting the language of the provision made in the collective bargaining agreement at Article 33 Section 1C. that the Union agrees to submit virtually all contract related matters to the negotiated grievance procedure-- and to use sparingly unfair labor practice procedures-- I am able to perceive in it no legally binding effect such as would preclude the instant action.

I have also considered and find no merit in Respondent's contention that this is not properly an unfair labor practice matter but, rather, is one of contract interpretation which therefore should be pursued through the grievance procedure. What is involved here is not as Respondent urges a matter of contract interpretation, but rather of a right, guaranteed by, the Executive Order, standing independent of the parties collective bargaining agreement. The complaint being grounded upon such right is the proper subject matter of this unfair labor practice action.

Findings of Fact

1. Complainant has, and at all times material hereto had, exclusive recognition as representative of Respondent's nonsupervisory employees.

2. At all times material hereto, a negotiated multi-center agreement (Document 6225, Rev. 10-75, J. Ex. #2, herein referred to as MCA-2) governed Labor-Management Relations at the Activity.

The preamble to MCA-2 incorporates the following language:

... the public interest requires high standards of employee performance and continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency; and ... the well being of employees and efficient administration of the government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment;

and ... the participation of employees is improved through the maintenance of constructive and cooperative relationships between the labor organization and management officials

3. The Internal Revenue Service Center, Fresno, California, is responsible for the processing of tax returns and related documents through the use of automatic data processing systems and for the maintenance of accountability records for the Internal Revenue taxes collected within its area of jurisdiction.

Since the Service Center's inception, it has maintained a program of quality review in order to exercise control over the quality of its product. In mid-1973, the quality review system was expanded in scope so as to allow for evaluation and rating of individual employees per se. In that context an employee's error rate is compared to that of his peer group as a whole, and the employee is given a relative rating on the basis of that comparison. An employee's rate of errors is ascertained from a review of the employee's work for particular errors listed on a special list of critical errors, or defects, devised for the particular program involved. Procedurally, quality reviewers review a random sampling of the employee's production. Sample size is determined by several complex mathematical formulae and tables, based on factors such as anticipated peer group production levels and error rates.

In February 1975, at the negotiations over MCA-2, the Union sought to have a voice in determining the system for quality review of employees' work. Management rejected this asserting that such was its sole responsibility. Ultimately, the standards established by management were incorporated as part of the agreement, as pertinent here, in Article 6 Section 6. The Union was concerned that there were disparities in the treatment of employees under the quality review system. Ultimately, the parties developed the terms "valid", "indicative", and "uniform" as the limitations to be placed on management in its operation of the quality review system. Thus, the system had to be "valid", the work product sample was required to be indicative of the employee's work, and the application of the system to individual employees had to be uniform within peer groups. When the Union asked what was to be grievable in the proposed provision, management responded that the commitment to uniform application alone would be grievable.

In Accounting Branch, prior to December 30, 1975, the reviewers selected work samples for review by choosing cases at spaced intervals, beginning with a number chosen by the reviewer. However, the Branch management determined that that system was potentially vulnerable to abuse by reviewers, whether conscious or unconscious, in determining subjectively which cases to pull. Therefore, the Branch decided to shift to a procedure by which one control clerk pulled all the sample cases for the reviewers; the change in procedure was announced in a memorandum dated December 30, 1975, and issued by the Branch Chief to all employees (M. Ex. #4).

Subsequently, the management of Accounting Branch became aware of the fact that certain employees had spotted unconscious trends of control clerks and reviewers to favor certain numbers in choosing sample cases; employees were able to "stack" their cases accordingly and thereby distort the resultant data. Inasmuch as this made the application of the quality review system non-uniform in the Accounting Branch, the Acting Branch Chief decided to make another change in sampling procedures. This second change was announced in a memorandum, issued to all employees and dated April 5, 1976 (J. Ex. #3), which described the changed procedures.

4. No prior notice was given by management to the Union of the implementation of the new system, and no opportunity to meet, confer or negotiate on the implementation or impact thereof was afforded, out of which circumstance arises this uniform labor practice matter.

Conclusions of Law

The basic issue here presented is whether Respondent Agency stands in violation of the Executive Order by failure to meet and confer/negotiate with Complainant Union prior to institution of the quality review system described in the memorandum dated April 5, 1976.

Section 19(a) of the Order, as here pertinent, provides that Agency Management shall not (1) interfere with, restrain or coerce an employee in the exercise of the rights assured by this Order, or (6) refuse to consult, confer or negotiate with a labor organization as required by this Order.

Section 11(a) of the Order requires an agency to meet with a labor organization which is accorded exclusive recognition at reasonable times and to confer in good faith with respect to personnel policies and practices, as well as matters affecting working conditions of unit employees. This duty is expected of the parties to the extent that it is appropriate under applicable laws and regulations, policies set forth in the Federal Personnel Manual, Agency Policies and Regulations, a national agreement at a higher level, and the Order itself. While section 11(a) of the Order sets forth the scope of the Activity's duty to meet and confer enforced in section 19(a)(6), section 11(b) provides that the obligation to meet and confer does not include matters with respect to the mission of the agency or the technology of performing its work; and management retains the right, in any agreement between it and a labor organization, under section 12(b) of the Order, to maintain the efficiency of the government operations entrusted to it and to determine the methods and means by which such operations are to be conducted.

Thus, while the Order imposes a requirement upon management that it meet with labor to negotiate with respect to personnel policies and practices as well as matters affecting working conditions of unit employees, no such obligation exists in the so-called area of "management prerogatives" in which its actions are non-negotiable.

Work product quality being crucial to Respondent Agency's mission the establishment of standards and criteria by virtue of which quality is measured and evaluated is its exclusive prerogative and is privileged. Complainant makes no argument to the contrary. It therefore stands undisputed that the Activity did not have any obligation to negotiate with the Union concerning the decision to adopt a new system of quality review or the criteria to be employed therein and, in any event, it is so found and concluded.

However, even when an Activity is privileged by the Order to take such action without first bargaining about the basic decision, as noted in the last sentence of 11(b) as interpreted by the Assistant Secretary and the Federal Labor Relations Council, it nevertheless is obliged to bargain, upon request, with the collective bargaining representative of its employees concerning the procedures for implementing the decision and the impact of the decision on the employees. Immigration and Naturalization Service, FLRC No. 70A-10; Plum Island Animal Disease

Laboratory, FLRC No. 71A-11; Griffiss Air Force Base, FLRC No. 71A-30; Norton Air Force Base, A/SLMR No. 261; U. S. Department of Interior, Bureau of Indian Affairs, A/SLMR No. 341; New Mexico Air National Guard, A/SLMR No. 362; Federal Railroad Administration, A/SLMR No. 418; Army and Air Force Exchange Service, A/SLMR No. 451; Bureau of the Mint, U. S. Department of the Treasury, Case No. A/SLMR No. 750.

It thus is well settled that employer may not lawfully change personnel policies, practices or working conditions without first providing the collective bargaining representative an opportunity to negotiate the implementation and impact of the change; failure so to do constitutes a violation of the Order.

Management in its July 29, 1976, letter reply to the Union's charge (J. Ex. 5) appears to recognize that if the changes brought about by the new quality review system constituted "new" personnel policies or practices there would be an obligation to negotiate. It goes on to reason, however, and it was so argued at trial and on brief, that such changes were implemented in order to comply with the parties' agreement and understanding that management would administer the quality review system in a uniform manner; and, that being measures taken to implement and administer an already-existing bilaterally-negotiated personnel policy they did not constitute "new" personnel policies or practices. Thus, management concludes "we are not convinced, therefore, that the center had an obligation to share the letter with you in advance so as to give you the opportunity to negotiate".

In implementing what it described in the April 5, 1977, memorandum (J. Ex. 3) as its "new system" of Quality Review management employed practices and procedures as detailed therein different from those theretofore utilized. That substantial changes in practice and procedure were involved may be inferred from the fact that the system had to be abandoned at one point for lack of sufficiently trained personnel to administer it (Tr. 173); there is no contention that changes in practices and procedures were not made and, in any event, such in fact were made.

The evidence thus discloses that under the new quality review system changed practices and procedures were implemented having effect upon the evaluations of the quality of employees' work and upon the several performance evaluations and ratings having ultimate bearing upon the most basic of the terms and conditions of employment--retention

in job status and career advancement (Tr. 61-62; J. Ex. 2, Articles 6-9). That such procedures may have been implemented for the purpose of compliance with the agreed upon concept of uniformity does not diminish management's obligation to negotiate implementation and impact.

That the subject system, or any system of quality review, the procedures of which were non-uniformly applied, would impact adversely on some employees is apparent since Respondent measures the quality of each employee's work relative to that of the other employees performing the same work. The validity of any such measurement and its fairness to a given employee are therefore dependent not upon what standard of measure is used, but rather how it is used. For example, a system in which bad criteria were applied uniformly to all employees would be more fair than a system in which excellent criteria were applied even somewhat non-uniformly. Apparently, that is the very reason the Thompson/Murphy grievance was filed; not to complain of the criteria, but rather that the procedures described in the April 5, 1976, memorandum were not being utilized. It is reasonable to infer that one of the concerns of the grievants was the relative advantage or disadvantage that employees evaluated under different systems might have as to each other.

If any example need be given of a specific area which could have been negotiated to advance the concept of uniformity, the record furnishes a concrete illustration in the discontinuance of certain procedures set forth in the April 5, 1976, memorandum due to lack of trained quality review personnel (Tr. 173). It is of obvious importance that the procedures of a given system once implemented remain in effect with sufficient continuity and total duration as to assure the integrity of the system of relative ratings. An area that might have been discussed prior to implementation is what measures would be taken to insure that there would be sufficient, and sufficiently trained, quality review personnel to administer the new procedures uniformly and with continuity.

Clearly, under a relative rating system it is important that the work of all employees be measured by the same standard. To the extent that the systems procedures are non-uniformly applied the standard is varied employee to employee. Thus, an employee's quality rating is impacted adversely in proportion to the degree of non-uniformity of implementation of the procedures employed. It being apparent that any system of quality review non-uniformly administered would adversely impact on the employees, the

contention made on behalf of Respondent that no element of impact is present is rejected.

Nevertheless, while management must negotiate as to the impact of a privileged decision, no violation for failure to do so exists where the Union has not requested such of the Activity. Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289. However, in order that the Union be given a meaningful opportunity to consult and confer on impact issues, it would have to be informed of the action sufficiently in advance of implementation to allow for the preparation of proposals and the good faith exchange of views contemplated by the Order. The right to bargain would be meaningless unless the Union was advised of the procedures proposed for implementation of the system in sufficient time to afford a reasonable opportunity to consider and analyze the implementation and the impact of the decision and to request to bargain thereon. Therefore, only by a showing that Complainant Union was made aware with specificity of the action intended to be taken by the Agency prior to its implementation and that the Union thereafter failed timely to request to meet and negotiate can Respondent exculpate itself. If the Activity is found to have failed to have afforded the Union a meaningful opportunity to confer, a violation of section 19(a)(6) must be found.

Respondent contends that any obligation it may have had to negotiate concerning implementation and impact was discharged at the MCA-2 negotiations when it agreed that any new system of quality review would be valid, indicative and uniform. I cannot so conclude. The MCA-2 negotiations conceptualized the theory of uniformity. The obligation to negotiate the implementation of such concept as related to the practices and procedures to be utilized in a specific system of quality review survived the MCA-2 negotiations.

While the Union abandoned its attempt at the MCA-2 negotiations to participate in establishing standards of quality review, likely in recognition that such was management's exclusive prerogative, its interest in uniformity of application of such standards was emphasized rather than placed in doubt and certainly never was relinquished. It has not been shown that any waiver was intended and certainly none clearly and unmistakably was made of the Union's right to negotiation of the implementation and impact of any system of quality review prospectively to be employed by management. Neither does any practice of the parties in relation to other changes establish a clear

and unmistakable waiver of such right. On the contrary, from the testimony of Kathryn Lee Bierhalder, which I credit as having come from a knowledgeable witness and having been delivered in a forthright, candid and assured manner, it appears that management met with the Union on a number of occasions to negotiate changes in the quality review system; and, on at least one such occasion, there were negotiations prior to implementation (Tr. 65, 66). Additionally, consistent with reason, management could not help but have recognized the Union's vital institutional interest in assuring the uniformity of any such system. When such was devised, and prior to implementation, it therefore remained management's obligation to notify and afford the Union reasonable time within which to request negotiation. The record establishes that the Activity failed so to do and that the Union was unaware of the new quality review system until after its implementation.

It is stated in Department of Treasury, IRS, Manhattan District and NTEU, reported at A/SLMR No. 841 that "Sometimes the lines between a decision, the procedures for implementing the decision and the impact of that decision are difficult to draw or to see. In the instant case for example, the decision ... is very close to the procedures for implementing that decision."

As I see the matter at hand, management had a privileged right to devise a new system of quality review; but, it had an obligation to negotiate the implementation of the changed practices and procedures and the impact of the new system. To the extent that the design of the system, which is non-negotiable, and the implementation of its procedures, which is negotiable, overlap, a grey area exists. Substance and procedure here are almost inextricably bound together as the April 5, 1976, memorandum reveals. This does not render the issue incapable of resolution, however, nor does it relieve management of the duty to negotiate, although, in practice it will require the "constructive and cooperative relationship ..." between labor and management memorialized in the preamble to MCA-2 (J. Ex. 2).

It is not within the scope of this decision to rule upon any specific proposals by the Union, none having been submitted. This decision therefore does not extend beyond affirmation of management's obligation to negotiate implementation and impact.

The area of these negotiations, however, would appear to be circumscribed by the principle enunciated by the Council in Veterans Administration Independent Service Employees

Union and Veterans Administration Research Hospital, Chicago, Ill., FLRC No. 71A-31.

The emphasis is on the reservation of management authority to decide and act on these matters, and the clear import is that no right accorded to unions under the Order may be permitted to interfere with that authority. However, there is no implication that such reservation of decision making and action authority is intended to bar negotiations of procedures, to the extent consonant with law and regulations, which management will observe in reaching the decision or taking the action involved, provided that such procedures do not have the effect of negating the authority reserved.

In view of all of the above and considering the totality of the circumstances in this case, I find and conclude that Respondent, by unilaterally issuing the subject April 5, 1976, memorandum and implementing the quality review system described therein, deprived Complainant of the right to meet, confer and negotiate, to the extent consonant with law and regulations, on the implementation and the impact of said system on unit employees. Respondent thereby violated section 19(a)(6) and derivitively violated section 19(a)(1) of the Executive Order.

Recommendation

Upon the foregoing findings of fact and conclusions of law and pursuant to section 203.23(a) of the Rules and Regulations, 29 C.F.R. § 203.23(a), I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of Executive Order 11491, as amended.

Recommended Order

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the Rules and Regulations, 29 C.F.R. § 203.26(b), the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Fresno Service Center, shall:

1. Cease and desist from:

- (a) Instituting changes in the system used for review of the quality of the work of its employees represented exclusive

by the National Treasury Employees Union, Chapter 97, or any other exclusive representative, without first notifying the exclusive representative and affording it the opportunity to meet, confer and negotiate, to the extent consonant with law and regulations, on the uniformity of the procedures which management will observe in implementing such system and on the impact of such changed procedures on unit employees.

- (b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

- (a) Notify the National Treasury Employees Union, Chapter 97, or any other exclusive representative, prior to institution of changes in Quality Review procedures and, upon request, meet, confer and negotiate, to the extent consonant with law and regulations, on the uniformity of the implementation of such procedures and the impact of such changes on unit employees.

- (b) Upon request by the National Treasury Employees Union, Chapter 97, made within a reasonable time of the date of this Order, meet, confer and negotiate as to the matters above described, to the extent consonant with law and regulations, concerning the new system of Quality Review outlined in the April 5, 1976, Memorandum to "All Employees Accounting Branch" from "Acting Chief, Accounting Branch" subject "Quality Review Sampling".

- (c) Post at all Department of Treasury, Internal Revenue Service, Fresno

Service Center, Fresno, California, facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Fresno Service Center and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

- (d) Pursuant to section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.


STEVEN HALPERN
Administrative Law Judge

Dated: September 6, 1977
San Francisco, California

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICES

We hereby notify our employees that:

WE WILL NOT refuse to meet, confer and negotiate in good faith by instituting changes in the system employed in Quality Review of unit employees, without first affording the National Treasury Employees Union, Chapter 97, or any other exclusive representative, the opportunity to meet, confer and negotiate, to the extent consonant with law and regulations on the uniformity of the procedures which management will observe in implementing such system and on the impact of such on unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights assured by the Executive Order.

WE WILL notify the National Treasury Employees Union, Chapter 97, or any other exclusive representative, prior to institution of changes in Quality Review procedures and, upon request meet, confer and negotiate, to the extent consonant with law and regulations, on the uniformity of the implementation of such procedures and the impact of such changes on unit employees.

WE WILL, upon request by the National Treasury Employees Union, Chapter 97, made within a reasonable time, meet, confer and negotiate as to the matters above described, to the extent consonant with law and regulations, concerning the system of Quality Review outlined in the April 5, 1976, Memorandum to "All Employees Accounting Branch" from "Acting Chief, Accounting Branch" subject "Quality Review Sampling".

(Agency or Activity)

DATED _____ By: _____
(Signature)

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.

February 6, 1978

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Building, 450 Golden Gate Avenue, San Francisco, California, 94102.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
SOCIAL SECURITY ADMINISTRATION, BRSI,
NORTHEASTERN PROGRAM SERVICE CENTER
A/SLMR No. 984

This case arose as a result of an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1760 (Complainant) alleging, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order when, on May 25, 1976, it transferred claims cases from a work module to the remaining section of its Claims Authorization Branch without meeting and conferring with the Complainant as to the decision and on its impact and implementation.

The Administrative Law Judge found, and the Assistant Secretary concurred, that the Respondent was not obligated to afford the Complainant an opportunity to meet and confer on its decision to transfer claims cases, as such decision was outside the scope of the bargaining requirements of the Order. However, the Assistant Secretary did not adopt the Administrative Law Judge's finding that the Respondent was also under no obligation to negotiate on the impact and implementation of its decision as the transfers involved no substantial change in the duties, responsibilities, or functions of the Respondent's employees.

The Assistant Secretary concluded that the decision to transfer claims cases effected a change in employee terms and conditions of employment. However, he noted that the record indicated that in May 1975, the Respondent had informed the Complainant that cases would be transferred on a continuing basis and that there was no evidence of a request for bargaining on impact and implementation by the Complainant at that time, or at any time during the subsequent year, even though transfers were being conducted. Under these circumstances, the Assistant Secretary concluded that the Respondent's conduct in May 1976, was not violative of the Order.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
SOCIAL SECURITY ADMINISTRATION, BRSI,
NORTHEASTERN PROGRAM SERVICE CENTER

Respondent

and

Case No. 30-07247(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1760

Complainant

DECISION AND ORDER

On September 9, 1977, Administrative Law Judge William Naimark issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in the subject case, including the exceptions and supporting brief filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, to the extent consistent herewith.

The instant complaint alleges, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order when, on May 25, 1976, it transferred claims cases from a work module to the remaining section of its Claims Authorization Branch without meeting and conferring with the Complainant as to the decision and on its impact and implementation.

The Administrative Law Judge concluded that the Respondent's failure to bargain over the decision to transfer claims cases was not violative of the Order as, in his view, such a decision is a reserved management right under Section 12(b)(5) of the Order. He noted also that the obligation to bargain on the impact and implementation of a decision arises only when management takes an action effectuating a change in existing terms and conditions of employment. Having found that the transfers involved no substantial change in the duties, responsibilities, or functions of the Respondent's employees, he concluded that the Respondent was under no obligation to negotiate on impact and implementation and, therefore, did not violate Section 19(a)(1) and (6) of the Order by refusing to bargain in this regard.

I concur with the Administrative Law Judge's determination that the Respondent was not obligated to afford the Complainant an opportunity to meet and confer on the former's decision to transfer claims cases, as such decision was outside the scope of the bargaining requirements of the Order. However, I find that the Respondent was obligated under the Order to afford the Complainant notice and an opportunity to meet and confer on the procedures to be utilized in effectuating its decision to transfer claims cases, which, in my view, effected a change in employee terms and conditions of employment, and on the impact of its decision on adversely affected employees. In my opinion, under the particular circumstances herein, the Respondent met its obligation in this regard.

It is clear from un rebutted testimony in the record that in May 1975, the Respondent notified the Complainant that, due to a diminishing workload in the remaining section of the Branch, cases would be transferred from the modules on a continuing basis. There is no evidence of any request by the Complainant for bargaining on impact and implementation at that time, or at any other time during the year preceding the incident from which the instant complaint arises, even though the record indicates that case transfers were being conducted on a regular basis. ^{1/}

Under these circumstances, I find that the Respondent's conduct herein was not violative of the Order. Accordingly, I shall order that the instant complaint be dismissed in its entirety.

^{1/} Cf. U.S. Department of Air Force, Norton Air Force Base, 3 A/SLMR 175, A/SLMR No. 261 (1973).

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-07247(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.

February 6, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



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In the Matter of

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, BRSI, NORTHEASTERN
PROGRAM SERVICE CENTER

Respondent

Case No. 30-7247 (CA)

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1760

Complainant

.....

FRANCIS X. DIPPEL
Labor Relations Officer
Social Security Administration, BRSI
Northeastern Program Service Center
6401 Security Boulevard
Room 1220 West High Rise Building
Baltimore, Maryland 21235
For the Respondent

JAMES O'LEARY
Vice-President for Grievancies
American Federation of Government
Employees, AFL-CIO, Local 1760
P.O. Box 626
Corona-Elmhurst, NY 11373
For the Government

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on March 8, 1977 by the Regional Administrator for Labor-Management Services of the U.S. Department of Labor, New York Region, a hearing in this case was held before the undersigned on March 22, 1977 at Flushing, New York.

The proceeding herein is brought under Executive Order 11491, as amended (herein called the Order). A complaint was filed on July 22, 1976 by American Federation of Government Employees, AFL-CIO, Local 1760 (herein called the Complainant) against Department of Health, Education and Welfare, Social Security Administration, BRSI, North-eastern Program Service Center (herein called the Respondent). The said complaint alleged, in substance, that on May 25, 1976 Respondent violated Sections 19(a)(1) and (6) of the Order by transferring claims case work from a module to the Claims Branch without meeting and conferring with Complainant both as to the decision and impact upon employees of such transfer. Respondent submitted a response dated August 19, 1976 alleging it was not obliged to bargain over such transfer of cases since this was a management prerogative. Further, it asserted there was no impact upon employees since the transfer involved no new job functions.

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.

Upon the entire record herein and from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings of fact, conclusions and recommendations:

Findings of fact

1. At all times since about 1969 Complainant has represented the non-supervisory employees of Respondent's Northeastern Program Center.
2. A collective bargaining agreement, effective by its terms on March 15, 1974 for a period of two years, was executed by the National Office, American Federation of Government Employees, AFL-CIO and various locals, including Complainant, and the Bureau of Retirement and Survivors Insurance (BRSI) of Social Security Administration, covering the unit of non-supervisory employees at the Northeastern Program Center and other service centers of the BRSI. The said agreement has continued in effect since its expiration date.

3. Until 1974 the claims processing procedure for social security benefits at the Respondent's center were handled by the Claims Authorization Branch. In October 1974, the modular system of processing cases was introduced thereat. This provided for the handling of cases by a module composed of about 42 employees who, as specialists, performed the entire processing functions handled by 200-300 individuals prior thereto. By 1976 there were 41 modules in the Program Service Center, and the entire modularization was not completed. About 40 employees of the 300 who worked in the branch are still not modularized. They work in Section 1, and the Claims Authorization Branch has ceased to exist. 1/

4. Charles Lunin, Director of Operations, testified that management has, in the past, always moved cases around when a back-up occurred. Further, that while cases were also transferred from module to module, or from module to branch, the union has not, in the past, asked to negotiate the transfer of such cases. It does appear, however, that the distribution of cases received from other sections or programs centers had been the subject of discussion between management and the bargaining agent; that suggestions had been received from the union re the method of accomplishing such distribution, and modification made by the employer with respect thereto.

5. On May 20, 1976 Bruce Friedman, a claims authorizer and treasurer of Complainant, noticed that cases were coming in to the branch from one of the modules. He spoke to Norman Green, manager of the section, regarding consultation of the transfer of cases. The manager replied he did not feel it was a proper subject for consultation, whereas the union indicated that bargaining was proper in respect to how the cases should be worked, overtime resolved, or the priority to be given such cases when handled. Green suggested that the union official talk to Isodore Gross, the branch manager.

6. Friedman conferred with Gross on the same day and asked why there was not consultation concerning the cases being transferred from the module. The manager retorted it was not necessary; that some months ago when cases were

1/ Record facts show, and it is not disputed, that the introduction of the modular system was adopted after negotiations with the union.

received from another program center there had been discussions with the union, and it resulted in "carte blanche" being given to management in regard thereto. When the union representative protested that this situation was different, Gross suggested he speak to manager Al Brown.

7. On May 24, 1977 Friedman and union agent Irwin Berger, vice-president for Claims Authorization Branch, met with Brown. The union representatives requested consultation on the transfer of cases from the module. They asked whether all authorizers would receive transferred cases, if the cases would be put in a bin and handled in order or when the authorizer was available, and whether overtime would be paid. Brown told the union agents that the transfer of cases and assignments was not a matter for consultation, despite part discussion, since there was a new structure in the organization. 2/

Conclusions

Complainant asserts that management had conferred with it in the past regarding assignment of casework; that its refusal to do so in May 1976 was a breach of its obligation to bargain in violation of 19(a)(1) and (6) of the Order; and that, assuming arguendo, it was not a bargainable subject, management waived its rights under Section 11(b) of the Order by reason of past consultation with the union in regard thereto. It also maintains that the union was never afforded an opportunity to make a formal request to meet because Respondent implemented the case assignment and transfers without giving Complainant notification thereof. In contending that the employer has violated the Order herein, Complainant insists the decision to transfer claims cases is bargainable, and, further, Respondent is obliged to meet and confer regarding the impact of the decision.

(1) While an agency is mandated, under Section 11(a) of the Order, to meet and confer re personnel policies and practices, as well as matters affecting working conditions, certain matters are excluded from the scope of obligatory bargaining. Thus, under 11(b), the obligation

2/ Brown testified that while he notified the union of any transfer of cases in the past, he did not negotiate the matter; that while the union requested bargaining as to the impact of case assignment, it was not granted. Moreover, Brown stated he did not feel bound to confer re impact upon the authorizers caused by the transfer of cases to the claims authorizers.

does not include matters dealing with the technology of performing its work. Moreover, management retains the right, pursuant to 12(b) of the Order, to maintain the efficiency of Government operations entrusted to them and to determine the methods, means and personnel by which such operations are to be conducted.

In my view decisions as to the assignment and flow of cases within an agency must necessarily be reserved to management in order to effectively conduct its operations. Efficiency of government performance, as well as its functioning, would be impaired and hampered if the decisions regarding the transfer of cases required continuous bargaining with the union representative. Since management retains the right under 12(b) to assign employees to tasks, a correlative right to assign them cases would seem warranted to maintain effective operations. I consider the transfer of claims cases by Respondent to be a management function, and conclude that, at least under 12(b)(5), a decision in this regard is embraced within the right granted management to determine the methods and means by which its work is to be performed.

Complainant's argument that Respondent has, in the past, bargained over the assignment and transfer of cases does not justify a different conclusion herein. Apart from the fact that there is some dispute as to whether actual bargaining occurred as to this matter, the Assistant Secretary has held that past practice and bargaining history are without controlling significance where a matter constitutes a reserved management right under Section 12(b) of the Order. Small Business Administration, District Office, Hato Rey, Puerto Rico, et. al. A/SLMR No. 751. See also Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, VA, FLRC No. 71A-56.

Accordingly, and in view of the foregoing, I conclude that the failure to bargain over the decision re the transfer of claims cases from the module to the claims section, as alleged herein, was not violative of Section 19(a)(1) or (6) of the Order.

(2) In respect to the contention that Respondent was obliged to meet and confer as to the impact of its decision prior to implementation, I find no merit therein.

The assignment and transfer of cases is a continued function of the agency and its personnel. Questions posed by Complainant's representatives concerning the handling of transferred cases were properly addressed to immediate supervisors at all times. However, the record does not support a finding that the transfer of claims cases resulted in any substantial change in duties, responsibilities or functions of Respondent's claims authorizers who performed the work. The obligation to bargain re procedures involved and the impact of a decision prior to implementation arises only when management takes action affecting a change in existing terms and conditions of employment. Department of Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 814. Accordingly, and in view of my conclusion that the transfer of cases from the module herein involved no especial change in the duties and functions of the employees, I find no violation of 19(a)(1) or (6) by Respondent for refusing to bargain re the impact of its decision in that regard.

RECOMMENDATION

It having been found that Respondent did not violate Sections 19(a)(1) and (6) of the Order by refusing to bargain over the decision, or impact therein, to transfer claims cases from its module division to the claims section, I recommend that the complaint herein be dismissed in its entirety.


 WILLIAM NAIMARK
 Administrative Law Judge

Dated: 9 SEP 1977
 Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION,
 REGION 10,
 AUBURN, WASHINGTON
 A/SLMR No. 985

This case involved an unfair labor practice complaint filed by American Federation of Government Employees, Local Union 2600, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) of the Order by an investigator of the General Services Administration's Office of Investigation questioning the Complainant's Chief Steward during the course of an administrative investigation. The investigator asked for the names of the persons attending a union meeting, which names he sought in connection with an investigation of possible violations of agency regulations with regard to the unlawful taking of a confidential bid document. The document had been obtained by another employee at the union meeting in question. When the Steward refused to cooperate in any manner, asserting an intrusion into union business, the investigator reminded him of possible administrative discipline up to and including discharge.

The Administrative Law Judge, noting that the investigator advised the Steward that the only reason he wished to obtain the names was to interview persons to determine how the document was obtained and that he was not interested in any matters discussed at the meeting, concluded that the investigator's inquiry was reasonable under the circumstances and did not constitute a violation of the Order.

The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 10,
AUBURN, WASHINGTON

Respondent

and

Case No. 71-4081(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL UNION 2600, AFL-CIO

Complainant

DECISION AND ORDER

On August 29, 1977, Administrative Law Judge Edward C. Burch issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendation.

Under the particular circumstances of the instant case, I agree with the Administrative Law Judge that dismissal of the subject complaint is warranted. Thus, the record reflects that, with respect to the particular incident alleged to be violative of the Order, the Criminal Investigator of the Office of Investigations of the General Services Administration,

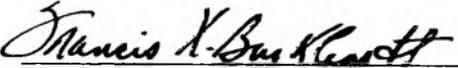
1/ In reaching the disposition of the instant case, I find it unnecessary to pass on the Administrative Law Judge's conclusion on page 6 of his Recommended Decision and Order that Mr. Voiland was not "a representative of management."

during the course of an administrative investigation, advised the Chief Steward that the only reason he wished the names of those people in attendance at the Union meeting was to interview these individuals to determine how the bid document involved was disclosed from a confidential agency file and that he was not interested in matters discussed at the meeting.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 71-4081(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 9, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
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211 Main Street, Suite 528
San Francisco, California 94105



- 2 -

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed by the American Federation of Government Employees ("AFGE"), December 7, 1976, and amended March 25, 1977, under Executive Order 11491, as amended, against the General Services Administration ("GSA"), Region 10, a Notice of Hearing on complaint was issued by the Regional Administrator for the San Francisco Region April 25, 1977.

The amended complaint alleged respondent violated section 19(a)(1) of the Executive Order when a special investigator of respondent, in the course of an administrative investigation, asked complainant's Chief Steward for the names of all persons who attended a union meeting June 19, 1976. When the Chief Steward refused to furnish the names of those in attendance he was threatened, it is alleged, with administrative sanctions up to and including removal.

A hearing was held June 15, 1977, in Auburn, Washington, at which time exhibits were received and witnesses examined.

Upon the basis of the entire record the following findings of fact, conclusions and recommendation are made.

Findings of Fact

June of 1976, Mr. William Pearson, manager of the self-service store of the Federal Supply Service, Seattle, Washington, called a procurement agent, Mrs. Mead, and requested information on obtaining labor to assist in the self-service store. Mr. Pearson, in that conversation, made reference to a confidential procurement bid. When questioned he stated he did not at that time have the document before him. Mrs. Mead, who was suspicious, asked Mr. Pearson to call back when he could refer to the document. June 25, 1976, he again called, stating he had the procurement document before him, and discussed the document. Having concluded Mr. Pearson had obtained a confidential document, Mrs. Mead reported the incident to a senior procurement agent in the Federal Supply Service, GSA, Auburn, Washington.

June 28, 1976, James E. Voiland, Criminal Investigator assigned to the GSA Office of Investigations in Auburn, Washington, was advised by letter by the then Regional

(202) 653-5092
(415) 556-0555

In the Matter of)

GENERAL SERVICES ADMINISTRATION)
REGION 10)
AUBURN, WASHINGTON)

Respondent)

and)

CASE NO. 71-4081(CA)

AMERICAN FEDERATION OF GOVERNMENT)
EMPLOYEES, LOCAL UNION 2600, AFL-CIO)
Complainant)

Wayne A. Crabtree, Esquire
Star Route 1, Box 72
East Emerald Lake Drive
Grapeview, Washington 98546
For the Complainant

James F. Hicks, Jr.
Office of the General Counsel
General Services Administration
Washington, D. C. 20405
For the Respondent

Before: EDWARD C. BURCH
Administrative Law Judge

Commissioner of the Federal Supply Service, Marvin Blaylock, that Mr. Pearson may have been in unauthorized possession of a confidential procurement bid. Mr. Blaylock's letter was considered by Mr. Voiland to be a request for an investigation.

The requirement of confidentiality is, of course, to insure that the government obtains contracts at the lowest prices. Obviously that goal is lost when bidders have access to the bids of others.

Federal Procurement Regulations, 2nd ed., F.P.R. Amendment 153, September 1975, section 1-3.805-1(b), provide "no information regarding the number or identity of the offerors participating in the negotiations shall be made available to the public or anyone whose official duties do not require such knowledge."

The procurement bid in question lost its confidentiality once the contract was awarded. That occurred June 24, 1976.

A preliminary investigation satisfied Mr. Voiland that "there was something to the allegation." Mr. Voiland determined that Mr. Pearson had no authority to be in possession of the document and had no legitimate access to the file. He then advised his Central Office in Washington, D. C. that there was a basis for suspecting a violation of the Standards of Conduct of GSA and requested his office to assign a case number and initiate an investigation. Field investigators, such as Mr. Voiland, report not to the Regional Administrator where they are assigned, but to the Office of Audits and Investigations, in Washington, D. C., who in turn reports directly to the GSA Administrator in Washington, D. C.

Having received authority to proceed with the investigation Mr. Voiland interviewed Mr. Pearson on July 2, 1976.

Mr. Pearson stated he had obtained a copy of the bid at the June 19, 1976, meeting of the AFGE Local 2600. Mr. Pearson denied knowing who brought the document to the meeting.

Elwin A. Snyder, Chief Steward of Local 2600, was then interviewed July 12, 1976. Mr. Snyder denied knowing who had brought the document to the meeting but confirmed the document was at the June 19, 1976, union meeting.

Shortly thereafter Mr. Voiland met with an assistant United States attorney to determine if there was a possible

criminal violation under 18 U.S.C. § 1905. ^{1/} The United States attorney suggested further investigation.

By October 20, 1976, Mr. Voiland had interviewed approximately 25 persons in an attempt to learn how the document had been removed from the government file and the name of the responsible person. Of those interviewed approximately seven to ten were union members and the remainder were not members of AFGE.

August 25, 1976, a second meeting was held with the Assistant United States Attorney. When advised that the government had apparently not been harmed nor the bidding system compromised by the unauthorized disclosure, the United States Attorney declined criminal prosecution, and suggested the matter be handled administratively. A report of the investigation was sent by Mr. Voiland to his Central Office September 14, 1976. A copy was not sent to the Regional Administrator.

October 20, 1976, Mr. Voiland again interviewed Mr. Snyder. Mr. Snyder was asked, and refused to give, the names of those persons at the June 19, 1976, union meeting. Mr. Voiland wanted the list to enable him to question all persons present. He had not been able to obtain this information from other sources.

Mr. Snyder was advised by Mr. Voiland, on October 20, that the only reason he wished the names was to interview those persons to determine how the bid document was disclosed from a confidential file. Mr. Voiland further explained he was not interested in the subject matter discussed at the union meeting.

Mr. Snyder was advised of section 104.2 of the GSA Standards of Conduct, which provides:

Each employee must cooperate with investigative representatives conducting official investigations and furnish signed statements under oath if appropriate.

^{1/} "Whoever, being an ... employee of the United States ... discloses or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties ... which information concerns or relates to ... trade secrets, processes, operations ... shall be fined or imprisoned ..."

He was further advised that failure to comply with section 104.2 of the GSA Standards of Conduct could result in disciplinary action, up to removal. Mr. Snyder was advised Mr. Violand did not make disciplinary decisions but that the violation would be reported.

Mr. Snyder responded that the information was confidential to the union and, he felt, outside the scope of the investigation.

Mr. Voiland received no direction or control from the Regional Administrator of Region 10. However, on November 17, 1976, he submitted a report to the Regional Administrator. This report contained information that dealt with matters the Regional Administrator might act upon, such as uncooperativeness of witnesses, and advisement of the security problem. This report was sent only after it was determined the case would not be handled as a criminal offense, but rather, would be handled administratively.

It is clear from all of the evidence that the investigation was conducted by persons independent of Region 10, and that the investigation was neither directed nor controlled by the management of GSA Region 10.

Discussion, Further Findings of Fact and Conclusions

Section 19(a)(1) of the Executive Order provides that agency management shall not interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order. One of those rights is section 1, which provides that each employee has the right:

... freely and without fear of penalty or reprisal to form, join, and assist a labor organization ... and each employee shall be protected in the exercise of this right.

Complainant contends section 1 was violated (1) when Mr. Snyder was asked the names of those in attendance at the June 19, 1976, union meeting and (2) was then threatened for failure to give those names.

In Office of Economic Opportunity, Region 5, A/SLMR No. 477, the Assistant Secretary agreed with the recommendation of the Administrative Law Judge, who found that interrogation and threats to a union employee were in violation of section 19(a)(1) of the Executive Order.

In that case a memo was issued by management withdrawing the privilege of the union to post and distribute

material because those postings contained attacks upon management. The memo was itself attacked by a circulated leaflet. Management then attempted to learn who had been responsible for the leaflet. An employee was interrogated as to whether she wrote or distributed the leaflet. She refused to answer and was then advised discipline would be taken against her for failure to answer.

The Administrative Law Judge concluded that the interrogation was a prohibited interrogation of an employee concerning union activities. He further concluded that management's investigation of alleged misconduct may not encroach on the rights afforded by section 1 of the Order. See also, Vandenberg Airforce Base, California, A/SLMR No. 383.

The principles of the above cases are, of course, sound. They are simply not applicable to the present fact situation.

There was here no interrogation concerning union activities nor was there a threat.

Mr. Voiland wished only the names of those present at the union meeting so he could question them, not concerning union activity, but concerning possible violations of the GSA Standards of Conduct, the Federal Procurement Regulations, and the United States Code. There was no intrusion on the internal affairs of the union nor was there any threat, open or veiled, that in any way interfered with, restricted or coerced an employee in the right to form, join or assist a labor organization.

Mr. Snyder was not threatened because of any union activity. First, he was not threatened. He was simply advised that disciplinary action might be taken by others under the GSA Standards of Conduct. Further, there was no discriminatory action taken because of union activity as in Environmental Protection Agency, Perrine Primate Laboratory, A/SLMR No. 136.

It is also very important to note that the interrogation was conducted, not by a representative of management, but, rather, by an independent criminal investigator who reported only to Washington, D. C.

The mere fact that the person questioned concerning unauthorized disclosures is a union official does not make the questioning violative of the Executive Order.

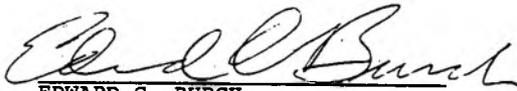
February 9, 1978

Department of Transportation, FAA, Las Vegas, A/SLMR No. 796 stated that the distribution of non-public information is not a right protected by section 1(a) of the Executive Order and a reprimand therefore does not violate the Order.

In conclusion, the investigation, the questioning, and the admonishment here in question encroached upon no rights afforded by section 1 of the Executive Order, and there was no violation of section 19(a)(1) of that Order.

Recommendation

Having found that respondent has not engaged in conduct violative of section 19(a)(1) of the Order, I recommend that the complaint herein be dismissed in its entirety.


EDWARD C. BURCH
Administrative Law Judge

Dated: August 29, 1977
San Francisco, California

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER AMENDING RECOGNITION AND CLARIFYING
UNIT OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U. S. COAST GUARD SUPPORT CENTER,
PORTSMOUTH, VIRGINIA
A/SLMR No. 986

This case involved a petition for clarification of unit (CU) and amendment of recognition (AC) filed by the Tidewater Virginia Federal Employees Metal Trades Council (Council) seeking to amend and clarify the unit for which it received exclusive recognition at the U. S. Coast Guard Base, Portsmouth, Virginia, (Base) to reflect changes brought about by the closure of the Base and the mass transfer of its personnel to the U. S. Coast Guard Support Center, Portsmouth, Virginia, (Support Center). The Council sought to amend the description of its exclusively recognized unit by changing the designation "U. S. Coast Guard Base, Portsmouth, Virginia" to "U. S. Coast Guard Support Center, Portsmouth, Virginia." It also sought to clarify its unit at the Support Center with respect to employees of the Public Works Division and the Security Section of the Administrative Division, who were employed at the Support Center prior to the mass transfer of base personnel. The Activity contended that these employees should be considered as within the Council's unit. At the hearing, the Council agreed with the Activity's position.

The Assistant Secretary found that, subsequent to the base closure and transfer of base personnel to the Support Center, the Council's exclusively recognized unit continues to remain appropriate for the purpose of exclusive recognition under the Order and that the previously unrepresented employees of the Public Works Division and the Security Section had become an integral part of the Council's reconstituted unit at the Support Center. Accordingly, he ordered that the exclusively recognized unit represented by the Council be amended to conform the recognition to the existing circumstances resulting from the base closure and transfer of base personnel to the Support Center and to clarify the unit to include all eligible employees of the Public Works Division and the Security Section of the Administrative Division.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. COAST GUARD SUPPORT CENTER, PORTSMOUTH, VIRGINIA

Activity

and

Case No. 22-07895(AC/CU)

TIDEWATER VIRGINIA FEDERAL EMPLOYEES METAL TRADES COUNCIL, PORTSMOUTH, VIRGINIA

Petitioner

DECISION AND ORDER AMENDING RECOGNITION AND CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Nancy Anderson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the brief filed by the Activity, the Assistant Secretary finds:

On August 9, 1963, the Petitioner, Tidewater Virginia Federal Employees Metal Trades Council, herein called Council, was granted exclusive recognition in a unit of essentially all Wage Grade and General Schedule employees of the U. S. Coast Guard Base, Portsmouth, Virginia, herein called Base Portsmouth. The most recent negotiated agreement was entered into by the Council and Base Portsmouth on January 16, 1976. In this proceeding, the Council seeks to amend its recognition to reflect the closure of Base Portsmouth and the mass transfer of base unit employees to the U. S. Coast Guard Support Center, Portsmouth, Virginia, herein called Support Center. It also seeks to clarify the status of all the previously unrepresented Wage Grade and General Schedule employees of the Support Center. These employees were employed in the Public Works Division and the Security Section of the Administrative Division at the Support Center prior to the above-noted base closure.

On April 7, 1977, all employees, civilian and military, and all program responsibilities of Base Portsmouth were physically and administratively transferred to the existing U. S. Coast Guard Support Center,

Portsmouth, Virginia, approximately 8 miles away. The Council contends that, as a result of the closure of Base Portsmouth and the relocation of its employees and their functions to the Support Center, the name of the Activity should be changed from U. S. Coast Guard Base, Portsmouth, Virginia, to the U. S. Coast Guard Support Center, Portsmouth, Virginia, to conform to the existing circumstances precipitated by the closure and physical transfer of all unit employees. In this regard, the Council contends that the unit has remained appropriate and intact and that the employees' duties, classifications, and assignments have remained unaffected by the physical relocation. The Activity agrees with the Council's position with respect to the amendment of recognition but also contends, with respect to the proposed clarification of unit, that the Council's unit should be considered to include employees of the Public Works Division and Security Section of the Administrative Division. The Activity asserts that such a unit would be appropriate as the employees involved not only share a community of interest, but the unit would promote effective dealings, efficiency of operations, and prevent unit fragmentation. At the hearing, the Council agreed with the Activity's position.

The U. S. Coast Guard Support Center, Portsmouth, Virginia, is a Coast Guard "unit" within the command of the 5th U. S. Coast Guard District, one of 12 such districts in the continental United States. The mission of the Support Center, subsequent to the closure of Base Portsmouth, is to operate and maintain boats in execution of assigned programs; maintain and repair cutters, boats, buoys, shore facilities and equipment; and provide a wide range of material and personnel support services for other units.

Prior to its closure, Base Portsmouth was administratively organized into three divisions, Industrial, Comptroller, and Administrative, 1/ and the Council's exclusively represented unit comprised the 47 eligible employees in the Industrial and Comptroller divisions. 2/ Subsequent to the April 7, 1977, base closure, these divisions were transferred en masse to the Support Center. The record reveals that at the Support Center there were some 17 unrepresented civilian employees who were assigned to the Public Works Division and the Security Section of the Administrative Division prior to the transfer of the Council's unit and that these employees have remained in their respective positions.

Subsequent to the closure of Base Portsmouth and the transfer of employees, and except for the physical relocation and change of Activity's title, unit employees are performing essentially the same duties that

1/ The Administrative Division was comprised solely of military personnel.

2/ The record indicates that there were some nonappropriated fund activity employees located at the Base who were never a part of the exclusively represented unit.

they performed at Base Portsmouth under the same immediate supervision. In addition, the record reveals that the unit employees have not changed job titles, skills, divisional assignments, personnel practices or policies, or other terms and conditions of employment. Labor relations policies continue to be administered by the District Personnel Office and the Activity Commander. Under all these circumstances, I find that the unit which was at Base Portsmouth has been relocated at the Support Center and continues to remain appropriate for the purpose of exclusive recognition under the Order.

Under the new organizational structure, all Support Center employees are subject to the supervision of the Commander and his staff. The record further reveals that all employees of the Support Center, including those assigned to the Public Works Division and the Security Section of the Administrative Division, enjoy essentially similar job classifications, duties, skills and working conditions pursuant to policies and procedures established by the Support Center. Moreover, they now share common overall supervision, as well as the personnel and labor relations policies and practices established by the Coast Guard Headquarters in Washington, D. C., and administered by the 5th District Personnel Office, the Support Center Commander and his staff.

Under these circumstances, I find that the employees assigned to the Public Works Division and the Security Section of the Administrative Division accreted into and became an integral part of the bargaining unit represented exclusively by the Council. Thus, in my view, subsequent to the closure of Base Portsmouth and the physical transfer of its employees, the previously unrepresented employees in the aforementioned divisions have been administratively and functionally integrated into the Council's existing unit of Support Center employees and now share a clear and identifiable community of interest with such employees. Although the record shows that the Public Works Division and Security Section employees perform a portion of their work separate and apart from other divisions, a significant number of their projects require the direct and indirect support of those divisions and are controlled and coordinated by the Support Center Commander and his staff. Moreover, the inclusion of the subject employees into the unit represented by the Council, under the circumstances outlined above, will, in my view, promote effective dealings and efficiency of agency operations by reducing unit fragmentation in an activity where components are functionally integrated and where the success of the Activity's mission requires cooperation and interaction between its component parts.

Accordingly, I shall amend the recognition and clarify the unit consistent with my decision herein.

ORDER

IT IS HEREBY ORDERED that the exclusive recognition granted on August 9, 1963, to the Tidewater Virginia Federal Employees Metal Trades

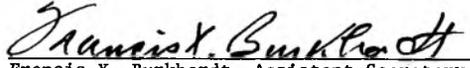
Council, be, and it hereby is, amended by changing the designation "U. S. Coast Guard Base, Portsmouth, Virginia" to read "U. S. Coast Guard Support Center, Portsmouth, Virginia."

IT IS FURTHER ORDERED that the unit exclusively represented by the Tidewater Virginia Federal Employees Metal Trades Council be, and it hereby is, clarified by including in the said unit all eligible employees located in the Public Works Division and the Security Section of the Administrative Division.

The unit description, as clarified, is as follows:

All Wage Grade and General Schedule employees of the U. S. Coast Guard Support Center, Portsmouth, Virginia, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees, nonappropriated fund activity employees, temporary employees with no reasonable expectation of continued employment, and supervisors as defined in the Order.

Dated, Washington, D. C.
February 9, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

February 15, 1978

A/SLMR No. 987

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE
AND IRS CHICAGO DISTRICT,
CHICAGO, ILLINOIS
A/SLMR No. 987

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE
AND IRS CHICAGO DISTRICT,
CHICAGO, ILLINOIS

Respondents

and

Case No. 50-13134 (CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 010

Complainants

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 010 (Complainants) alleging that the Respondents violated Section 19(a)(1) and (6) of the Order by their failure to allow a union representative to continue speaking at a formal meeting between representatives of management and unit employees. The Complainants contend that the union representative was engaged in representing the employees when he was improperly prevented from continuing such representation. The Respondents contend, on the other hand, that the meeting involved was not a formal discussion within the meaning of Section 10(e) of the Order. However, the Respondents argue that, even if the meeting in question was a formal discussion within the meaning of Section 10(e), management was within its rights in directing the union representative to return to his seat when his remarks exceeded the bounds of the issue for discussion.

The Assistant Secretary concluded that dismissal of the instant complaint was warranted. In this connection, he found that the meeting in question was a formal discussion within the meaning of Section 10(e) of the Order in that it was a meeting between management and unit employees wherein suggestions were solicited and the matter being discussed affected general working conditions of employees in the unit. He further concluded, however, that, under the particular circumstances of the case, where the Respondent only restricted the union representative's participation in the meeting to the extent that his remarks clearly were extraneous to the subject matter, and where the evidence did not reflect that he was prevented from either representing the employees' interests or stating the Complainants' position regarding the subject matter of the meeting, the evidence was insufficient to establish that the Respondents' conduct was violative of the Order.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

This matter is before the Assistant Secretary pursuant to Regional Administrator R. C. DeMarco's Order Transferring Case to the Assistant Secretary of Labor, dated June 20, 1977, in accordance with Sections 203.5(b), 203.7(a)(4) and 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits and briefs, the Assistant Secretary finds:

The complaint herein alleges that Respondents violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by their failure to allow a union representative to continue speaking at a formal meeting with unit employees. The Complainants contend essentially that the meeting in question was a formal discussion within the meaning of Section 10(e) of the Order and that the union representative was engaged in representing unit employees when he was improperly prevented by the Respondents from continuing such representation.

The Respondents contend, on the other hand, that the meeting in question was not a formal discussion within the meaning of Section 10(e) of the Order. And even if the meeting in question was a formal discussion within the meaning of Section 10(e), the Respondents assert that management was within its rights in directing the union representative to return to his seat when his remarks exceeded the bounds of the issue for discussion at the meeting. ^{1/}

^{1/} The Respondents also raised two procedural issues which they claimed had never been ruled upon. In this regard, the Respondents contend that the instant complaint should be dismissed as the Respondent, Internal Revenue Service, hereinafter called IRS, Chicago District, was not simultaneously served with a copy of the instant complaint
(Continued)

The undisputed facts, as stipulated by the parties, are as follows:

A meeting took place on June 13, 1975, in the South Area Office of the Chicago District of the IRS. Present at the meeting were five management officials, including the Office Manager of the South Area Office and various District Office officials, Mr. Michael Peacher, the Chief Steward of the exclusive representative of the Chicago District's employees, the National Treasury Employees Union, Chapter 010, hereinafter called NTEU, and approximately 60 bargaining unit employees. Mr. Peacher was present in his capacity as a union official.

The purpose of the meeting was to inform the employees about a management proposal concerning space utilization and to obtain employee suggestions and opinions concerning this proposal. The meeting was part of management's overall plan to implement its proposal throughout the Chicago District and was one of several meetings held. It was not conducted for the purpose of grieving or negotiating on the proposal.

The meeting began with the Office Manager explaining its purpose. He indicated that after he finished his explanation the management officials present would try to answer the questions of employees and solicit suggestions for improvement of the proposal. He spoke for approximately one-half hour after which unit employees began asking questions. Approximately ten minutes into the questioning period, Mr. Peacher asked to be recognized. Upon being recognized, he went to the front of the room and made the following two points: (1) that the proposal would, in his opinion, victimize the employees; and (2) that employees, in his opinion, were already "subsidizing" the Government by providing their own supplies and transportation to perform their field duties.

The Office Manager interrupted Mr. Peacher at this point and stated that his remarks were improper as they did not deal with the issue under discussion. Mr. Peacher agreed not to make further similar remarks, stating that he was merely trying to show by his remarks that the employees were already making sacrifices in the interest of economy. Mr. Peacher then suggested that if employees wanted to take some action concerning the proposal, they could do what he was going to do, which was to write their Congressman regarding the proposal. At this point a District Office official interrupted Mr. Peacher and said he had overstepped the bounds of appropriate comments, and that he (Peacher) should limit

1/ as required by Section 203.4(b) of the Assistant Secretary's Regulations, and as, in their view, the Complainants failed to furnish any evidence in support of the complaint at the time the complaint was filed.

I find no basis for dismissal of the instant complaint based on either of these contentions. With respect to the first argument, the evidence establishes that both the IRS, Chicago District and the IRS National Office were named in the instant complaint, the IRS National Office was served with a copy of the instant complaint, and the record reflects that both parties were fully represented at all stages of the proceeding. With respect to the Respondents' second argument, I find that the evidence herein establishes that the Complainants met their initial burden of proof in this matter so as to warrant further processing of the complaint.

himself to commenting on the issue being discussed. Further, he stated that Peacher was conducting union business on Government time when he suggested that employees should contact their Congressman. For these reasons, the District Office official told Peacher to return to his seat. After telling the employees that this was a management attempt to silence the Union, Chief Steward Peacher sat down and made no further comment during the meeting which ended shortly thereafter.

FINDINGS AND CONCLUSIONS

In my view, the subject meeting constituted a "formal discussion" within the meaning of Section 10(e) of the Order. 2/ Thus, the meeting was between management and unit employees, and the matter being discussed, a proposal concerning space utilization, was a matter clearly "affecting general working conditions of employees in the unit." In this regard, I find that the Respondents' reliance on the Federal Labor Relations Council's decision in National Aeronautics and Space Administration (NASA) Washington, D.C. and Lyndon B. Johnson Space Center, Houston, Texas, 3 FLRC 617, FLRC No. 74A-95 (1975) is misplaced. Thus, the subject meeting was between management and unit employees, and not, as in the NASA case, between headquarter-level management and employees in a unit recognized at a lower organizational level. Moreover, the meeting in question was not merely an "information gathering device" as in NASA, but rather was a meeting where management clearly indicated at the outset that it was soliciting suggestions in connection with a management proposal concerning the working conditions of unit employees. Under these circumstances, I find that the NTEU had the right to be represented at the meeting and the obligation to represent the interests of all the employees in the unit. 3/

However, under the particular circumstances herein, I find that dismissal of the instant complaint is warranted. Thus, as noted above, the Respondents restricted the participation of the NTEU representative in the meeting only to the extent that his remarks were extraneous to its subject matter, and there was no evidence that the representative was prevented from representing the unit employees or stating the position of the NTEU regarding space utilization plans of the Respondents. Indeed, the evidence reflects that Chief Steward Peacher, after he was first interrupted by management, in effect, conceded that his remarks were not on point. Moreover, there was no allegation that Peacher, after being told to return to his seat, attempted to or was prevented

2/ Section 10(e) provides, in pertinent part, that, ". . . The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

3/ Cf. U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, 3 A/SLMR 290, A/SLMR No. 278 (1973).

February 22, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NAVAL TRAINING CENTER,
ORLANDO, FLORIDA
A/SLMR No. 988

This case involved a petition for clarification of unit filed by the Hotel, Motel, Restaurant Employees and Bartenders Union, Local 737, AFL-CIO (Petitioner) seeking to clarify the status of its existing exclusively recognized unit after an agency directed reorganization involving the Activity. The Petitioner proposed to clarify its existing unit of messes and consolidated package stores by including in it all the eligible employees of the Activity's Enlisted Mess Open, contending that those employees have accreted to its existing unit due to the reorganization.

The reorganization resulted from a directive of the Deputy Chief of Naval Operations (Manpower) that the management of all clubs and messes within the Department of the Navy be performed by the Chief of Naval Personnel, rather than the Navy Resale Systems Office in Brooklyn, New York. The reorganization was implemented locally when control of the Enlisted Club and its employees was transferred from the Navy Exchange, Naval Training Center, Orlando, Florida, to the Administrative Command of the Activity. The Enlisted Club was redesignated the Enlisted Club Open.

The Activity took the position that the unit should be clarified as sought by the Petitioner. The Intervenor, Local 1451, National Federation of Federal Employees, Independent, conceded that the employees of the Enlisted Mess Open were no longer a part of its existing unit of all employees in the Navy Exchange, Naval Training Center, Orlando, Florida. However, it asserted that the employees involved have not accreted into the Petitioner's existing unit, but that an election should be conducted among the employees of the Enlisted Mess Open giving them a choice between the Petitioner and "no union."

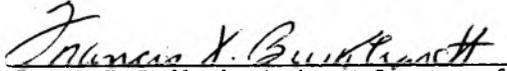
The Assistant Secretary found that the employees of the Enlisted Mess Open share a community of interest with the employees represented exclusively by the Petitioner as they share common supervision; receive their personnel services from the same Civilian Personnel Office; are subject to the same hiring and recruiting programs; are provided with the same job rating and position classification service by the same Civilian Personnel Office; and share the same retirement, group health, and insurance programs. He found also that effective dealings and efficiency of agency

from making any further comment in connection with the subject at issue. Accordingly, under these circumstances, I find that the evidence was insufficient to establish that the Respondents' conduct was violative of Section 19(a)(1) and (6) of the Order, and, therefore, I shall order that the subject complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-13134(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 15, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

operations would be promoted by virtue of inclusion of the employees in question in the Petitioner's existing unit. Under these circumstances, based on the policy set forth by the Federal Labor Relations Council in Department of the Army, Fort McPherson, Georgia, FLRC No. 76A-82 (June 2, 1977), the Assistant Secretary found that the approximately 30 employees of the Enlisted Mess Open had accreted to the unit of approximately 150 employees represented by the Petitioner.

Accordingly, the Assistant Secretary ordered that the unit be clarified consistent with his findings.

A/SLMR No. 988

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVAL TRAINING CENTER,
ORLANDO, FLORIDA

Activity

and

Case No. 42-3865(CU)

HOTEL, MOTEL, RESTAURANT EMPLOYEES
AND BARTENDERS UNION, LOCAL 737, AFL-CIO

Petitioner

and

LOCAL 1451, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, INDEPENDENT 1/

Intervenor

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Seymour X. Alsher. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Activity, the Assistant Secretary finds:

The Hotel, Motel, Restaurant Employees and Bartenders Union, Local 737, AFL-CIO, herein called the Petitioner, seeks to clarify the status of its existing exclusively recognized unit of approximately 150 non-appropriated fund employees after an agency directed reorganization involving the Activity. 2/ The Petitioner proposes to clarify its existing

1/ The name of the Intervenor appears as amended at the hearing.

2/ The Petitioner is the exclusive representative of the following certified unit with the standard exclusions: All employees of the Commissioned Officers Mess Open; Chief Petty Officers Mess Open; Petty Officers Mess Open; Consolidated Package Store; Consolidated Mess Open, McCoy Annex; and Consolidated Package Store Annex, McCoy Annex of the Naval Training Center, Orlando, Florida.

unit by including in it all full-time and regular part-time employees of the Enlisted Mess Open of the Activity, approximately 30 in number.

The Petitioner contends that the employees of the Enlisted Mess Open have accreted to its existing unit based upon common supervision, functional integration, geographical proximity, similar jobs and skills, and equivalent working conditions. Local 1451, National Federation of Federal Employees, Independent, herein called the Intervenor, 3/ concurs that the employees of the Enlisted Mess Open are no longer a part of its Navy Exchange unit. However, it asserts that the employees involved have not accreted into the Petitioner's existing unit, but that an election should be conducted among the employees of the Enlisted Mess Open giving them a choice between the Petitioner or "no union." The Activity contends that an election in this case would serve no useful purpose and that the employees of the Enlisted Mess Open have, in fact, accreted to the Petitioner's existing unit.

The above noted reorganization began on August 5, 1976, when the Deputy Chief of Naval Operations (Manpower) directed that the management of all clubs and messes within the Department of the Navy be exercised by the Chief of Naval Personnel, rather than the Navy Resale Systems Office in Brooklyn, New York. The directive was implemented locally on May 25, 1977, when control of the Enlisted Club was transferred from the Navy Exchange at the Activity to the Naval Administrative Command of the Activity. The Enlisted Club was redesignated the Enlisted Mess Open. The approximately 30 nonappropriated fund employees of the Enlisted Club, including management officials and supervisors, were directly affected by the reorganization.

The mission of the Activity is to provide basic indoctrination for enlisted personnel, to provide initial skill, advanced and/or other specialized training for officers and enlisted personnel of the regular Navy and Navy Reserve, to provide command and coordination for the efforts of assigned subordinate activities, and to provide support to other activities as assigned. The Activity is host to approximately 20 tenant activities located on the Naval Training Center compound. The Naval Administrative Command, one of the three major component command organizations of the Activity, performs the "housekeeping" functions (logistics support and administrative services) for the other activities of the Naval Training Center. Among its other functions, the Naval Administrative Command has responsibility for the operation of the various consolidated package stores and messes, including, as a consequence of the above noted reorganization, the Enlisted Mess Open. The mission of the Navy Exchange, Naval Training Center, Orlando, Florida, is to serve authorized patrons as a large, diversified retail store and, through profits, to provide a source of funds for the welfare and recreation of military personnel.

3/ The Intervenor was granted exclusive recognition on December 9, 1968, for a unit of all employees in the Navy Exchange, Naval Training Center, Orlando, Florida. The unit consists of approximately 710 nonappropriated fund employees.

Although the Enlisted Mess Open is in the same building as the former Enlisted Club, the employees of the Navy Exchange's Enlisted Club were treated as new hires by the gaining Naval Administrative Command. Further, these employees were treated as being terminated for some purposes, and transferred for others. 4/

As indicated above, the Intervenor concedes that employees of the Enlisted Mess Open no longer are part of its unit. The record reveals that subsequent to the reorganization the employees at issue no longer share common supervision with Navy Exchange nonappropriated fund employees, nor are they serviced by the same personnel office. Also, the two groups of employees do not have routine and regular working contacts, nor is there interchange between them. In addition, they no longer share the same area of consideration for reduction in force purposes.

Under the circumstances, I find that the employees of the Enlisted Mess Open share a community of interest with employees represented exclusively by the Petitioner. Thus, as part of the Naval Administrative Command of the Activity, the two groups share common supervision. Further, they receive all personnel services from the Civilian Personnel Office of the Activity, which provides personnel services to all tenant activities located on the base with the exception of the Navy Exchange. 5/ In addition, the employees of the Enlisted Mess Open and the employees represented by the Petitioner are subject to the same hiring and recruiting programs, are provided with the same job rating and position classification service by the Civilian Personnel Office, and share the same retirement, group health, and insurance programs.

I find also that effective dealings and efficiency of agency operations would be promoted by virtue of the inclusion of the disputed employees in the Petitioner's existing unit. Thus, the record reveals that the Activity has the same labor-management relations authority with regard to both Enlisted Mess Open employees and the employees represented by the Petitioner. Additionally, the Civilian Personnel Office is responsible, in general, for the labor relations program for the nonappropriated fund activities under the jurisdiction of the Activity, and for the administration of the current negotiated agreement between the Petitioner and the Activity. By the terms of this agreement, the employees of the consolidated package stores and messes represented by the Petitioner are in the same area of consideration for primary consideration for merit promotion. Employees of the Enlisted Mess Open are eligible for participation in this merit promotion program. Further, the Enlisted Mess Open's operations, fund handling system, and job classifications have been modified and now resemble those of the Activity's other messes and consolidated package stores.

4/ Thus, they were afforded the rights of transferees by receiving time-in-grade credit for the time they had worked for the Navy Exchange, and they were given the right as terminated employees to be paid for their annual leave, or as transferees to transfer their annual leave with them.

5/ The Navy Exchange has its own personnel office.

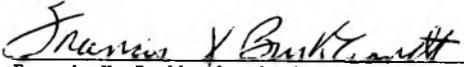
February 22, 1978

In Department of the Army, Fort McPherson, Georgia. FLRC No. 76A-82 (June 2, 1977), the Federal Labor Relations Council (Council) determined that a finding that a group of employees has accreted to an existing unit must take into account equal application of the three Section 10(b) criteria and the purposes and policies of the Order sought to be achieved; i.e., preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure. Further, it noted that in the Federal sector a finding of accretion is not dependent upon thorough physical integration of the employees at issue into the existing unit. As noted above, I have found that the employees of the Enlisted Mess Open share a clear and identifiable community of interest with the employees represented by the Petitioner, and that their inclusion in the unit would promote effective dealings and efficiency of operations. Under these circumstances, while the employees of the Enlisted Mess Open remain a distinct and identifiable grouping of employees with no evidence of thorough physical integration between them and the employees already in the Petitioner's unit, and despite the fact they originally voted to be represented by a labor organization other than the Petitioner, 6/ based on the policy set forth by the Council in its Fort McPherson decision, I am constrained to find that the approximately 30 employees of the Enlisted Mess Open have accreted to the unit of approximately 150 employees represented by the Petitioner. Accordingly, I shall order that the unit represented by the Petitioner be clarified to include the employees of the Enlisted Mess Open.

ORDER

IT IS HEREBY ORDERED that the unit of messes and consolidated package stores at the Naval Training Center, Orlando, Florida, for which the Hotel, Motel, Restaurant Employees and Bartenders Union, Local 737, AFL-CIO, was certified as exclusive representative on February 8, 1974, and clarified on October 24, 1974, be, and it hereby is, clarified to include all eligible employees of the Enlisted Mess Open.

Dated. Washington, D. C.
February 22, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

6/ As indicated above, however, the Intervenor concedes that the employees of the Enlisted Mess Open are no longer part of its Navy Exchange unit.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE,
MEMPHIS SERVICE CENTER
A/SLMR No. 989

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU, Chapter 98 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order when it terminated the employment of Audrea Huggins, a probationary employee and union steward, due to her union activities. The Complainant further alleged that the Respondent independently violated Section 19(a)(1) of the Order by its reference to Ms. Huggins' union activities in a performance appraisal.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(2) of the Order as there was insufficient evidence to establish that Ms. Huggins was terminated from employment because of her union activities. With regard to the alleged Section 19(a)(1) violation, he found that the Respondent's statement in Ms. Huggins performance appraisal concerning her union activities was violative of Section 19(a)(1) of the Order and thus recommended the issuance of an appropriate remedial order.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations and issued an appropriate remedial order for the violation found herein.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
MEMPHIS SERVICE CENTER

Respondent

and

Case No. 41-5028(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 98

Complainants

DECISION AND ORDER

On October 21, 1977, Administrative Law Judge John H. Fenton issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had violated Section 19(a)(1) of the Order, and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge found further that the Respondent had not violated Section 19(a)(2) of the Order as alleged in the complaint. Thereafter, the Respondent filed an exception directed solely to the Administrative Law Judge's Recommended Order. ^{1/}

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the Respondent's exception to the Administrative Law Judge's Recommended Order, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

In its exception, the Respondent contended that the Administrative Law Judge's proposed remedy in the instant case was unnecessary inasmuch as it had previously complied with the terms of a settlement agreement in another case which effectively resolved the subject case. I disagree. Thus, the instant case involves a different employee than the prior

^{1/} It was noted that the Respondent did not except to the Administrative Law Judge's finding that it had violated Section 19(a)(1) of the Executive Order, and that the Complainant did not except to the recommended dismissal of the alleged violation of Section 19(a)(2) of the Order.

case, and the appraisal material found violative of the Order herein still remained in the employee's personnel file at the time of the hearing in this matter. Accordingly, I shall require the Respondent to remedy the violation found herein, including the posting of a notice consistent with such remedial order. In my view, such a remedial notice is necessary to inform and assure employees that the rights guaranteed to them and their exclusive representative by the Order will be protected.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Memphis Service Center, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing Audrea Huggins, by inserting any remark or comment in any appraisal regarding the union activities of Audrea Huggins.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Require and instruct its supervisors not to insert any remark or comment in any appraisal regarding the union activities of Audrea Huggins.

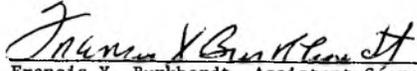
(b) Expunge any reference to union activities made by the Respondent, if such reference exists, from the personnel file of Audrea Huggins.

(c) Post at its facility at the Memphis Service Center, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Center Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Center Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the instant complaint, insofar as it alleges a violation of Section 19(a)(2) of the Order, be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 22, 1978



Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce Audrea Huggins by inserting any remark or comment in any appraisal regarding the union activities of Audrea Huggins.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of our employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

WE WILL require and instruct all of our supervisors that they shall not insert any remark or comment in any appraisal regarding the union activities of Audrea Huggins.

WE WILL expunge any reference to union activities, if such reference exists, from the personnel file of Audrea Huggins.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



..... :
In the Matter of :
INTERNAL REVENUE SERVICE, :
MEMPHIS SERVICE CENTER :
Respondent :
and :
NATIONAL TREASURY EMPLOYEES :
UNION, and NTEU CHAPTER 98 :
Complainant :
.....

Case No. 41-5028(CA)

HARRY G. MASON, ESQUIRE
Internal Revenue Service
Office of the Regional Counsel
P.O. Box 1074
Atlanta, Georgia
For the Respondent

JOHN F. BUFE, ESQUIRE
Assistant Counsel
National Treasury Employees Union
1730 K Street, Suite 1101
Washington, D. C. 20006
For the Complainant

Before: JOHN H. FENTON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed August 16, 1976, under Executive Order 11491, as amended, by the National Treasury Employees Union and its Chapter 98, against the IRS Memphis Service Center, a Notice of Hearing on Complaint was issued on October 18, 1976, by the Regional Administrator for the Atlanta Region of the Labor-Management Services Administration.

JHF:hjc

The complaint alleged that Respondent violated Sections 19(a) (1) and (2) of the Executive Order by making reference to Ms. Audrea Huggins' union activities in a performance evaluation, and by discharging her because of such activities.

A hearing was held in Memphis, Tennessee, on November 9 and 10, 1976. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. Post-hearing briefs were filed and have been duly considered.

Upon 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. NTEU Chapter 98 has been collective bargaining representative of the Memphis Center employees at all material times. Ms. Huggins was hired in January, 1975 as one of 10 seasonal WAE GS-3 tax examiners employed for the peak tax season. She was furloughed in August, recalled on February 2, 1976 and discharged on March 26. The termination was "for disqualification during probationary period for uncooperative attitude toward your manager in your work".

2. When she was hired she was assigned to the Receipt and Control Section, Unidentified Unit, under the supervision of Ms. Mary Dudero. At dates not well fixed, she was detailed to other units under the supervision of Ms. Gladys Henderson and Ms. Emma Williams. During this same period, and also at unknown times, she joined the Union and became its Treasurer. She was appointed steward for Receipt and Control on July 23.

3. On June 4, 1975 Dudero evaluated Huggins on a furlough and recall form. At the same time she rated six GS-4 tax examiners, and three other GS-3 tax examiners, all of whom had entered service with Huggins. 1/ The GS-4's received scores ranging from 96 to 80. The GS-3's received a 72, and three 64s. Huggins received a 64 which was, by reference to error rates, the lowest of all. On a rating

1/ The GS-4's had received promotions.

scaled from 1 to 5 she received a 3 in quantity and quality of work performed and a 2 in dependability. A score of 3 indicates fully acceptable performance a two is superior to that. On June 11 Dudero rated Huggins on a rating form used for promotion to non-supervisory positions. She received an identical appraisal, plus a 3 in an additional factor which assessed learning ability and application of knowledge to job.

4. Later in June, Huggins grieved her 64 rating, unsuccessfully requesting that it be raised. That rating affected her prospects for furlough and recall, as well as her chances for achieving permanent status. She testified that she was told an 80 was necessary for permanent status and that Dudero, at a counselling session preceding the June 4 rating, had indicated that she would receive an 80 for her unmeasured work, notwithstanding that the computer print-out sheet (IPR) for measured work she had performed scored her 64. Thus she accused Dudero of misrepresenting the matter to her. Dudero's version of this was that, after the initial three-week training period, she assigned Huggins to "unmeasured critical work". Huggins allegedly attempted to avoid having her work reviewed by not putting it in the review basket, denied ever being told to do so and later acknowledged her presence at the meeting where such instruction were given but denied having heard them. 2/ When Huggins' error rate reached 64%, Dudero placed her on uncritical work where no error rate was kept. At some later time, when she went over Huggins' IPR with her, she explained the furlough-recall procedure, noting that management works off the top of the list and that Huggins was on the bottom. Huggins said she would not have made so many errors if she had as much experience as the others. Huggins asked for and was granted a second meeting in the presence of Chief Steward Marlene Johnson. At Johnson's request she was given another chance on critical (unmeasured) work, with senior tax examiner Virginia Hall working with her one-on-one. Hall reported back that her progress was good. 3/

2/ Dudero stated that Huggins would not listen to descriptions of errors when they were brought back, but rather appeared to be busy composing her response or excuse. Neither evaluation made mention of this, nor was she counselled about such alleged attitude.

3/ Johnson also requested a transfer from the section on the ground that there was a developing personality conflict. [continued on next page]

5. Huggins was twice detailed for two-week periods to the Cleaning Unit of the Receipt and Control Branch, under the temporary supervision of Emma L. Williams. Williams described her, in a signed statement made available to the Union, as a very conscientious, cooperative and eager employee whose quality of work steadily increased while her error rate decreased. In her testimony she acknowledged that Huggins had a high error rate, as did some others. Huggins worked for Gladys Henderson, Section Chief of Audit, on two-week details in June and in August. Henderson on August 28 prepared at Dudero's request an evaluation of her work. She found her production rate low and her quality very good. She commented that Huggins was "most cooperative...seemed eager to do what you wanted...and appeared to want to do a good job. With respect to dependability, she had the following to say:

Spent entirely too much time observing what went on in the area and on the phone, although I believe most of this was probably...on union matters. She spent quite a bit of time over in Correspondence Audit at the desk of Marlene Johnson (another union official)...4/

Huggins was in non-work status when this was written, having been furloughed in early August. She was unaware of its existence until after her recall to work on February 2, 1976.

3/ - continued

She observed that Huggins did not believe what Dudero said, that Dudero believed Huggins did not believe what she said, and that "the respect and trust was wavering".

4/ There is no indication that this was intended to flag upper management's attention to Huggins' activist Union role. On the contrary, it appears to have been offered in mitigation of her low production. Even Huggins, who displayed a highly suspicious turn of mind as to the impact of her Union activities upon her employment conditions, spoke highly of Henderson as a supervisor. As noted, the appraisal was in other respects flattering, and the reference to time consumed in Union matters appears to be an effort to square low production with the presence of other attributes which would suggest high productivity.

6. Whatever the relationship between Huggins and Dudero during 1975, matters took a prompt turn for the worse when Huggins returned to duty in 1976. During her first week back, she sought health insurance coverage. Dudero denied her request on the ground she had not worked the required six months in 1975 and did not have the prospect of six months employment in 1976. It is evident that Huggins thought this was discriminatory. Dudero explained that such insurance was available only to employees with six months service who could reasonably anticipate six more months. Because Huggins did not yet have six months, and was on the bottom of the recall list, Dudero did not think she could qualify.

7. On February 10, Huggins, as steward, was approached by seven or eight permanent GS-4 employees about rumors that temporary GS-5 promotions were to be given to seasonal employees. Huggins took the matter to Dudero, but refused her request for the names of the employees she represented. Dudero told her that any discussion was premature as no appointments had been made, but agreed to hold a meeting and explain the matter to the complaining employees after the promotions were made. There was some controversy over the anonymity of the complaining people. 5/ Huggins and Johnson then visited Dorothy Kallaher in Labor Relations to report the incident. Kallaher agreed that a meeting between Dudero and the concerned employees would be one way to handle it, but said that it was up to Dudero. Dudero was again approached and again refused. A signed request from the concerned employees, dated February 25 was then presented to Dudero, and a meeting was finally held on March 1 after Huggins left on sick leave for cancer surgery.

8. On February 19 Huggins went to Dudero's desk, again bringing up the subject of health insurance coverage and also asking about a promotion to GS-4, as she was now eligible on the basis of six months service. Dudero told her that the decision about insurance was final. According to Huggins, she further told her that "there was no GS-4 in the future, period". Dudero testified that she told Huggins

5/ It is evident from Union Exhibit 4, a memorandum prepared by Dudero, that she was upset about Huggins' refusal to name the complaining employees (which she believed violated the "agreed procedures" for informal conferences), [continued on next page]

that her high error rate made promotion impossible and that time-in-grade did not suffice. Huggins reacted by saying that she was not going to be treated in this way, that she would not accept the treatment she received the year before, and that, if she did not receive a promotion, she would file a grievance. Dudero replied that that was her privilege. Each testified that the other raised her voice. Again, there was obviously irritation on both sides. 6/

Later that day, another incident occurred which clearly led to an angry exchange. Huggins was called to Dudero's desk for purposes of a counselling session, but was first presented with a white card to be filled out for use in furlough and recall. Huggins' version is that Dudero threw the card on the desk and instructed her to fill it out with her name, social security number, address and telephone number. Huggins asked what it was needed for, as such information was in her files. Dudero did not respond, and Huggins just sat looking at her because she had not answered. Dudero again instructed her to fill it out, and Huggins repeated her question concerning the need for it. Dudero then grabbed the card, told Huggins she was insubordinate and announced the intention to terminate her. At this point, being dumbfounded by Dudero's loud and abusive

5/ - continued

that she felt Huggins had "told" her to call a meeting (which she refused to do until after the fact) and that she was irritated by Huggins' attitude. Dudero testified on cross-examination, when asked whether Huggins thus displayed a bad attitude, that she did, that she "always displays a bad attitude if you don't agree with her".

6/ On cross-examination Dudero admitted that she thought of this as a threat, and as improper, drawing a distinction between one's right to file a grievance, and the use of a threat to grieve in order to get one's way. When pressed on whether such "threats" were one of the ways Huggins displayed an improper attitude, she replied that "usually her bad attitude was in regard to errors". Elsewhere on cross, Dudero stated she was upset not by any such threat, but by the reference to alleged mistreatment the year before, as Dudero felt she had gone out of her way to help Huggins, notwithstanding her problems. In a note written after the incident (Union Exhibit 6) Dudero stated [continued on next page]

manner, Huggins started to write down what Dudero had to say. She asked Dudero what the card was for, and was informed it was for furlough recall. Huggins then said she had not refused to fill it out, but had simply asked what it was for. Huggins then said she was sorry Dudero had taken "that attitude" about it and Dudero responded that she was indeed sorry, that everyone knows she is sorry and that she would be sorrier. Dudero then pulled out Huggins' IPR for purposes of going over it. Huggins was still busy writing down what she had said about the card. Dudero instructed her to stop writing. Huggins explained that she was just taking notes because she believed she needed to take them. Dudero again told her to stop writing, reminding her she was going over her IPR with her. Huggins said "Just a second" and continued to finish the sentence she was on. Dudero then jumped up in anger, took the IPR, and again threatened Huggins with termination for insubordination. Needless to say, with respect to this and all other incidents, Dudero has a very different recollection, one which would provide more ample justification for the described loss of control which she in any event denies. I find it unnecessary to determine which is the more accurate recollection of the event, as I would conclude that Dudero had cause to be upset and that this was an important incident in a rapidly deteriorating relationship.

9. Later in the day on February 19, Dudero summoned Huggins to a counselling session in the Section Chief's office. What transpired there was the subject of much conflicting testimony as well as several exhibits (Union Exhibits 1, 2 and 6). According to Huggins she was unaware of the purpose of the meeting, and asked when she sat down if a decision had been reached concerning the promotion "grievance". Dudero replied that the purpose of the meeting was to counsel her on her errors, not to discuss other employees. Huggins then requested and was refused the attendance of her steward. Dudero then presented her with the previously described Henderson appraisal and requested that she initial it. Dudero advised her that she must lower her error rate to 7% in two weeks. Huggins asked why the permissible error rate for other employees was 11%. Dudero allegedly replied that Huggins had to reduce her error rate to 7% regardless of the rate applied to others, and said

6/ - continued

that Huggins used a loud voice so that others could hear her, that she tried to embarrass and scare her, and that she tries to give others the impression that she is the boss and that "I will do what she wants or else".

that adverse action would ensue if she did not. 7/ Each woman took notes. Huggins' notes (Union Exhibit 2) were signed, to verify their accuracy, by Dudero. That Exhibit consists of two pages, obviously copied from the two sides of one piece of paper. On what is labeled page 1, reference is made to the error rate discussion, the unsuccessful request for a steward, and Dudero's manner at the counselling session. She is described as "loud and vicious", and is reported to have threatened Huggins with adverse action and warned her not to discuss the matter with anyone else. On the reverse side are three paragraphs, the first two of which are numbered. Paragraph 1 has to do with attitude, and indicates that Huggins was told she was not a steward during her working time in the area, but the same as any other employee, and that she was not to threaten Dudero because she did not receive a promotion. Paragraph 2 indicates that Huggins was instructed to fill out and sign a form before leaving the unit on Union business. The third, unnumbered, paragraph states that Dudero showed Huggins the Henderson appraisal of August 28 and requested that she sign it to acknowledge she had seen it. Next to this is Dudero's signature and an acknowledgement that "this is correct". The Exhibit was introduced to establish that Dudero had set an error rate for Huggins alone, coupled with a discharge threat, had sworn her to secrecy, and had warned her about her activities as steward and her announced disposition to grieve about the failure to promote her. Dudero asserted that she had acknowledged only the paragraph concerning the Henderson memo. I think its highly likely that the page was signed by her as it is, but I do not believe she was aware of the reverse side. In any event, I in large measure credit Dudero's account of the counselling session, as reflected in Union Exhibits 1 and 6, and her testimony.

7/ Dudero informed the other GS-3 examiners that their error rates had to be held to 7%, and told the GS-5s, at a meeting, that their error rates could not exceed 11%. The meeting was provoked by Dudero's receipt of a memo from management, informing her that the Section's error rate was too high. Dudero showed the memo to her subordinates, and was obviously concerned about measures to reduce the rate. Thus, according to Chief Steward Johnson, Dudero had called a meeting of the entire unit, told them that the error rate was getting out of sight and that something had to be done about it.

Although important to the resolution of this controversy as I view it, I cannot on this record reconstruct the order in which matters were discussed with any sense of certainty. It appears from the notes taken by both that attitude was the first matter brought up. However, from Huggins testimony and from the turn which the discussion took, Huggins apparently came to the meeting thinking the matter of the temporary promotions would be on the table. In fact, Dudero had called the meeting because it was the time for counselling about error rates and because she wished to discuss Huggins' attitude, especially after the incident(s) that morning. When Huggins arrived in the office, she asked about the temporary promotions, and was told that she was not there for any discussion of that, but for a counselling session about her attitude and her error rate. Turning to her attitude first, Dudero told her that when she is working in the unit she is an employee the same as any other employee, and that Dudero expected the same respect from her as from any other subordinate. She told her further that she was not to threaten her with what she would do if she did not receive a promotion or any other desired action. Dudero then shifted to Huggins' error rate, saying that it must be reduced to 7% by March 5. Huggins asked what would happen if she did not do it and was told it could mean adverse action. Huggins then informed Dudero that others in the unit, including permanent employees, had higher error rates, and demanded to know what Dudero intended to do about them. It is clear that Huggins thought she was being singled out, and likely that she said so. Dudero told her that she did not discuss Huggins with other employees and did not intend to discuss them with her. Then, in what Dudero took to be a deliberate misunderstanding of her words, Huggins replied that she could discuss whatever she wished with whomever she wished. In her notes (Union Exh. 1 and 6) Dudero again observed that Huggins does not listen attentively but rather concentrates on her own thoughts, and shows no desire or intention to improve. She also wrote that Huggins "has the worst attitude of any employee I have ever known". Dudero described Huggins' bad attitude during counselling as a rejection of errors brought to her attention as "nit-picking", as not having happened or as consistent with instructions. Huggins also allegedly demonstrated an unwillingness to focus on her problems, but rather turned to the problems of other employees, thus "trying to act as a policeman in the unit" and telling Dudero what to do.

At the end of the session Dudero remarked that she had worked with many people without having all of these problems. Huggins replied that Dudero only thought she was

without problems, that she in fact had many of them. Dudero asked what they were, and Huggins told her the only reason for her belief that she had no problems was that she had never had a Union steward working for her before. ^{8/} She then said she was not going "to let (Dudero) get by with anything". At Huggins' request an informal conference with her steward was arranged.

Sometime during the session Dudero presented Huggins with a copy of the Henderson appraisal and instructed her to read it and sign it. After initially refusing to sign, Huggins did so.

10. Complainant attempted to establish animus toward Huggins in her capacity as steward by attributing to Dudero the statement that she would "never have a union steward in her unit", and by showing that she reacted with irritation and hostility to phone calls placed to Huggins as steward. Thus Huggins testified that Dudero made such a statement. Dudero denied having done so, pointing out that she had in fact dealt with stewards before. Both Shirley Wilkes, a Union witness, and Earl Walker had previously served as stewards in that Unit. While Wilkes was apparently inactive, Walker testified that he took up Union matters with Dudero on two occasions. He said that she was fair and objective, and treated him with appropriate respect. Lillian Hyde and Shirley Wilkes allegedly witnessed the statement, but failed to confirm it. In the circumstances, I credit Dudero's denial. On the matter of the telephone, Evelyn York testified that Dudero's tone of voice would change when she called Dudero to the phone. Lillian Hyde testified that she was put off by the rude attitude manifested by Dudero when, after ascertaining that Hyde was calling from home, she asked Hyde whether her phone call to Huggins was on Union business. Dudero testified that she could not recall this incident, but explained that, because both taxpayers and revenue officers called her unit, it was her practice when answering calls placed to Huggins in the latter's absence, to inquire whether the call was on IRS business or Union business. She said that she did so because business callers could often have their inquiries answered in any event, and callers on Union matters could be referred to Johnson. No evidence was presented indicating that she ever inquired into the nature of calls about Union matters. Shirley Wilkes, a former steward,

^{8/} In fact at least two other employees preceded her as steward.

testified that Dudero's voice was raised when anyone got a lot of calls.

11. Huggins also alleged that the defect code, which would enable her to understand the nature of her errors and to take appropriate corrective action, was withheld from her until February. Given my understanding of operations this seems a most implausible claim. 9/ Reference to the code is routinely made when errors are found and returned. Defect codes are routinely issued to new employees, and there certainly existed no reason, early in her employment, to withhold such materials. I find it difficult to understand how she could work for six months unaware of the presence of the code and the need for it, and am persuaded by this and the testimony of Dudero and Stiger that she had the Code. In any event, it was not her high error rate as such, but her alleged attitude when counselled or otherwise instructed about it, which is at the heart of this case.

12. The Union called several witnesses in support of Huggins' view of her experience with Dudero. Thus Mary Myers, a signatory to the request for a meeting about the temporary promotions, expressed the belief that this "grievance" led to Huggins' trouble, and said there was no meeting because, after Huggins went on sick leave, they were too scared to pursue the matter. Evelyn York, also a signatory, testified that no meeting occurred, and said that Dudero seemed distressed by Huggins' Union activity. York was clearly influenced by her belief that Dudero threatened to terminate Huggins for insubordination in response to the latter's presentation of the temporary GS-5 grievance. That incident was in fact provoked by Huggins' failure to fill out the recall form. The recollections of Myers and York are also called into question by their statements that no meeting was held concerning the temporary promotions. Dudero's testimony that she held a meeting on March 1 is supported by Respondent Exhibit 3 and by Shirley Wilkes. I find that the meeting occurred.

13. On the crucial matter of Huggins' attitude when confronted with errors, employees Annie Stiger, Elizabeth Moore and Virginia Hall gave testimony damaging to her cause. Stiger, a GS-5, said that Huggins was at times "reluctant" to acknowledge errors brought to her attention and that her attitude was, in this respect, different from that of other em-

9/ Annie B. Stiger, a GS-5 who assisted in training Huggins, testified that she did have a defect code list. [continued on next page]

ployees. Stiger reported that she was sometimes argumentative when errors were brought back, or couldn't seem to understand her mistake. GS-6 Senior Tax Examiner Virginia Hall was briefly assigned in 1975 to help train Huggins because of her high error rate. She testified that Huggins often would offer excuses when shown her errors, asserting that she had never been told how to do it properly, or that she had missed a training session. Hall summed it up by saying that Huggins seemed to have the attitude, when shown errors, that you were picking on her and trying to hurt her. She also noted that Huggins had a tendency to repeat errors. Tax Examiner Elizabeth Moore trained Huggins in the beginning. She testified that Huggins was different from the other trainees in that she did not accept errors but offered excuses. Moore further testified that, in 1976, Huggins continued her practice of claiming that someone else told her to do her assignment the wrong way (to the point where Moore instructed her not to ask anyone else), or that she had never been told how to do it correctly. Moore said that Huggins was more hostile in such situations in 1976, and gave the impression that her mind was on something else. I am persuaded that, although Huggins was in many respects an eager and cooperative employee, anxious to do well, she was also a difficult employee because of an inability to acknowledge responsibility for errors. I conclude she was defensive about them, and focused her attention on excuses rather than on the effort to learn and apply correct procedures.

14. Dudero testified that she began her effort to terminate Huggins on February 20, the day after the counseling session which she had memorialized in Respondent Exhibit 6, in which she concluded that Huggins had the "worst attitude of any employee (she had) ever known". On March 16 the Center notified Huggins by letter that "it is necessary to terminate you...for disqualification during your probationary period for your uncooperative attitude toward your manager in your work. This attitude has been demonstrated on numerous occasions both in response to your manager's directions and counselling, and in regard to your work performance". The termination was to be effective on March 26, thus violating Article 30, Section 1(B) of the Multi-Center Agreement, which requires 15 days notice of termination. 10/

9/ - continued
Chief Steward Johnson testified that one was requested during the June 1975 grievance.

10/ Complainant attempts to exploit this fact, but I [continued on next page]

That notice was received by Huggins on March 19, the day before she left the hospital after an emergency cancer operation. Pursuant to Section 1(c) of MCA Article 30, through steward Johnson, Huggins submitted a written reply and requested opportunity to make an oral reply and postponement of her termination date. She also requested an extension of time in which to make her oral reply and the right to be represented by counsel. G.W. Grabo, Assistant Director of the Center denied these requests. He took the position that granting Huggins an additional 15 days pursuant to Article 30 would not have altered her appeal rights in any way, and that she had no right to counsel. The oral reply meeting took place on Friday, March 26. Huggins had in the meantime submitted her written reply, in which she asserted her Union activities had caused her termination, and Grabo had interviewed Dudero, Mr. Bret Creeze, the Chief of the Section and Mr. Bill McGoldrick, a Unit Supervisor in the same Section. Grabo heard Huggins' oral reply, and promised to conduct an investigation before making a decision. He made it clear that the "tone" of Huggins relationship with Dudero, and the question of who caused the bad feeling would be decisive to him. He then interviewed Virginia Hall and Elizabeth Moore. He testified that they confirmed Dudero's description of Huggins as unreceptive to criticism, antagonistic, and as appearing to "have it in" for supervisors. Satisfied that the problem was with Huggins' attitude toward supervision, Grabo promptly told the Labor Relations Section to advise Huggins that the termination decision would not be changed so as to avoid her reporting for work on Monday. Upon returning to her home, Huggins found a Form 50 Notification of Personnel Action (Joint Exhibit 1(c)), dated March 22, informing her that she was "terminated after receiving written notification of decision to terminate".... Complainant contends that this exposes the oral reply session as a charade, the final decision to terminate having preceded the discussion and the additional investigation. Respondent asserts that it altered nothing because Grabo retained the authority to modify or rescind the termination action. Thus the Form 50 Notification was confirmation of the decision to terminate, and Huggins' separation could not have been accomplished without it. I read the contract as contemplating service of

10/ - continued

am persuaded it is of no significance. Respondent's Exhibit 2 lists 14 probationary employees terminated during the 5 months preceding Huggins discharge. Only one received the required 15 days notice. None were shown to be the Union officials.

the papers reflecting a decision to terminate before the oral reply session occurs. I therefore reject the Union's argument that a purposeless meeting took place which fortifies its claim that Huggins was terminated for union reasons.

15. Assistant Director Grabo testified that, although Huggins' activities as steward played no role in the decision to terminate her he received "feedback" from managers other than Dudero to the effect that she used her union position against her supervisor. Thus he received the impression that she took advantage of her Union position to cause problems where there were none, to carry forward a personal vendetta under the guise of Union business, and to make Dudero look bad as a supervisor by aggravating and embarrassing her. In its Response to the Complaint, IRS said that "Huggins attempted to use her union position as an offensive weapon against management to allow her to ignore or thumb her nose at her supervisor when her supervisor attempted to counsel her. The fact that Huggins was a union steward did not exempt her from complying with the standards expected by management from all its employees. Huggins attempted to exempt herself and was terminated". Complainant argues that these matters constitute admissions that Huggins' union activities and her "attitude" as steward, in fact played a role in, and therefore tainted, the decision to discharge her.

16. While Huggins was a candidate for Chief Steward at the time of her removal, there is no evidence that management was aware of this fact until thereafter. Likewise, there is no evidence that Dudero was aware that Huggins had cancer when she decided that termination was the appropriate course of action. The evidence is to the contrary. I address this point because the Complainant strongly suggests that management heartlessly ignored the possibility that Huggins' actions might have been caused by emotional strain, and might have been excused or remedied in a less harsh way. Huggins in fact learned of the condition very shortly before the operation. Finally, there is no evidence of a general union animus on management's part at the Memphis Center.

Conclusions

The reference to Huggins' union activities in Supervisor Henderson's August 28, 1975, performance appraisal is clearly violative of 19(a)(1), notwithstanding my finding of its

innocent purpose, unless the charge filed on April 14, 1976 is considered untimely because more than six months had passed. The Federal Labor Relations Council (FLRC) has held that timeliness is measured from the date of the incident, rather than from the date a complainant gains knowledge of the incident, absent fraudulent concealment or other unusual circumstance. In Federal Aviation Administration, Western Region, San Francisco, California, FLRC No. 74A-27 (Report No. 55, 1974), the Council sustained the Assistant Secretary's dismissal, as untimely, of a complaint filed more than nine months after the activity sent written communications concerning complainant's union activities to the Civil Service Commission. In rejecting complainant's contention that the date of discovery should govern, the Council noted that he made "no showing, for example, that the written communications were retained in..(his)..personnel file, and thereby constituted a continuing unfair labor practice... that might warrant the granting of a "waiver" of the timeliness requirement." I would make on this record no finding that Respondent fraudulently concealed or otherwise willfully withheld the document. Rather I find it was simply prepared after Huggins was furloughed, and was forgotten until the counselling session revealed its presence and the obligation to show it to her. While the Council in FAA did not decide that retaining such materials in a file constitutes a continuing violation, it strongly suggests that such is the case. In Western Division of Naval Facilities Engineering Command, San Bruno, California, A/SLMR No. 264, the Assistant Secretary held such a remark in an appraisal form constituted a continuing violation where it was retained on file and was accessible into the period reached by the complaint. As the instant evaluation was retained in the file until at least February 19, 1975, less than two months prior to the charge, it follows that an actionable violation of Section 19(a)(1) occurred.

Resolution of the Section 19(a)(2) issue is difficult to articulate, notwithstanding my conviction that Huggins' Union activities did not lead to her termination, because her role as steward and her performance as an employee were almost simultaneously enmeshed in a developing personality conflict, with the hostility spilling over in both directions. The ultimate question is whether Huggins' stewardship played any part in the decision to terminate her, and it cannot fairly be said, on this record, that the growing conflict is entirely separable from her Union activities. Thus Huggins clearly irritated Duderio by the manner in which she

demanding a meeting about the temporary GS-5 promotions, as well as her failure to name the complaining employees. She irritated her even more when she brought the subject up again at the counselling session. Duderio was annoyed by Huggins "threat" to file a grievance over the refusal to promote her, although it is clear that Duderio was also annoyed by Huggins' assertion that she would not put up with the kind of treatment she had received the year before. Finally, Duderio was upset by what she took to be Huggins' posturing as a "policeman" in the unit, attempting to indicate that she, rather than Duderio, ran the unit.

On the other hand, it is obvious that Huggins, as an employee, severely tested Duderio's patience on many occasions. She did so particularly with her demonstrated inability to accept criticism constructively, by her refusal to fill out the furlough-recall card without first asking many questions, and by her taking notes rather than listening to what Duderio had to say. It is equally obvious that, at a time when Duderio was quite concerned about her unit's error rate, she became very angry with Huggins' reaction to the effort to counsel her. Huggins was unable to separate her role as an employee from her role as a steward, and insisted on focusing on employee problems when Duderio attempted to address her problems as an employee. Duderio reminded her that, as an employee, she was no different from other employees, and that the purpose of the counselling session was to seek improvement in her error rate rather than to talk about other employees. Huggins nevertheless wound up the session by telling Duderio that she had lots of problems as a manager, was ignorant of them only because she had never before had a steward, and that she (Huggins) would not let her get away with anything. She also accused Duderio of attempting to swear her to secrecy about the meeting. The upshot was Duderio's conclusion that Huggins was the worst employee she had ever had. This session, and the incident about the card, precipitated the decision to terminate. Because there was clearly much misunderstanding and considerable ambiguity in their communications, it is important to put these meetings in perspective.

That general perspective begins with two observations: that there is no credible evidence of Union animus, as such, on the part of the activity or Duderio, and that Huggins was a marginal employee in her probationary year. Thus, there is no suggestion that the Memphis Center's management was ill-disposed toward Union adherents or activists. On the contrary, it appears that a cooperative relationship existed

with the Union, and it was established that previous stewards in Duderero's unit were treated with courtesy and respect. On the matter of Huggins' performance, I find she was a marginal employee because she was on the bottom of the recall list. The earlier, relatively favorable ratings by Duderero are accorded little weight because I credit her testimony that she was aware of Huggins' need for employment and attempted to help her in the hope she would improve. The other evidence indicates a high error rate. It also very significantly indicates a developing personality conflict over a month before Huggins was appointed steward. That conflict featured Huggins' assertion, in her informal grievance of June, 1975, that Duderero had deliberately misled her about the rating she would receive. This display of attitude, the central issue here, postdated the evaluations. I am not persuaded by the Williams and Henderson evaluations that Huggins was a superior employee. She worked briefly for them, on different work. As Duderero testified, she was an eager employee, anxious to please. The real difficulty centered on her reaction to criticism. Neither Williams nor Henderson had a sufficiently long association with her to test that factor. The testimony of Stiger, Moore and Hall, who worked with her over a long period of time goes directly to this point, and describes an employee whose reaction to errors brought to her attention was negative and unproductive.

Thus the personality conflict had erupted before Huggins was designated steward. In addition, on the basis of appraisals which also antedated any Union activity, she was at the bottom of the furlough and recall list. Upon her return to work in February 1976, and again before any significant Union activity (during her very first week) a dispute developed over her eligibility for insurance. Huggins thought Duderero was wrong about the duration of her 1975 employment and was obviously concerned and suspicious about Duderero's explanation that she could not meet the requirement that there be a reasonable likelihood that she would work for six months in 1976. While Duderero's caution seems altogether sensible, and devoid of any improper motive, it is apparent that both her decision and Huggins' persistence in re-raising the matter contributed significantly to their deteriorating relationship.

On February 10 Huggins approached Duderero about the GS-5 promotions. As noted, Duderero was upset at Huggins' manner, feeling that she was being "told" to call a meeting, and at her refusal to name the complaining employees, which she regarded as a violation of the agreed-upon procedures for informal grievances. While refusing to take prompt action,

because the promotions had not taken place, Duderero did, after receiving a signed request from the employees, hold a meeting to explain the matter. On February 19 Huggins again asked about her health insurance and about a promotion, and another "personal" incident occurred which contributed to their growing alienation. Later that same day Huggins, by refusing to promptly fill out the furlough-recall card and by ignoring Duderero's request that she, in effect, stop writing notes and start listening to her supervisor, so provoked Duderero that she spoke of the possibility of termination for insubordination. Having been frustrated in her intention to counsel Huggins about her error rate by this development, Duderero called her later in the day to the Section Chief's office for more private counselling about her attitude and her error rate. She concluded, in evident exasperation, that Huggins was the most difficult subordinate she had ever attempted to supervise. That session and the earlier session that day, even as recounted by Huggins reveal an employee who sorely tested her supervisor with respect to her role as an employee. To repeat, she resisted the filling out of a simple form as unnecessary, she persisted in taking notes when her supervisor directed her to listen, and she kept focusing on the problems of the unit when her supervisor tried to deal with her shortcomings as an employee. All of this followed Virginia Hall's report that she was experiencing much difficulty in trying to deal with Huggins' errors, and occurred at a time when upper management had indicated its displeasure with the error rate in Duderero's unit. Concerned with securing prompt improvement, Duderero was met with Huggins' previously demonstrated attitude that she was being picked upon and treated differently from others, and a generally defensive reaction which precluded a useful discussion of her own shortcomings. The course of the discussion shows that Huggins, rather than acknowledging her errors and seeking guidance for purposes of improvement, sought to talk about everyone else. She persisted in doing so even after being reminded that she was there as an employee, and that the discussion was to be confined to her performance as an employee. I am persuaded that she went on to misinterpret Duderero's statement that Duderero did not discuss her problems with other counselled employees and would not discuss their problems with her as a command that she (Huggins) could not discuss the session with anyone else. Duderero understandably concluded that it was not possible to work constructively with her, and that she should be separated during her probationary year. It is clear that she was totally exasperated by Huggins' attitude.

I dwell on this at length because, as noted above, a discharge is tainted if motivated in any measure by a desire to be rid of a Union activist. I cannot conclude on this record that Dudero had any such purpose. Huggins' activity had consisted of presentation of the request for a meeting about the temporary promotions and a statement that she would not let Dudero get away with anything. The reference to a policeman in the unit was tied to Huggins' efforts, during the counseling session, to discuss the performance of other employees instead of focusing on her own. I find that Dudero was, indeed, annoyed by the manner in which Huggins presented the grievance, and by her persistence in bringing it up at an inappropriate time. I have also found that Dudero was far more greatly annoyed by Huggins' conduct, as an employee, at the meetings on February 19. Given the attitude displayed by Huggins, the marginal quality of her work, and the serious personality conflict which had arisen, abundant reason existed for her separation. Given also the fact that Dudero had peacefully coexisted with previous stewards, and had in no way indicated hostility toward the Union, I am not persuaded that her decision to recommend discharge was affected by the fact that Huggins was the steward, or brought an informal grievance to her attention, or threatened to keep her in line. While Dudero may have resented the manner in which these things were done, or the inappropriate use of a counselling session for such purposes, there exists no convincing evidence that she urged Huggins' separation on such grounds or even that she would be disposed to do so. I therefore recommend that the Section 19(a)(2) allegations be dismissed.

Recommendations

1. That the Section 19(a)(2) allegations of the complaint be dismissed.
2. That Respondent be found to have engaged in conduct proscribed by Section 19(a)(1), based on its supervisor's having commented about Huggins' union activity in a performance evaluation memorandum, and that, accordingly, the following Order, designed to effectuate the policies of Executive Order 11491, be adopted.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Memphis Service Center, shall:

1. Cease and desist from:
 - (a) Interfering with, restraining, or coercing Audrea Huggins, or any other employee, by inserting any remark or comment in any appraisal regarding the union activities of Audrea Huggins or any other employee.
 - (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.
2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:
 - (a) Require and instruct its supervisors not to insert any remark or comment in any appraisal regarding the union activities of Audrea Huggins or any of its employees.
 - (b) Expunge any reference to union activities made by the Respondent, if such reference exists, from the personnel file of Audrea Huggins or any other of its employees.
 - (c) Post at its facility at the Memphis Service Center, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Center Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulleting boards and other places where notices to employees are customarily posted. The Center Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.
 - (d) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of this Order as to what steps have been taken to comply herewith.

Dated: 21 661 1977
Washington, D.C.


JOHN H. FENTON
Administrative Law Judge

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce Audrea Huggins, or any other employee, by inserting any remark or comment in any appraisal regarding the union activities of Audrea Huggins or any other employee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of our employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

WE WILL require and instruct all of our supervisors that they shall not insert any remark or comment in any appraisal regarding the union activities of Audrea Huggins or any other employee.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor whose address is: 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. MERCHANT MARINE
ACADEMY, SHIP'S
SERVICE ORGANIZATION
A/SLMR No. 990

This case involved a petition for clarification of unit filed by the American Federation of Government Employees, AFL-CIO, Local 2116 (AFGE) seeking to determine the status of three employee classifications. The Activity contended that one of the employees was a supervisor within the meaning of Section 2(c) of the Order, and that the remaining two employees were confidential employees.

The Assistant Secretary found that the employee classified as Associate Buyer-Secretary was not a supervisor within the meaning of Section 2(c) of the Order, that the Secretary to the General Manager of the Activity was a confidential employee, and that the Bookkeeper of the Activity was not a confidential employee.

Accordingly, the Assistant Secretary clarified the unit consistent with his determinations.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. MERCHANT MARINE ACADEMY,
SHIP'S SERVICE ORGANIZATION

Activity

and

Case No. 30-07468(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2116

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Herschell Chanin. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief submitted by the Activity, the Assistant Secretary finds:

The Petitioner, the American Federation of Government Employees, AFL-CIO, Local 2116, hereinafter called AFGE, was certified on November 16, 1976, as the exclusive representative of a unit of all nonsupervisory employees assigned to Ship's Service Organization of the U.S. Merchant Marine Academy, Kings Point, N.Y., hereinafter called the Activity. In this proceeding, the AFGE seeks to clarify the status of the following three employees who the Activity contends should be excluded from the unit: Celia Rubenstein, Associate Buyer-Secretary; Marion Conroy, the Secretary to the General Manager of Ship's Service; and Lorraine Fishman, Bookkeeper of Ship's Service. The Activity contends that Rubenstein is a supervisor and that Conroy and Fishman are confidential employees.

The mission of the Merchant Marine Academy is to train individuals to serve as officers in the American Merchant Marine. The mission of the Activity (which is a nonappropriated fund activity) is to provide uniforms, textbooks and other government goods to the Midshipmen of the Academy. The Academy is one of five Federal academies operating under the Maritime Administration, which is part of the U.S. Department of Commerce. Organizationally the Activity is divided into the following stores: Cleveland Store, Uniform and Varsity Shop, Warehouse and the Bookstore.

With respect to the particular employees whose status is in dispute herein, I make the following findings and conclusions:

Celia Rubenstein, Associate Buyer-Secretary

The record reveals that Rubenstein works in the Cleveland Store along with three other employees to whom she makes routine work assignments within well established guidelines. In this connection, she realigns personnel in the store from one work area to another and trains new employees. However, the evidence establishes that she has not hired, fired, transferred, suspended, laid off, recalled, promoted, discharged, rewarded or disciplined employees, adjusted their grievances, or recommended such actions. Although it is contended that Rubenstein has the authority to review grievances it is acknowledged that her review of them would not necessarily be effective. Rubenstein reports to Mr. Yanovsky, the General Manager of the Activity, but does not attend the monthly staff meetings held by Yanovsky and Mr. Lewis, the head of Administrative Services and Procurement of the Academy.

Under the foregoing circumstances, I find that the evidence is insufficient to establish that Rubenstein is a supervisor within the meaning of Section 2(c) of the Order. Thus, as noted above, her assignment of work is routine in nature, within established guidelines, and does not require the use of independent judgment. Further, the evidence does not establish that she adjusts grievances or effectively recommends adjustment. Accordingly, I shall include the position of Associate Buyer-Secretary in the exclusively recognized unit.

Marion Conroy, Secretary to the General Manager of Ship's Service

The record reveals that Conroy is the personal secretary of Mr. Yanovsky, who is responsible for the supervision of the entire complement of employees in all four of the Activity's stores and, thus, is in charge of all the employees in the bargaining unit. In this capacity, he is involved in formulating and effectuating labor relations and management policy with respect to the Activity. In this regard, the parties stipulated that during the course of the past contract negotiating sessions Yanovsky actively participated on behalf of management and that he has a responsibility for effectuating labor-management policy in the Activity.

The evidence establishes that Conroy performs a variety of secretarial duties for Yanovsky, including acting as his principal secretary. In this regard, she is responsible for, and has access to, Yanovsky's personal files and employee personnel records. She prepares and types all of his correspondence, reviews all of his incoming mail, and has access to, and has typed, letters of promotion, discipline, removal and Yanovsky's personal notes on the aforementioned contract negotiations.

Under these circumstances, I find that Conroy acts in a confidential capacity to an official who is involved in the formulation and effectuation of the Activity's labor-management policies. Accordingly, I shall order that the Secretary to the General Manager of the Ship's Service be excluded from the exclusively recognized unit as a confidential employee.

Lorraine Fishman, Bookkeeper of Ship's Service

Lorraine Fishman is employed as the Activity's bookkeeper. She prepares financial surveys and reviews, prepares and maintains all Activity bookkeeping records. However, her access to personnel records is limited in that she only refers to them in connection with questions concerning financial matters. Although in her capacity as bookkeeper she has attended staff meetings concerning "financial" matters, Ms. Fishman testified that she has never attended staff meetings involving personnel matters. Her recommendations regarding the financial dispositions of budgets and surveys are subject to review and the record reflects that her recommendations on "buy-back" of sick leave and the duration of the annual plant-wide shut down were both rejected by the Activity.

Based on the foregoing, I find that the record fails to establish that Fishman serves in a confidential capacity to the officials who formulate and effectuate labor relations policies. Accordingly, I find that the Bookkeeper of the Ship's Service is not a confidential employee and should be included in the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the American Federation of Government Employees, AFL-CIO, Local 2116 on November 16, 1976, be, and it hereby is, clarified by including in said unit the Associate Buyer-Secretary and the Bookkeeper of Ship's Service, and by excluding from said unit the Secretary to the General Manager of Ship's Service.

Dated, Washington, D.C.

February 23, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. CUSTOMS SERVICE,
WASHINGTON, D.C.
A/SLMR No. 991

This case involved a petition for consolidation of units filed by the National Treasury Employees Union (NTEU) on behalf of itself and/or its constituent local chapters seeking to consolidate 12 units for which the NTEU and/or its constituent local chapters are the current exclusive representatives. Through the subject petition, the NTEU sought to establish a consolidated unit consisting of all professional and non-professional employees of the Customs Service in its national headquarters and offices of the Regional Commissioners, who are currently represented exclusively by the NTEU and/or its constituent local chapters. The Customs Service contended, essentially, that the NTEU was without standing to file the instant petition on behalf of one of its exclusively recognized local chapters as, among other things, the Executive Order requires that consolidation may be sought only by an exclusive representative and the NTEU had not, as a minimum, sought authorization from its exclusively recognized local chapter to file the present petition. Furthermore, the Customs Service asserted that the proposed consolidated unit was not appropriate because it did not meet the criteria established by Section 10(b) of the Order.

The Assistant Secretary found that the NTEU had standing to file the instant petition on behalf of its exclusively recognized local chapter. With respect to the appropriateness of the proposed unit, he noted that consistent with the Federal Labor Relations Council's clear policy guidelines on consolidation of units there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units. Given these policy guidelines, and based on the facts presented, he found that the consolidated unit petitioned for by the NTEU was appropriate for the purpose of exclusive recognition under the Order. Thus, he found that the employees in the unit sought share a common mission, common overall supervision, essentially similar work classifications and working conditions, and similar labor relations and personnel policies and practices. Under these circumstances, he concluded that the employees in the petitioned for consolidated unit share a clear and identifiable community of interest. The Assistant Secretary also found, in the light of the Federal Labor Relations Council's 1975 Report and Recommendations, that the record demonstrated that the proposed unit consolidation would promote effective dealings and efficiency of agency operations.

Accordingly, he directed an election in the consolidated unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. CUSTOMS SERVICE,
WASHINGTON, D.C.

Activity

and

Case No. 22-06810(UC)

NATIONAL TREASURY EMPLOYEES
UNION

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Jonathan Kaufman. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

The Petitioner, National Treasury Employees Union, hereinafter called NTEU, on behalf of itself and/or its constituent local chapters, seeks to consolidate 12 units for which the NTEU and/or its constituent local chapters are the current exclusive representatives. 2/ The petition, as amended at the hearing, includes all nonprofessional employees assigned to the Headquarters Office of the U.S. Customs Service with the exception of the Office of Investigations and the Office of Internal Affairs, all professional employees of the Office of Regulations and Rulings, all nonprofessional employees in Regions I, II, III, IV, V, VI, VII, VIII, and IX, and all professional employees in Regions II and IX.

Specifically excluded are all professional employees in Regions I, III, IV, V, VI, VII, and VIII, management officials, supervisors, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and all headquarters and field elements of the Office of Investigations and the Office of Internal Affairs. 3/

The NTEU is the exclusive representative of the Activity's employees in field and Headquarters offices in 12 exclusively recognized bargaining units. At present only 2 of its 12 units are covered by negotiated agreements, a unit of professional employees in the Office of Regulations and Rulings and a unit of nonprofessional employees in Region VII. The remaining units are now in the process of negotiating new agreements.

The Activity contends that the NTEU was without standing to file the instant petition on behalf of one of its exclusively recognized local chapters, NTEU Local 101, and that such chapter must jointly participate in, or give its authorization to, the filing of a unit consolidation petition which encompasses that chapter's certified unit. The Activity further asserts that the proposed consolidated unit is not appropriate because it does not meet the criteria established by Section 10(b) of the Order since the proposed unit is directly contrary to its existing organizational structure, lines of delegated authority, and the employees involved do not share a community of interest.

The mission of the Customs Service, which is an organizational component of the Department of the Treasury, is to assess, collect and protect revenues from import duties and taxes and to control carriers, persons, and articles entering into or departing from the United States in accordance with customs laws. In addition, the Customs Service enforces and/or administers over 400 State and Federal laws relative to international traffic and trade.

The Customs Service operates under the direction of the Commissioner of Customs who is appointed by the Secretary of the Treasury. The Secretary has delegated to the Commissioner of Customs his rights, powers and duties under the Tariff Act of 1930, as amended, as well as

1/ At the hearing, the Hearing Officer received into evidence, over the objection of the U.S. Customs Service, herein also called the Activity, Petitioner's Exhibit 3, an internal document containing the views of various Activity management officials concerning the propriety of a possible consolidation of units. As, in my view, such document is irrelevant and immaterial to the present proceeding, it was not considered in reaching the determination herein. Under these circumstances, I find that the Activity was not prejudiced by the ruling of the Hearing Officer.

2/ NTEU Chapter 101 is the exclusive representative for a unit of professional employees in the Activity's Office of Regulations and Rulings. The national NTEU is the exclusive representative for all other units herein.

3/ Although the transcript is unclear as to whether or not all professional employees of Region II were intended to be included in the petition, the record is clear that the parties understood and intended the petition, as amended at the hearing, to include all units currently represented by the NTEU, including all units in which elections or appeals involving the NTEU were pending, should the NTEU prove successful. Accordingly, as the NTEU, since the filing of the instant petition, has been certified as the exclusive representative of all professional and nonprofessional employees in Region II, and all nonprofessional employees in the Puerto Rico District Office, Region IV, these units will be included among those sought to be consolidated in the subject petition.

other laws, with express exceptions. The Assistant Secretary of the Treasury (Enforcement, Operations, and Tariff Affairs) has general supervisory authority over the Customs Service. The Assistant Secretary of the Treasury for Administration exercises direction over all general administrative functions, such as personnel, organization, and audit, etc. within the Treasury Department. The Chief Counsel of the Customs Service is under the general supervision of the General Counsel of the Treasury and is responsible to one of the Treasury Department's five Assistant General Counsels.

The Commissioner of Customs may prescribe certain internal regulations for the guidance of Customs Officers which are not inconsistent with regulations issued by the Treasury Department, and he may waive requirements of Customs Regulations in accordance with law. The Commissioner may also further delegate his rights and powers to his subordinates. The Commissioner is responsible for the implementation and administration of all Presidential directives and legislation relating to Customs. He also promulgates rules and regulations with the approval of the Secretary of the Treasury.

The Activity has two primary organizational levels, a Headquarters Office, located in Washington, D.C., and nine Customs regions located throughout the United States. The Headquarters Office consists of the Office of the Commissioner, the Deputy Commissioner and seven major organizational subdivisions, six of which are headed by an Assistant Commissioner who reports to the Deputy Commissioner. These six subdivisions are the Office of Administration, Office of Operations, Office of Investigations, Office of Regulations and Rulings, Office of Internal Affairs, and Office of Enforcement Support. The seventh office is the Office of the Chief Counsel.

The record reveals that the day-to-day operations of the Activity's Headquarters Office are essentially directed by the Deputy Commissioner and the various Assistant Commissioners. The Headquarters Office develops nation-wide policies and programs for the administration of Customs laws and provides overall direction for the Activity's field organization. The Assistant Commissioner (Administration) provides executive direction and leadership in the development, implementation, and evaluation of service-wide programs, policies, and procedures pertaining to, among other things, personnel management, position classification, training and career development, labor and employee relations, employment, equal employment opportunity (EEO), and headquarters personnel matters. He also exercises line supervision over all Headquarters Office of Administration personnel and activities. Working under the direction of the Assistant Commissioner, the Headquarters Office provides functional supervision and guidance to regional and other field personnel in all administrative matters. There are eight Divisions in the Office of Administration, among which is the Personnel Management Division. ^{4/}

^{4/} The other divisions include the Management Analysis Division, Logistics Management Division, Accounting Division, Budget and Planning Division, Equal Opportunity Division, Public Information Division, and Automatic Data Processing Division.

The Personnel Management Division is divided into the following six branches:

(1) The Position Classification and Pay Programs Branch is responsible for the direction of classification and wage administration in the Activity which includes the development of policies regarding allowances and differentials, classification standards and guides, hours of work, and leave administration.

(2) The Labor-Management Relations Program Branch is responsible for developing, planning, coordinating, budgeting and evaluating the labor-management relations program of the Activity. This office provides technical advice to management officials throughout the Service, interprets Executive Order 11491, as amended, regulations, and case law, and recommends Activity-wide policy in this connection. Its areas of responsibility include contract negotiations and administration, unfair labor practice cases, negotiated grievances and arbitration, mediation and impasse resolution, matters before the Federal Labor Relations Council, national consultations, unit determinations, matters before the Department of Labor, and coordination with the Department of the Treasury.

(3) The Employee Relations Program Branch is responsible for the direction, scope, and effectiveness of the employee relations and incentive awards functions of the Customs Service including, in part, agency adverse actions, grievance systems and appeals, EEO cases, disciplinary actions, incentive awards, insurance and health benefits, and recreation.

(4) The Staffing Programs Branch is responsible for the direction, scope and effectiveness of the staffing function in the Customs Service including, among other matters, appointments, details, overseas employment, probationary periods, employee rotation, skills inventory, EEO coordination, the merit promotion system, performance appraisals, evaluations, processing personnel actions, qualification standards, recruitment, reduction-in-force and outplacement, separations, special emphasis employment programs, special pay rate determinations and supervisory selection techniques.

(5) The Headquarters Personnel Branch develops, recommends and administers the Headquarters personnel management program including, in part, accessions, the merit promotion system, classification, personnel records, personnel actions, qualification standards, recruitment, labor and employee relations, reduction-in-force, separations, special pay scales, status of persons, special employment programs, and training.

(6) The Training and Career Development Branch is responsible for the development, implementation and evaluation of the training functions in Customs including the development and administration of a labor-management relations training program.

The Assistant Commissioner (Operations) provides executive direction and leadership over the development, implementation, evaluation and management of Activity-wide programs, policies and procedures pertaining to the major operational functions of the Activity which include, among other functions, the administration of a comprehensive program planning and budgeting system for the Office of Operations, including regional and district operations. The Assistant Commissioner (Operations) exercises line supervision over all Headquarters Office of Operations personnel and activities. Working under the direction of the Assistant Commissioner and his Deputy, the Headquarters Office provides functional supervision over regional and other field personnel in all operational matters.

There are four types of regional offices in each region: the Office of the Regional Director of Investigations, the Office of the Regional Director of Internal Affairs, the Office of the Regional Counsel, and the Office of the Regional Commissioner. ^{5/} The Offices of the Regional Commissioners, with the exception of Region II, are divided into Districts, Ports and Stations. Whereas headquarters personnel located at headquarters are under the immediate direction of the appropriate Assistant Commissioner, the field personnel, who implement the programs and policies of the Customs Service in the program areas under the jurisdiction of the National Headquarters Offices of Administration, Operations, Regulations and Rulings, and Enforcement Support, are assigned in each region to the Office of the Regional Commissioner. Each Regional Commissioner is directly responsible to the Deputy Commissioner. It appears that exclusively recognized units of regional personnel sought to be consolidated by the instant petition include only those employees assigned to, and under the direction of, the various Regional Commissioners in the nine regional offices.

The Regional Commissioners are responsible for the day-to-day operations of the Customs Service in their respective programmatic areas and for the implementation of the policies, programs and procedures established by the National Headquarters. They supervise the operations of the District Offices, Ports and Stations within their regions. The number of employees in the various regional units sought to be consolidated herein ranges from approximately 200 to approximately 2,800.

Whereas the majority of unit employees in the regional offices are operational employees, i.e. inspectors, import specialists, customs patrol officers, and agents, with the remaining employees being primarily clerical or administrative, most Headquarters Office nonprofessional employees are clerical or administrative employees. Fifty to sixty

^{5/} It appears from the record that the regional boundaries of the first three types of these offices are the same as those of the Regional Commissioners discussed below. National Headquarters Offices of Investigations, Internal Affairs, and Chief Counsel have their own regional and field offices which operate under their direct line authority.

percent of all bargaining unit positions receive training at the Customs Service Academy in Washington, D.C. In addition, training material prepared in the regions is often used nation-wide. The record reveals that some employees in various regions are called upon to conduct intensive enforcement efforts across regional lines based on plans developed in the Headquarters Office, and that other employees are detailed from one region to another to assist in handling seasonal variations of workload and are permanently reassigned between regions and between regions and headquarters. Because the nine Customs Regions encompass the United States, Puerto Rico, and the Virgin Islands, there are significant differences in climate and workload between the different regions. However, the record reveals that regional employees, especially in contiguous regions, share many similarities in duties, climate and working conditions.

In 1963, a Treasury/Customs Survey Group was commissioned to conduct an evaluation of the mission, organization, and management of the Activity and to make recommendations for improvement. The Survey Group reported, the following major findings: (1) Too many independent field activities were reporting directly to the Headquarters in Washington, D.C. to permit consistent and efficient direction; (2) there was a lack of unity of command over Customs work performed in a given port, district or geographic region, creating an absence of uniformity among areas with common problems; (3) there was a need for a better distribution of workload and responsibility; and (4) a different organizational structure was needed, with unity of command at all levels to assure tight management of all Customs responsibilities.

As a result of this report both the Activity's Headquarters Office and its field operations were restructured and consolidated, with regions being established to furnish greater operational and administrative unity to field operations. This reorganization was substantially completed in July 1966, and is reflected in the foregoing description of the Activity's organizational structure.

From the record, it now appears that line authority in the Customs Service for the field flows from the Commissioner and Deputy Commissioner directly to the Regional Commissioner, District Director, Area Director and Port Director. Assistant Commissioners do not have line authority over Regional Commissioners, but do exercise functional authority or supervision over regional and other field personnel regarding programs within their specialized areas. Functional officials, i.e. Assistant Commissioners, enunciate national policy and issue instructions, regulations and advice for the guidance of operations officials. While only line officials can take corrective action, a Customs official receiving instructions issued by either line or functional officials is nevertheless responsible for seeing that implementing instructions necessary to effective execution are issued and that all necessary steps are taken to determine that the instructions are carried out. Due to the number and complexity of the instructions which must flow from the Headquarters Office to the field offices, line officials in Headquarters review

and sign only the most important of these instructions. Functional officials are authorized not only to formulate (using their specialized knowledge and skills) but also to issue all the rest of the necessary instructions. 6/

The involvement of Department of the Treasury and Customs Headquarters in Custom's regional matters is demonstrated further by the location of approval authority for organizational changes in the Customs regions. The Assistant Secretary of the Treasury (Enforcement, Operations, and Tariff Affairs) must approve changes in the location of a regional or district headquarters, the establishing or abolishing of Ports of Entry and Customs stations, and the establishing, abolishing, or changing of boundaries of Customs regions or districts. Field changes involving geographic adjustments also normally receive advance approval from the Assistant Secretary of the Treasury for Administration. The Commissioner of Customs must approve any action which would result in the changing of functions, or the establishment or abolishment of regional headquarters offices and divisions, headquarters offices and divisions, district divisions, Office of Regional Director (Internal Affairs), and Internal Affairs field division, Service Headquarters branches, and Office of Investigations regional, district, and resident agent offices. The Commissioner of Customs has delegated to Regional Commissioners the authority to approve changing the functions of, or the establishment or abolishment of, branches, sections, and units in regions and districts over which they have line authority, provided that no organizational change conflicts with an organizational structure prescribed by higher authority. Assistant Commissioners have authority to change the functions of, or to approve the establishment or abolishing of, sections in units, both in Headquarters and the field over which they have line authority. Regional Commissioners and Assistant Commissioners, in the exercise of their line authority within certain limitations, have been delegated authority by the Commissioner to establish or abolish temporary and permanent positions over which they have line authority.

The record discloses that the Commissioner of Customs has specifically delegated most of his labor relations authority to the Director of the Personnel Management Division who is authorized (1) to act as the Customs' representative in dealing with the national headquarters of labor organizations; (2) to negotiate agreements covering Customs' headquarters employees in a bargaining unit consisting of employees under the supervision of more than one Assistant Commissioner, and

6/ The Customs Manual and other specialized manuals (i.e. personnel and organization) contain operating instructions for Customs officers to utilize in the performance of their duties. Additionally, an internal directives system is used to establish, amend, or clarify policy, organization, authority, responsibility, methods, and procedures within the Headquarters Office or throughout the field organization. Directives under this system are issued over the signature of the Commissioner or, where the Commissioner has so delegated the authority, by the six Assistant Commissioners.

multi-unit agreements; (3) to act as the final approving authority of all local agreements, subject to existing statements of Customs Service policy; (4) to represent the Customs' position in the representation matters, unfair labor practice cases, standards of conduct cases and other formal proceedings before the Department of Labor, the Federal Labor Relations Council and the Federal Service Impasses Panel (the Activity's General Counsel represents the Activity in these proceedings); (5) to consult, as appropriate, with labor organizations holding national consultation rights; and (6) to grant national consultation rights.

Regional Commissioners and Assistant Commissioners may, regarding a unit under their jurisdiction, (1) negotiate agreements after prior consultations with the Director, Personnel Management Division; (2) consult with local union officials regarding local issues; (3) grant exclusive recognition; (4) determine the appropriateness of bargaining units after consultation with the Director, Personnel Management Division; (5) conduct representation elections; (6) file unfair labor practice complaints, after consultation with the Director Personnel Management Division; and (7) request assistance of the Federal Mediation and Conciliation Service. The authority delegated to the Director, Personnel Management Division and Assistant Commissioners may be redelivered to the Chief, Labor and Employee Relations Program Branch.

The Customs Service has raised a threshold question that the NTEU is without standing to file the instant petition, which includes a headquarters unit of professional employees for which NTEU Chapter 101 is the exclusive representative. As indicated above, the National NTEU is the certified representative in the remaining units involved.

It has been held previously that there is nothing in the Order, the 1975 Report and Recommendations of the Federal Labor Relations Council, or the Assistant Secretary's Regulations, which requires the Assistant Secretary to challenge the constitutional authority of a national labor organization, such as the NTEU in the instant case, to file a unit consolidation petition on behalf of its exclusively recognized local chapters. 7/ While, under certain circumstances, it may be necessary to review the constitutional authority of a national labor organization to take such action where the constitution of the labor organization is unclear in this regard or appears to delimit such authority, there is no contention herein, nor does it appear, that the Constitution and Bylaws of the NTEU preclude the NTEU from filing a unit consolidation petition on behalf of one of its constituent local chapters. Accordingly, I find that the NTEU has standing to file the instant petition for itself and on behalf of one of its exclusively recognized local chapters.

7/ See Internal Revenue Service, Washington, D.C. A/SLMR No. 831 (1977), and Internal Revenue Service, Washington, D.C. A/SLMR No. 853 (1977).

With respect to the appropriateness of the proposed consolidated unit, the Customs Service contends that it is an essentially decentralized organization which has delegated primary authority for those decisions concerning the terms and conditions of employment of its employees to its line managers at each level of its organization. In this regard, the record shows that all the Assistant Commissioners (with respect to Headquarters affected employees) and the Regional Commissioners have been delegated and effectively exercise day-to-day authority with respect to such matters as hiring, firing, transfer, intra-regional or office reassignment, promotion, reduction-in-force, furloughing, classification of positions (up to GS-14), discipline, the utilization of WAE or intermittent employees, overtime, safety, outside employment, awards and employee counseling. Regional Commissioners and Assistant Commissioners also exercise labor relations authority which enables them to grant recognition, file unfair labor practice complaints, grant administrative leave or official time to union officials, resolve grievances, approve the use of bulletin boards, and negotiate collective bargaining agreements. Furthermore, the record shows that only a small number of Activity employees receive either temporary details or permanent reassignments/promotions between Customs regions and that the effective areas of consideration for both reduction-in-force procedures and promotions are Region-wide. Based on these considerations, the Customs Service argues that consolidation will require the centralization of its decision-making authority with respect to all matters affecting employee terms and conditions of employment and adversely affect effective dealings and efficiency of agency operations.

It has been held previously that in view of the clear policy guidelines in the consolidation of units area set forth in the 1975 Report and Recommendations of the Federal Labor Relations Council, which accompanied the issuance of Executive Order 11838, there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units. 8/ In this context, and based upon all the foregoing circumstances, I find that the proposed consolidated unit is appropriate for the purpose of exclusive recognition under the Order in that it meets the three unit criteria set forth in Section 10(b). Thus, I find that the employees in the unit sought, consisting of all employees currently represented exclusively by the NTEU in a number of existing bargaining units, enjoy a clear and identifiable community of interest in that they share a common mission, common overall supervision, essentially similar job classifications and working conditions, and similar personnel and labor relations policies and practices.

The Activity's contention that consolidation will result in the centralization of its decentralized decision-making authority with respect to employee terms and conditions of employment must be examined in the context of the substantial degree of Headquarters Office involvement already being exercised in those areas. The record in this case contains over 2,000 pages of testimony and over 700 exhibits. The exhibits appear to include almost every Customs regulation and directive

8/ See Education Division, Department of Health, Education and Welfare, Washington, D.C.. A/SLMR No. 822 (1977).

applicable to matters affecting employee terms and conditions of employment. Of particular interest has been the Customs Organization Manual, the Customs Personnel Manual, the Merit Promotion Plan, and various directives dealing with delegations of authority to Regional Commissioners and Assistant Commissioners. These exhibits demonstrate that while Regional Commissioners and Assistant Commissioners exercise extensive day-to-day authority over their employees with respect to hiring, firing, transfer, promotion, reduction-in-force, discipline, etc., this authority is limited by Headquarters budgetary and administrative directives prescribing the circumstances and the procedures that must be used and/or considered prior to the exercise of that authority. Additionally, it is noted that the Director of the Personnel Management Division, Office of Administration, presently is delegated authority to deal with the national headquarters of labor organizations and to negotiate agreements covering Customs Headquarters employees in a bargaining unit consisting of employees under the supervision of more than one Assistant Commissioner, and multi-unit agreements, and that Regional Commissioners and Assistant Commissioners, under existing delegations of authority, may now negotiate agreements, determine the appropriateness of bargaining units, and file unfair labor practice complaints only after prior consultations with the Director, Personnel Management Division. Under these circumstances, I view it as highly improbable that a unit nation-wide in scope and an agreement negotiated at the national level of the Activity would have a significant impact on the Activity's current methods of decision-making and policy formulation.

Consequently, I find from the facts presented, and in the light of the Federal Labor Relations Council's clear policy pronouncements, that the proposed unit consolidation will promote effective dealings and efficiency of agency operations. Thus, in my opinion, national negotiations in the Customs Service will provide the parties with the opportunity to resolve labor-management relations matters which are national in scope and which require uniform application. Moreover, a national agreement derived from national bargaining will tend to be more cost effective by allowing the negotiation of employee terms and conditions of employment and personnel policies and practices on a national basis. Further, national negotiations within the Customs Service will permit direct, face-to-face access by the NTEU to representatives of the Activity at the national level and to the considerable scope of personnel concerns which are controlled at that level; it will tend to promote consistency and uniformity in negotiated terms and conditions of employment, and in their administration; 9/ and it will tend to promote predictability in budgeting and manpower planning as they relate to negotiated provisions.

9/ Lack of uniformity and inconsistent administration of negotiated terms and conditions of employment were cited by the NTEU as major employee concerns. Additionally noted is the fact that no evidence was presented to show that the Activity could not consult with its field personnel concerning negotiations on regionally sensitive issues with the NTEU at the national level, or that an agreement negotiated at the national level would interfere with the Activity's discretion to delegate to field level managers certain authority, such as the resolution of grievances and the scheduling of meetings with local union representatives, to deal with local problems. Cf. AFGE Council of Prison Locals. FLRC No. 76A-38 (1977).

Finally, the petitioned for consolidated unit, which provides for bargaining in a single, rather than in the existing 12 bargaining units, will reduce unit fragmentation and promote a more comprehensive bargaining unit structure, which is consistent with the policies of the Order.

Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended: 10/

All professional employees assigned to the Office of Regulations and Rulings and Regions II and IX, and all nonprofessional employees assigned to the Headquarters Office and Regions I, II, III, IV, V, VI, VII, VIII, and IX of the U.S. Customs Service, excluding all employees assigned to the Office of Investigations and the Office of Internal Affairs, all other professional employees assigned to the Headquarters Office and to Regions I, III, IV, V, VI, VII and VIII, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, guards, and supervisors as defined in the Order.

The Activity requested that in the event the proposed consolidated unit was found appropriate, an election be held to determine whether or not the employees involved desire to be represented in the proposed consolidated unit by the NTEU. As noted above, the unit found appropriate includes professional employees. However, the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I shall, therefore, direct that separate elections be conducted in the following voting groups:

Voting group (a): All professional employees assigned to the Office of Regulations and Rulings and to Regions II and IX, of the U.S. Customs Service, excluding all nonprofessional employees, all employees assigned to the Office of Investigations and the Office of Internal Affairs, all other professional employees assigned to the Headquarters Office and to Regions I, III, IV, V, VI, VII and VIII, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, guards, and supervisors as defined in the Order.

Voting group (b): All nonprofessional employees assigned to the Headquarters Office, and to Regions I, II, III, IV, V, VI, VII, VIII and IX of the U.S. Customs Service, excluding all professional employees,

10/ Insofar as the actual state of the exclusively recognized units at the time of the consolidation election may differ, if at all, from the unit found appropriate herein, the unit description should be so modified.

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all employees assigned to the Office of Investigations, and the Office of Internal Affairs, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, guards, and supervisors as defined in the Order.

Employees in the nonprofessional voting group (b) will be polled whether they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the National Treasury Employees Union.

Employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the National Treasury Employees Union, and (2) whether they desire to be represented in a separate consolidated professional unit if the proposed consolidated unit is approved by a majority of all the employees voting.

The valid votes cast by all the eligible employees will be tallied to determine if a majority of the valid votes have been cast in favor of the proposed consolidated unit. If a majority of the valid votes have not been cast in favor of the proposed consolidated unit, the employees will be taken to have indicated their desire to continue to be represented in their current units of exclusive recognition. If a majority of the valid votes are cast in favor of the proposed consolidated unit, the ballots of the professional employees in voting group (a) will then be tallied to determine whether they wish to be included in the same consolidated unit with the nonprofessional employees. Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same consolidated unit as the nonprofessional employees, the professional employees will be taken to have indicated their desire to constitute a separate consolidated professional unit, and an appropriate certification will be issued by the Area Administrator.

The unit determination in the subject case is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find the following units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees assigned to the Office of Regulations and Rulings and to Regions II and IX of the U.S. Customs Service, excluding all nonprofessional employees, all employees assigned to the Office of Investigations and the Office of Internal Affairs, all other professional employees assigned to the Headquarters Office and to Regions I, III, IV, V, VI, VII and VIII, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, guards, and supervisors as defined in the Order.

- 12 -

March 1, 1978

(b) All nonprofessional employees assigned to the Headquarters Office, and to Regions I, II, III, IV, V, VI, VII, VIII, and IX of the U.S. Customs Service, excluding all professional employees, all employees assigned to the Office of Investigations and the Office of Internal Affairs, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, guards, and supervisors as defined in the Order.

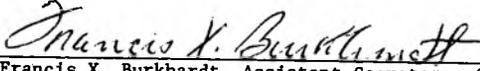
2. If a majority of the professional employees votes for inclusion in the same consolidated unit as the nonprofessional employees, I find the following unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional employees assigned to the Office of Regulations and Rulings and Regions II and IX, and all nonprofessional employees assigned to the Headquarters Office and Regions I, II, III, IV, V, VI, VII, VIII, and IX of the U.S. Customs Service, excluding all employees assigned to the Office of Investigations and the Office of Internal Affairs, all other professional employees assigned to the Headquarters Office and to Regions I, III, IV, V, VI, VII and VIII, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, guards and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the voting groups described above, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the National Treasury Employees Union.

Dated, Washington, D.C.
February 23, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL AVIATION ADMINISTRATION
A/SLMR No. 992

This case involved an unfair labor practice complaint filed by the Professional Air Traffic Controllers Organization (PATCO) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally altering the basic watch schedule without first negotiating with PATCO. The Respondent contended that the parties' negotiated agreement called for consultation only prior to any changes in the basic watch schedule and that consultation had, in fact, occurred. The Respondent further argued that Section 19(d) of the Order barred processing of the complaint herein.

The Administrative Law Judge found the matter of the basic watch schedule to be negotiable within the meaning of Section 11(a) of the Order, but concluded that the parties had contractually limited the bargaining obligation to one of consultation. He further found that consultation had occurred and recommended dismissal of the complaint. The Administrative Law Judge was unable to determine whether grievances which had been filed by local PATCO representatives raised the same issue as that raised in the complaint.

The Assistant Secretary adopted the Administrative Law Judge's recommendation that the complaint be dismissed, noting that in view of the disposition, he found it unnecessary to pass upon the negotiability of the basic watch schedule.

UNITED STATES DEPARTMENT OF LABOR

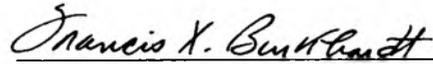
IT IS HEREBY ORDERED that the complaint in Case No. 22-7440(CA) be, and it hereby is, dismissed.

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

Dated, Washington, D.C.
March 1, 1978

FEDERAL AVIATION ADMINISTRATION

Respondent


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

and

Case No. 22-7440(CA)

PROFESSIONAL AIR TRAFFIC
CONTROLLERS ORGANIZATION

Complainant

DECISION AND ORDER

On October 14, 1977, Administrative Law Judge Robert J. Feldman issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and the Respondent filed an answering brief to the Complainant's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in the subject case, including the Complainant's exceptions and the Respondent's response thereto, I hereby adopt the Administrative Law Judge's findings, conclusions 1/ and recommendation. 2/

1/ Cf. U.S. Army School/Training Center, Fort Gordon, Georgia, 2 A/SLMR 201, A/SLMR No. 148 (1972). In view of the disposition herein, I find it unnecessary to pass upon the Administrative Law Judge's conclusion that the issue of the basic watch schedule is a negotiable matter within the meaning of Section 11(a) of the Order.

2/ In reaching the disposition herein, it was considered unnecessary to pass upon the Administrative Law Judge's comments on page 8 of his Recommended Decision concerning what he considered to be "the heart of the dispute" herein.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



FINDINGS OF FACT

.....
In the Matter of :
PROFESSIONAL AIR TRAFFIC :
CONTROLLERS ORGANIZATION :
Complainant :
and :
FEDERAL AVIATION ADMINISTRATION :
Respondent :
.....

Case No. 22-07440(CA)

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Federal Aviation Administration
Washington, D.C. 20591
For the Respondent

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION

This is an unfair labor practice proceeding in which a formal hearing of record was held pursuant to Executive Order 11491 as amended (hereinafter referred to the Order) and 29 CFR Part 203.

Respondent is charged with violating Sections 19(a) (1) and 19(a) (6) of the Order by unilaterally changing watch schedules for employees in the bargaining unit without meeting and conferring (i.e., negotiating) with the exclusive bargaining representative on the new watch schedules or the impact thereof upon the work force. Upon all the evidence adduced, my observation of the witnesses, and my judgment of their credibility, I make the findings of fact and reach the conclusions of law set forth below.

1. Complainant is the exclusive bargaining representative in the unit consisting of Air Traffic Control Specialists, GS-2152 series, employed at Respondent's air traffic control towers, air traffic control centers and combined-station-towers. It does not have national consultation rights.

2. At each of the Respondent's facilities, the hours of work and the work shifts of the air traffic controllers are determined in a basic watch schedule. Individual employees are then assigned periodically to the watch schedule, shifts being rotated or otherwise varied among employee groups or teams.

3. Article 5 of the negotiated agreement between the parties provides

Article 5--Changes In Agreement
And Past Practices

Section 1. It is agreed that personnel policies, practices and matters affecting working conditions which are within the scope of the Employer's authority will not be changed or implemented without prior negotiations when they are in conflict with this agreement.

Section 2. The parties agree to consult prior to implementing changes in personnel policies, practices and matters affecting working conditions that are within the scope of the Employer's authority and that are not specifically covered by this agreement.

4. Article 33 of the negotiated agreement provides in pertinent part as follows:

Article 33--Watch Schedules and Shift
Assignments

Section 1. Basic watch schedule is defined as the days in the week, hours of the day, rotation of shifts and change in regular days off. Assignments of individual employees to

the watch schedule are not considered as changes in the basic watch schedule. The basic watch schedule will not be changed without prior consultation with the Union. In developing the basic watch schedule the Facility Chief shall meet with the principal facility representative and carefully consider his views and recommendations concerning the schedule. The objective of this meeting or meetings shall be to carefully and thoroughly examine the alternatives and options available as suggested by the principal facility representative.

5. Prior to July, 1976, Respondent had required air traffic controllers to report for "pre-duty briefing" a sufficient amount of time before the start of the shift to acquaint themselves with prevailing conditions pertaining to the functions to which they were assigned. Although this practice necessitated the spending of time on the job in addition to the customary eight-hour shift, the employees had not been compensated therefor.

6. In April, 1976, Respondent notified its facility managers that in compliance with the Fair Labor Standards Act (FLSA) all overtime must be paid; that it would be necessary that supervisors insure that all overtime work is assigned and performed in increments of six minutes; that pre-duty briefing, called "duty familiarization", will be considered as "clock time" and therefore will require compensation; that the most practical method to reduce overtime costs relative to "duty familiarization" is the establishment of overlapping shift schedules which will minimize overtime costs and will additionally provide time for briefing and meetings away from the control areas; and that consultations with unions, at the local level, should be initiated as soon as possible.

7. Thereafter Complainant's local presidents or facility representatives were advised by Respondent's facility managers of proposed new watch schedules, which were prepared in response to Respondent's directives as to compliance with FLSA requirements.

8. Complainant advised its facility representatives that with respect to a new watch schedule, facility managers were

required under the Executive Order to negotiate rather than consult; that to engage in any discussion, it was necessary to have the FLSA Law, a copy of the General Notice (GENOT) distributed to all facilities on Implementation of the Fair Labor Standards Act, and the Civil Service Directives as to procedures on such implementation; and that upon refusal to furnish such documentation, grievances should be filed individually, rather than as union grievances.

9. Early in June, 1976, Complainant's Director of Labor Management Relations wrote to Respondent, calling attention to the fact that requests of local representatives for the above documents had been refused, and making a further request at the national level for information as to the FLSA Law or Civil Service Directive which mandates management to change watch schedules.

10. Respondent thereafter advised Complainant that neither the Law nor the Regulations of the Civil Service Commission explicitly dictate any specific action to change shift patterns, but they require payment of overtime in situations which in the past were not compensable. As a result, facility chiefs had been instructed to review watch schedules and to consult with union representatives before making any changes deemed necessary to minimize overtime costs associated with implementation of FLSA.

11. When new watch schedules were finalized and announced or put into effect, numerous grievances were filed at the local level, and on June 29, 1976, Complainant by its General Counsel issued an unfair labor practice charge against Respondent. This proceeding ensued.

12. At diverse times during the months of April, May and June, 1976, proposed new watch schedules were submitted to the local union president or facility representative at the Atlanta Air Traffic Control Tower, the Atlanta Air Route Traffic Control Center, the Baltimore Air Traffic Control Tower and Cleveland Air Route Traffic Control Center, among others. The facility chiefs asked the union representatives for their comments or suggestions and invited their consultation prior to putting any of such new watch schedules into effect.

13. Though their requests for the documentation suggested by the national office were denied, union facility representatives made objections, oral or written, to the proposed watch schedules or made counter proposals, a few of which were reflected in the final schedules put into effect.

14. A number of grievances were filed individually at the local level by facility representatives and other employees, pertaining to the new watch schedules or to overtime compensation for duty familiarization. Neither counsel having seen fit to introduce a copy of any grievance filed and the testimony thereon being imprecise and indecisive, no finding can be made as to whether the grievances raised the same issue as that presented here.

15. Respondent instructed its facility chiefs to consult with union representatives about the proposed new watch schedules. It did not instruct them to negotiate or to meet and confer.

16. In April, 1975, during the course of negotiation of the collective bargaining agreement, representatives of the parties discussed the 1975 report of the Federal Labor Relations Council on The Obligation to Negotiate, particularly in its effect upon Article 5 and Article 33. Neither of those Articles was changed as a result of the discussion.

17. Article 72 of the negotiated agreement dealing with FLSA Amendments was revised in 1976 without specific reference to watch schedules.

CONCLUSIONS OF LAW

On the surface, the controversy here appears to be largely a question of semantics. Did the Respondent's facility chiefs "negotiate" with union representatives over the proposed new watch schedules? Or did the chiefs "consult" with them prior to putting the schedules into effect?

The 1975 FLRC Report equates the obligation "to meet and confer" with the obligation "to negotiate". "Consultation" is required only where the union has national consultation rights under Section 9 (not here applicable). The change in watch schedules was a change in matters affecting working conditions, with respect to which there had been some question as to whether prior negotiation was required under the Order. In that regard, however, the FLRC made its position clear:

The Assistant Secretary, when faced with this issue in a case, concluded that the Order does require adequate notice and an opportunity to negotiate prior to changing established personnel

policies and practices in matters affecting working conditions during the term of an existing agreement unless the issues thus raised are controlled by current contractual commitments, or a clear and unmistakable waiver is present. We believe that the Assistant Secretary's conclusions on this matter is correct and, therefore, no change in the Order is warranted in this regard. 1975 FLRC Report, p. 42 (emphasis supplied).

At page 43-44 of its Report, the FLRC restates the rule as follows:

The parties to exclusive recognition have an obligation to "negotiate" rather than to "consult" on negotiable issues unless they mutually have agreed to limit this obligation in any way. (Emphasis supplied.)

Applying the above principles to the facts at hand, I conclude: that the change in work hours reflected in the new watch schedules was not integrally related to and consequently not determinative of the staffing patterns of the Respondent; that the purpose of the change was merely to minimize overtime under FLSA standards; and that being a matter affecting working conditions, the proposed watch schedule was a negotiable item within the meaning of Section 11(a) of the Order. See Southeast Exchange Region of the Army and Air Force Exchange Service Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656.

It is not disputed that there is a difference between the obligation to negotiate and the obligation to consult, the former requiring a good faith effort to reach agreement, and the latter requiring only genuine consideration of opposing viewpoints before making a determination. Thus in agreeing "to consult" prior to implementing changes affecting the working conditions referred to in Article 5, Section 2, and in agreeing pursuant to Article 33, Section 1, that the basic watch schedule would not be changed without "prior consultation", both parties, the Complainant as well as the Respondent, stipulated to something less than the negotiation required under the Order.

Prior to the 1975 FLRC Report, it was held that similar provisions in a negotiated agreement did not constitute a

clear and unmistakable waiver of a right granted under the Order. See NASA, Kennedy Space Center, A/SLMR No. 223. The question of waiver may not be determinative of the case at hand, however, in view of the Council's exception for mutual agreements to limit the obligation to negotiate.

Complainant contends, in effect, that even if the provisions of Article 5 and 33 constituted a waiver, Respondent is estopped from asserting any such waiver because of an alleged representation by Respondent's Deputy General Counsel to the effect that he would not permit his client to assert a waiver of Complainant's rights under the Order. The evidence as to the making of the alleged representation and as to reliance thereon by Complainant is conflicting and inconclusive. But assuming that there was no effective waiver, can we change an express agreement to consult into an implied agreement to negotiate?

Aside from possible proscription under the Parol Evidence Rule, the discussions of Articles 5 and 33 held in April, 1975, did not in fact alter the terms that had been tentatively agreed upon and that were embodied in the executed agreement. In Article 5, the nature of the obligation in respect to matters in conflict with the agreement and those not specifically covered by the agreement is plainly differentiated in Sections 1 and 2 respectively. If the parties meant consultation to be the same as negotiation, there would be no purpose in having two separate sections. In Article 33, Section 1, the nature of the obligation of prior consultation is spelled out in considerable detail, leaving no doubt that the parties contemplated something less than negotiation. There was no ambiguity in the written provisions, and the evidence as to the conversations in April, 1975, falls far short of proving a bilateral agreement to modify those provisions, which clearly limited the obligation to negotiate.

All in all, I must conclude that Complainant has failed to establish by a fair preponderance of the credible evidence that Respondent failed to discharge its obligations with respect to the proposed watch schedule changes under the provisions of the negotiated agreement between the parties or under the provisions of the Order as construed by the Federal Labor Relations Council. Considering the testimony as to the changes made in the proposed watch schedules after conferring with union facility representatives at the Atlanta Tower and the Baltimore Tower, and as to the facility chief's calling a meeting "to negotiate" the implementation of FLSA at the

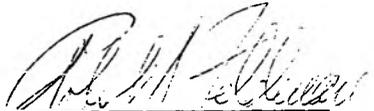
Atlanta Air Route Control Center, there might even be some question whether Complainant has sustained the burden of proving that Respondent failed to negotiate.

Going behind the legalisms that customarily becloud the real center of controversy, it is not unreasonable to infer from the evidence adduced that the basic problem is not the new watch schedules per se. Without impugning the motives of anyone, it is apparent that the requests for documentation were purely tactical and that the question of what time an air traffic controller reported for work on a given day was only incidental to the prime question of how much overtime he was to be paid. While the gravamen of this proceeding is said to be Respondent's alleged failure to negotiate or consult on the changed schedules, the heart of the dispute appears to be its failure to pay for more than six minutes of overtime for duty familiarization. While the quantum of overtime compensation is understandably a matter of grave concern to both parties, it is not within the purview of the Order. I find no violation of Section 19(a)(1) or Section 19(a)(6).

In view of the foregoing conclusions on the merits, and in view of the unsatisfactory state of the record with respect to the precise nature of the grievances filed and the relief requested therein, I find it neither necessary nor appropriate to make a determination or recommendation on the issue of whether consideration of this case as an unfair labor practice is precluded by Section 19(d) of the Order.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, I recommend that the complaint herein be dismissed in its entirety.


ROBERT J. FELDMAN
Administrative Law Judge

Dated: October 14, 1977
Washington, D.C.

RJF/mml

March 1, 1978

A/SLMR No. 993

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

SMITHSONIAN INSTITUTION,
NATIONAL ZOOLOGICAL PARK
A/SLMR No. 993

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 185, AFL-CIO (AFGE) alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by implementing a change in the interpretation of the Respondent's regulations concerning enforcement by unit employees of the Respondent's policy regarding the public consumption of alcohol on the Respondent's premises, without giving the AFGE notice and an opportunity to bargain over the impact and implementation of the change.

The Administrative Law Judge found that the Respondent had not violated Section 19(a)(1) and (6) of the Order. He concluded, among other things, that the AFGE had notice and ample opportunity to bargain on the impact and implementation of the change in the interpretation of enforcement policy, but had not requested such bargaining. Accordingly, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SMITHSONIAN INSTITUTION,
NATIONAL ZOOLOGICAL PARK

Respondent

and

Case No. 22-7450(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 185, AFL-CIO

Complainant

DECISION AND ORDER

On August 3, 1977, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 1/

1/ Under the circumstances herein, I find it unnecessary to pass upon the conclusion of the Administrative Law Judge, set forth on page 9 of his Recommended Decision and Order, that because the memorandum of April 13, 1976, did not, in his view, involve matters within Section 11(a) of the Order, there would be no obligation to bargain concerning its impact. In this regard, however, it is noted the Administrative Law Judge found, in fact, that the Complainant was given sufficient notice of the purported change but failed to request bargaining on impact and implementation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-7450(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 1, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



..... :
In the Matter of :
SMITHSONIAN INSTITUTION, :
NATIONAL ZOOLOGICAL PARK :
Respondent :
and : Case No. 22-7450(CA)
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, LOCAL 185, AFL-CIO :
Complainant :
..... :

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For the Complainant

Mr. Richard G. Hamilton
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For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). It was initiated by a charge filed on, or about, June 15, 1976, and a Complaint filed on August 30, 1976 (Asst. Sec. Exh. 1). Notice of Hearing issued January 24, 1977 (Asst. Sec. Exh. 2), pursuant to which a hearing was duly held before the undersigned on March 29, 1977, in Washington, D.C.

Local (also referred to as "Lodge") 185 is the exclusive bargaining representative of all employees of the National Zoological Park Police Division, except supervisory positions of Captains, Lieutenants and Sergeants, and a collective bargaining agreement was duly entered into on November 1, 1967, pursuant to E.O. 10988, the predecessor to the Order, and is still in full force and effect.

The Complaint alleged violations of Sections 19(a)(1) and (6) of the Order as the result of two actions: a) Implementing a change on April 13, 1976, in the interpretation of Agency Regulations concerning enforcement by unit employees of Respondent's public alcohol consumption policy without giving Local 185 reasonable notice of the proposed change or the opportunity to negotiate; and b) the establishment of a work shift in violation of Article XXI of the Agreement of November 1, 1967; however, the issue of shift change was not included in the Acting Regional Administrator's letter of January 24, 1977 (Asst. Sec. Exh. 3) and Complainant announced at the hearing that the allegation concerning the shift change was no longer involved. The matter of shift change was not litigated and will, therefore, be deemed to have been abandoned.

All parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues and briefs, timely filed, have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations:

FINDINGS

1. The April 13, 1976, Memorandum.

On April 13, 1976, Captain Middleton, Chief of the Zoological Park Police Force, issued the following memorandum to all members of the Zoological Park Police Force:

"Subject: Public Drinking (Beer)
Enforcement Policy

"The panda house roof cafe is dispensing beer in clear plastic containers with a 'mug logs'. Some patrons, after making purchases, are wandering away from the area of the cafe into the buildings or to other areas of the Park.

"Until further notice, police officers will not pursue public drinking statues

unless an obviously marked bottle or can is displayed or individual(s) is (are) unquestionable inebriated. (Here, I am sure FONZ personnel would not continue to serve a patron in that condition.)

"Mike Gill, FONZ, gave assurance that signs would be obtained cautioning patrons to restrict their movements to the cafe area while imbibing their beverage (beer)." (Comp. Exh. 1)

2. Complainant's Position Prior to Filing the Charge on June 15, 1976

Officer Ellerbe, President of Local 185 in April, 1976, testified that prior to April 13, Chief Middleton called him in and told him that a memorandum, such as that issued on April 13, 1976, would be coming out in a couple of days; that Chief Middleton told him the contents of the memorandum; that he, Ellerbe, told Chief Middleton he would have to talk to the men and see what they say; and that he, Ellerbe, talked to the men and they objected to the contents of the memorandum, or, more correctly, they objected to "pop stops" for the sale of beer in the Park. Officer Ellerbe stated that he did not ask Chief Middleton to negotiate when told of the content of the forthcoming memorandum nor after April 13, 1976, when he first saw the memorandum for the reason that Chief Middleton stated that he, Middleton, would get back to Officer Ellerbe.

Officer Smith, Vice President of Local 185 in April, 1976, and President at the time of the hearing, testified that on April 29, 1976, after the bimonthly meeting with management he contacted Mr. Doyle, Special Assistant to Dr. Reed, Director of the Zoo, and asked Mr. Doyle what he intended to do with the memorandum of April 13, 1976; that Mr. Doyle stated that he might revise it or do away with it; that he, Doyle, would get back to him (Smith), but never did. Mr. Smith stated that he made no other attempt to negotiate this matter because he had been president only about one month at the time of the hearing on March 29, 1977. 1/

1/ A meeting was held on March 11, 1977, at which ground rules for initiating Beer drinking on the premises, to begin about April 1, 1977, were discussed and a memorandum was furnished by Respondent. Although Mr. Smith's testimony is not a model of clarity, it appears that the membership of Local 185 still objects to the sale of beer and seeks in 1977 what is sought (Continued)

3. Respondent's Position Prior to the Charge of June 15, 1976.

Chief Middleton stated that he did not recall discussing the subject matter of the April 13, 1976, memorandum with Officer Ellerbe prior to issuance of the actual memorandum; that he had no discussion with Officer Ellerbe whatever with respect to the beer drinking after the issuance of the April 13, 1976, memorandum, although he did have discussions with Officer Ellerbe about the shift situation (which is no longer involved); that there was never any request by Complainant after issuance of the April 13, 1976, memorandum for a meeting to negotiate or bargain about the impact of the memorandum; that he did not have discussion with Officer Smith on, or about April 29, 1976, about the memorandum; however, Chief Middleton stated that Mr. Doyle told him that Officer Smith had spoken to him (Doyle) and stated that he (Smith) wanted the memorandum withdrawn. Indeed, Chief Middleton stated quite forthrightly that he made no attempt to negotiate with Complainant concerning the April 13, 1976, memorandum because he "thought it was a non-negotiable item."

Regular monthly labor-management meetings were held on April 29 (for which Complainant prepared an agendum on April 12) and on June 24 (for which Complainant prepared an agendum on June 14) and it is conceded, as shown by the agenda, by the minutes of union meeting, and by the testimony, that neither the memorandum of April 13, 1976, nor its subject matter was discussed, or asked to be discussed, at either the April 29, or June 24, 1976, regular monthly labor-management meeting.

4. Position of Parties After the Charge Had been Filed.

On July 7, 1976, Complainant and Respondent met in an effort to resolve the issue raised in the charge concerning the April 13, 1976, memorandum. Officer Ellerbe indicated that he again expressed objection to selling beer at "pop stops" because of the presence of children; But, when pressed as to the Union's demand, stated,

"Well, we asked them to get something with Mr. Ripley's name on it relieving us

Footnote 1 continued from page 3.

in 1976, namely, something signed by the Secretary of the Smithsonian Institution, which would protect the police officers from action, or inaction, as the result of compliance with Chief Middleton's order.

from the responsibility of being sued or charged or whatever it might be." (Tr. 1-64) 2/

Chief Middleton testified that Complainant objected because it "was not right to encourage people to walk around drinking " (Tr. 1-97) and that,

"My general concept of their position was that they questioned the authority to issue the regulation. It appeared to me that someone was making a moral judgment about whether or not it was right or wrong for the serving of beer." (Tr. 1-98)

* * * *

"As I recall the concerns that were discussed at that meeting centered upon whether or not the authority was there, whether or not the - it seemed to me, the Secretary's authority to supercede D.C. regulations or my authority to issue regulations." (Tr. 1-113)

CONCLUSIONS

Section 11(a) of the Order provides, in part, that an agency and a labor organization accorded exclusive recognition,

"... shall meet ... and confer ... with respect to personnel policies and practices and matters affecting working conditions. ..."

But Section 11(b) of the Order provides, in part, that,

"... the obligation to meet and confer does not include matters with respect to the mission of an agency. ..."

Respondent's decision concerning the sale of beer to the public did not involve personnel policies and practices or

2/ The reporter does not indicate any reason for the unorthodox method of numbering the pages of the transcript with the number "1" preceding the actual page number.

matters affecting working conditions. In Department of Defense, Air National Guard, Texas Air National Guard, Camp Mabry, Austin, Texas, A/SLMR No. 738 (1976), the Assistant Secretary stated, in part, as follows:

"... agency management's control of the consumption of alcoholic beverages at government facilities does not fall within the ambit of those personnel policies and practices and matters affecting working conditions which are contemplated by Section 11(a) of the Order."

Of course, in the Texas Air National Guard case, *supra*, there was a restriction on the use of alcoholic beverages at parties by unit employees; whereas in the present case the decision to sell beer at the Panda House Roof facility concerned the sale of beer to the public, not to unit employees. Moreover, the decision concerned the mission of Respondent, in this instance a facet of the operation of the Zoological Park. Not only did the decision not involve personnel policies and practices or matters affecting working conditions of unit employees but it was, in any event excluded from the obligation of Section 11(a) to meet and confer by Section 11(b) of the Order as a matter respecting the mission of Respondent.

This is not dispositive of the matter, however, as the memorandum of April 13, 1976, instructed unit employees as follows:

"Until further notice, police officers will not pursue public drinking statutes unless an obviously marked bottle or can is displayed or individual(s) is (are) unquestionably inebriated ..."

Respondent contends that such instruction was pursuant to the reserved rights of management as set forth in Section 12(b) of the Order, Section 12(b) provides, in part, as follows:

"(b) management officials of the agency retain the right, in accordance with applicable laws and regulations --

"(1) to direct employees of the agency;

* * * *

(5) to determine the methods, means, and personnel by which such operations are to be conducted; ..."

There can be no doubt that Respondent's memorandum of April 13, 1976, directed its employees within the meaning of Section 12(b) (1) of the Order and that it thereby determined the methods and means by which unit employees would conduct its operations within the meaning of Section 12(b)(5) of the Order. In short, Respondent had authorized the sale of beer in plastic containers at its Panda House Roof Cafe and its memorandum of April 13, 1976, in effect, with regard to beer purchased by the public at the Cafe instructed its police officers not to bother patrons who had purchased beer and had left the Cafe area with the plastic container unless an individual was unquestionably inebriated. Respondent had not authorized patrons to bring beer onto Zoo premises and the reference in the memorandum to "an obviously marked bottle or can" simply emphasized that beer in cans or bottles was not authorized.

In its brief, Complainant asserts that the memorandum of April 13, 1976, was "a unilateral decision by a lower level management official to change the application of a public law ... and this change caused a change in the working conditions of the Police Officers." (Comp. Brief, Point I).

Clearly, the memorandum of April 13, 1976, referred to "public drinking statutes"; ^{3/} but Chief Middleton, who wrote the memorandum, very credibly testified that he had reference only to the Regulations of the National Zoological Park which, in pertinent part, provides that, "... consumption of intoxicating beverages on the premises is prohibited unless officially authorized." (Comp. Ex. 2, 36 C.F.R. § 520.8); and that the consumption of beer on the premises had been officially authorized.

Accordingly, the instructions contained in the memorandum of April 13, 1976, were in accordance with applicable laws and

^{3/} At the hearing, I indicated that, from prior experience, I was aware that whether any particular law of the District of Columbia extended to a wholly segregated Federal enclave was not always clear or readily determined. See, in this regard, 40 U.S.C. § 193 n - x. But even if it were assumed that some D.C. Law applied, as the memorandum, at most, simply instructed unit police officers that they should not enforce ("pursue") such statutes unless an obviously marked bottle or can is displayed or individual(s) is (are) unquestionably inebriated, there was no change in the application of a public law and for the purpose of this decision we need go no further.

regulations and were issued pursuant to the reserved rights of management as set forth in Section 12(b) of the Order. While it is well established that notice and opportunity to bargain on impact of a decision pursuant to a reserved right of management may be required, AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., FLRC No. 71A-11, 1 Decisions and Interpretations of the Federal Labor Relations Council 100 (1971); U.S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261 (1973); but such obligation exists only if there is impact on employees in the sense that personnel policies and practices and matters affecting working conditions are involved. Department of the Navy, Norfolk, Naval Shipyard, A/SLMR No. 805 (1977).

Obviously, the instruction to police officers that they should not arrest patrons of the Zoo who, having purchased beer, wandered away from the Cafe area with the plastic containers, did not concern personnel policies or practices or, directly affect working conditions of unit employees. From the testimony of Officer Ellerbe and Chief Middleton, it is apparent that Complainant strongly opposed the sale of beer to the public at what it termed "pop stops" which Complainant recognized was not a matter over which it had any right to negotiate. Thus, although Officer Smith first told Mr. Doyle, on April 29, 1976, that he wanted the memorandum withdrawn, at the meeting of July 7, 1976, Complainant sought "something with Mr. Ripley's name on it". That is, Complainant challenged Chief Middleton's authority to issue the memorandum of April 13, 1976, and asserted that their working conditions were affected because they feared they might be sued.

Section 11(a) of the Order creates no right to negotiate the authority vested by Respondent in its Chief of the National Zoological Park Police and Complainant's expressed "fear" of personnel liability is without basis. First, the Police Manual provides, in part:

"Section 2-4. Members of the police force shall promptly obey all orders coming from a superior officer ... The person who obeys the order will not be held in any way responsible for disobedience of any orders previously issued.

"Section 2-5. Each member of the police force shall be held responsible for the proper performance of the duties assigned him and for

strict adherence on his part to the rules and regulations adopted from time to time for the proper administration of the police force. Only direct and positive orders to the contrary, by an officer of higher rank, shall relieve a member from performance of his responsibilities as set forth above." (Res. Exh. 4).

Second, the memorandum of April 13, 1976, constituted policy of Respondent and was issued pursuant to the authority of Captain Middleton as Chief of the National Zoological Park Police. Third, action by any officer in carrying out official policy of Respondent would make such action the action of Respondent. Fourth, the memorandum of April 13, 1976, did not direct the performance of any act; but, rather instructed forbearance in the enforcement of its drinking regulation unless specified conditions existed (i.e., intoxication or display of an obviously marked bottle or can). Consequently, I conclude that the memorandum of April 13, 1976, did not involve personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) of the Order and there was no obligation to give notice and opportunity to bargain on impact. Department of Defense, Air National Guard, Texas Air National Guard, supra; Department of the Navy, Norfolk Naval Shipyard, supra.

Moreover, if there were an obligation to give notice and opportunity to negotiate concerning impact, the record shows that prior to April 13, 1976, Officer Ellerbe, then President of Local 185, was informed of the intended memorandum. Accepting Officer Ellerbe's testimony that Chief Middleton told him that he (Middleton) would get back to him (Ellerbe) as a valid reason for Officer Ellerbe's omission of the item from the agenda prepared on April 12, 1976, for the April 29 labor-management meeting (I specifically do not find that any such statement was made after issuance of the April 13, 1976, memorandum in view of Chief Middleton's testimony, which was wholly credible, that he had no discussion with Officer Ellerbe, or any other representative of Local 185, about the memorandum after its issuance, which testimony was confirmed by the testimony of Officer Ellerbe) and further accepting Officer Smith's statement to Mr. Doyle that he (Smith) wanted the memorandum of April 13, 1976, withdrawn, nevertheless, the record is clear that Complainant never requested a meeting to negotiate impact, not even in the agenda it prepared on June 14, 1976, the day before it filed the charge herein. Indeed, it was not until the meeting

March 1, 1978

of July 7, 1976, to discuss the charge that Complainant, for the first time suggested that it wanted "something with Mr. Ripley's name on it." As Complainant had ample opportunity to request bargaining on the impact of the decision both prior to its implementation and prior to the filing of the charge herein but never requested bargaining on the impact of the decision, Respondent did not refuse to consult, confer, or negotiate with respect to the impact of its decision. Department of Air Force, Vandenberg Air Force Base, A/SLMR No. 350 (1974); Department of Air Force, Norton Air Force Base, A/SLMR No. 261 (1975); Alabama National Guard, A/SLMR No. 660 (1976).

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Complaint herein be dismissed in its entirety.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: August 3, 1977
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

HEADQUARTERS, U.S. ARMY MATERIEL
DEVELOPMENT AND READINESS COMMAND
A/SLMR No. 994

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1332, Independent (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to comply with terms of an oral agreement to furnish vacancy lists to the Complainant in connection with a proposed reorganization and reduction in force.

The Administrative Law Judge concluded that there was no "meeting of the minds" between the parties and, therefore, no such agreement existed. Under these circumstances, he recommended dismissal of the complaint.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

HEADQUARTERS, U.S. ARMY MATERIEL
DEVELOPMENT AND READINESS COMMAND

Respondent

and

Case No. 22-06872(CA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1332, INDEPENDENT

Complainant

DECISION AND ORDER

On November 21, 1977, Administrative Law Judge John W. Earman issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in the subject case, including the exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-06872(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
March 1, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of

Headquarters, U.S. Army Material
Development and Raadiness Command

Respondent

and

National Federation of Federal
Employees, Local 1332, Independent

Complainant
.....

Robert Englehart, Esquire
National Federation of Federal Employees
1016 Sixteenth Street, N. W.
Washington, D. C. 20036

For the Complainant

Stephen A. Klatsky, Esquire
Headquarters, U.S. Army Material
Development and Readiness Command
5001 Eisenhower Avenue
Alexandria, Virginia 22333

For the Respondent

Before: JOHN W. EARMAN
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

This is an unfair labor practice proceeding in which a hearing of record was held pursuant to Executive Order 11491, as amended. The complaint was filed on May 28, 1976 charging Respondents with violations of Sections 19(a)(1) and 19(a)(6) for failing to comply with an oral agreement to furnish Complainant lists of certain vacant positions which resulted from a reorganization and reduction in force. The parties were represented by counsel at the hearing and briefs were submitted.

Findings of Fact

In July 1975 Local 1332 of the National Federation of Federal Employees, the union, learned that a major reorganization involving large cutbacks in personnel was to be undertaken by Headquarters, U.S. Army Material Development and Readiness Command (DARCOM). Realizing the effect that a reduction-in-force would have on union members, a local vice president wrote the Civilian Personnel Officer requesting immediate action in five areas, including a freeze on all placements from outside the Headquarters, consultation on any exceptions to the freeze and a list of vacancies as they occur. As a result a meeting took place between the union and management on August 26, 1975. At issue in the present proceeding is whether there was an oral agreement made at this meeting that management would furnish the vacancy lists.

On September 3, management gave the union a draft of a proposed "freeze letter," in which the procedures to be used in the reorganization were set forth. Management suggested that another meeting be held to finalize the proposals. Such meeting did take place on September 4 and management noted changes in the draft letter in a memorandum on September 5, stating the draft incorporated the union suggestions considered acceptable.

There were meetings between the parties over the next several months including a quarterly consultation meeting in December 1975. On February 12, 1976 the union issued a news release outlining its position. The following day, February 13, management furnished the union a listing of positions under recruitment since November 1, 1975 with a promise of another list to be furnished. On February 20 a pre-complaint charge was filed. Subsequently management met with and furnished the union a statement of the number of positions filled from September 26, 1975 to February 29, 1976 with a list of individuals assigned. The parties then met on March 30, 1976 to try to resolve the pre-complaint letter and a letter was sent by management the following day regarding agreements reached. The letter did not include an agreement to furnish the lists in issue. On April 2 and 13 the union pointed out the omission which was corrected on April 19.

On October 5, 1976 the Acting Regional Administrator dismissed the complaint of May 28, 1976 finding that if there had been an agreement, such agreement would be invalid under the Executive Order because management would have bargained away Section 12(b) rights. A request for review of the dismissal of the complaint was granted on April 21, 1977.

Discussion and Conclusions

The Federal Labor Relations Council has established that the determination to fill or not to fill vacant positions is a retained management right under Section 12(b)(2) of the Order. National Council of OEO Locals and Office of Economic Opportunity, FLRC No. 73A-67, 2 FLRC 293. Section 12(b) establishes rights expressly reserved to management officials under any bargaining agreement. The Section is mandatory and the rights may not be relinquished or deleted. Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56, 1 FLRC 431. Thus, if the alleged oral agreement of August 26, 1975 provided for negotiation as to which positions were to be retained and filled it would not be a valid agreement.

In its brief the union contends that management determined the "position criticality" and it was agreed on August 26 that management would advise the union of the designated positions so that the union could determine if any employees of the activity could qualify for the jobs. The union says that the reason the provision was not reduced to writing in the September letter, as were the other agreements, was because the letter was drafted for distribution to managers who had no need for such information. In support of the agreement the union offered the testimony of three union officials. However, witness Pilewicz characterized the meeting as a "donnybrook" and indicated several times in his testimony that management did not respond as if there was an agreement. He pointed out that he protested the omission of the item from the "freeze letter" because the omission indicated that the proposal had not been agreed upon and that management replied that there was no obligation for it to comply with the proposal. Witness Goodman, also testified as to the oral agreement but added that he understood management would take "our proposals and our suggestions under consideration and get back with us." Neither witness Pilewicz or Goodman support union's argument.

Only witness Kern gave testimony that entirely supports the argument that an oral agreement was reached on August 26 with no misunderstanding that the union was asking for more than the right to comment on jobs designated as critical by management. He said the oral agreement had never been negotiated to his knowledge and the only dispute was over whether it would be included in the letter of September 25.

The union also relays for support of its position on minutes taken at the August 26 meeting which has management responding to a union question on information about critical jobs as follows:

"We will inform you and I will ask your opinion. But somebody has to make the final determination. Those areas are within my authority."

These apparently edited minutes were taken by the union. Assuming their accuracy, the language used does not indicate a complete agreement, instead it indicates a preoccupation by management with the responsibility to designate critical positions. This, standing alone, indicates that there was no meeting of the minds.

Management contends that the August 26 meeting was a preliminary meeting where proposals were made with the intent that the parties would meet again. Such meetings did take place and some union suggestions were accepted and some rejected in the "freeze letter." Management says that they first knew of the union's position after the pre-complaint charge was filed and that as a result of the March 30, 1976 meeting it was agreed that lists of positions determined to be critical would be furnished. Three management officials testified that no oral agreement had been reached on August 26 and two union officials were unable to recall such agreement. Union Vice President Tashjian, whose memorandum precipitated the meeting, said that the parties reached a general understanding that there should be a further meeting to work out details and that it was suggested that some kind of an agreement would be drawn so that the second meeting would cover all points of discussion.

By definition, if the parties reached an agreement, there was a mutual arrangement or the parties were in accord. That did not happen in this case. Events subsequent to the August 26 meeting clearly show a lack of a meeting of the minds. The weight of evidence indicates that management left the meeting with the impression that the union wanted to exercise the right reserved to management to select the positions to be retained as critical to the agencies operations.

The union contention that the agreement on union participation in filling critical positions was not put in the "freeze letter" of September 25, 1975 because the distribution was to be to managers who did not need to know, is thin at best. On the first page of that letter all other

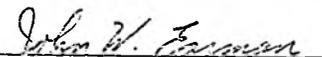
March 2, 1978

aspects of filling such positions are set forth and logic dictates that had an agreement for union participation been reached it would have been included. Also, expressly setting out who determines criticality supports the view that it was management's understanding that the union was seeking to participate in these determinations. Then too, it was not established that the letter was to have limited distribution as claimed by the union and, in fact, it appears to have been widely distributed.

In view of the above it is found that there was no oral agreement as the result of the meeting of August 26, 1975 between the union and management and the complaint of alleged violations, which hinge upon that agreement, should be dismissed.

RECOMMENDATION

On the basis of the foregoing Findings and Conclusions it is recommended that the Assistant Secretary dismiss the complaint.


JOHN W. EARMAN
Administrative Law Judge

Dated: November 21, 1977
Washington, D. C.

JWE:jp

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
NEW ORLEANS DISTRICT
A/SLMR No. 995

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and Chapter 6, NTEU, alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to notify the NTEU and give it the opportunity to negotiate over a change in the existing practice of allowing Revenue Officers employed in the Collection Division to perform certain official duties at their respective homes.

The Administrative Law Judge found that the Respondent had engaged in conduct violative of Section 19(a)(1) and (6) of the Order. In this regard, he concluded that under the Order the Respondent was not obligated to bargain with respect to its decision. However, the Administrative Law Judge found that the Respondent was required to give the NTEU reasonable notice prior to the implementation of the change. Since the failure to negotiate and give reasonable notice involved only bargaining over procedures for implementation and impact of a basic decision, the Administrative Law Judge did not include in his recommended order a status quo ante remedy.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations. He noted that the Complainant excepted to the Administrative Law Judge's failure to recommend a return to the status quo ante in his proposed order. The Assistant Secretary found that, under the particular circumstances of the case, a status quo ante remedy was appropriate. Thus, he ordered the Respondent to cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
NEW ORLEANS DISTRICT

Respondent

and

Case No. 64-3607(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND CHAPTER 6, NTEU

Complainant

DECISION AND ORDER

On October 12, 1977, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, except as modified herein.

ORDER 1/

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor

1/ In its exceptions, the Complainant sought a return to the status quo ante as a remedy for the unfair labor practices found herein. Under the particular circumstances of this case, and noting that the Respondent still allows, upon request, some Revenue Officers to perform official duties at their respective homes, I find that a status quo ante remedy is appropriate for the type of violation found herein.

for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, New Orleans District, shall:

1. Cease and desist from:

(a) Instituting a change in the location where Revenue Officers, who are represented exclusively by the National Treasury Employees Union, Chapter 6, perform their daily duties without first notifying the National Treasury Employees Union, Chapter 6, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such change, and on the impact the change will have on the employees adversely affected by such action.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

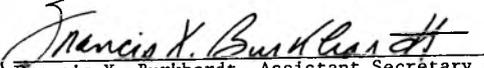
(a) Rescind the order instituting the change in the location where Revenue Officers perform their daily duties that became effective November 22, 1976.

(b) Upon request by the National Treasury Employees Union, Chapter 6, meet and confer, to the extent consonant with law and regulations, concerning the procedures used in implementing any decision to prohibit, contrary to past practice, employees from performing their official duties at their homes and the impact of any such change on adversely affected employees.

(c) Post at all Department of Treasury, Internal Revenue Service, New Orleans, facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the New Orleans District and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
March 2, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
 NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a change in the location where Revenue Officers, who are represented exclusively by the National Treasury Employees Union, Chapter 6, perform their daily duties, without first notifying the National Treasury Employees Union, Chapter 6, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such change, and on the impact the change will have on the employees adversely affected by such action.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Executive Order.

WE WILL rescind the order instituting the change in the location where Revenue Officers perform their daily duties that became effective November 22, 1976.

WE WILL, upon request by the National Treasury Employees Union, Chapter 6, meet and confer, to the extent consonant with law and regulations, concerning the procedures used in implementing any decision to prohibit, contrary to past practice, employees from performing their official duties at their homes and the impact of any such change on adversely affected employees.

 (Agency or Activity)

Dated: _____ By: _____
 (Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
 Washington, D.C. 20036



.....
 In the Matter of :

DEPARTMENT OF THE TREASURY :
 INTERNAL REVENUE SERVICE, NEW :
 ORLEANS DISTRICT, NEW ORLEANS :
 LOUISIANA :

Respondent :

and :

NATIONAL TREASURY EMPLOYEES UNION :
 and CHAPTER 6, NTEU :

Complainant :

.....
 DAVID N. REDA, Esquire
 Staff Assistant to the Regional Counsel
 Room 12D27, Internal Revenue Service
 1100 Commerce Street
 Dallas, Texas

For the Respondent

ROB V. ROBERTSON, Esquire
 Assistant Counsel
 National Treasury Employees Union
 Suite 104
 300 E. Huntland Drive
 Austin, Texas 78752

For the Complainant

Before: BURTON S. STERNBURG
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on March 8, 1977, under Executive Order 11491, as amended, by the National Treasury Employees Union and Chapter 6, NTEU (hereinafter called the Union or NTEU) against the Department of the Treasury, Internal Revenue Service, New Orleans District (hereinafter called the Activity or Respondent), a Notice of Hearing

on complaint was issued by the Regional Administrator for the Kansas City, Missouri Region on June 20, 1977.

The complaint alleges that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in unilaterally cancelling the existing practice of allowing revenue officers employed in the collection division to perform their official duties at their respective homes.

A hearing was held in the captioned matter on July 20, 1977, in New Orleans, Louisiana. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved herein.

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

The Union is the exclusive representative of Respondent's revenue officers assigned to the Collection Division of the New Orleans District Office. The revenue officers' primary duties are to collect delinquent taxes and returns. These duties require the revenue officers to spend most, if not all, of their working hours out in the field away from the New Orleans District Office.

Due to the fact that the revenue officers were out in the field most of the time and found it more convenient in terms of time and contacts to make their appointments with prospective clients prior to first checking in on a daily basis with the New Orleans District Office, the practice of working directly out of the revenue officers' respective homes rather than the official Internal Revenue Office became an established mode of operation. According to the record, the practice of working out of the revenue officers' own homes had been in effect at least since 1969. Further, according to the record, the revenue officers would only report to the Internal Revenue Office once or twice a week for purposes of picking up assignments, etc.

On November 22, 1976, all the revenue officers were informed by their respective group supervisors that,

"effective immediately," the practice of the revenue officers working out of their respective homes was to cease. No prior notice of the aforementioned order was given to the Union.

According to Robert Phillips, Chief of the Collection Division, who authorized the order curtailing the practice of working at home, he did so immediately upon discovering the existence of such practice since he believed, among other things, that the presence of the employees and government owned vehicles around the employees' homes during the daytime would give the neighbors the wrong impression of the Agency. Additionally, he was of the opinion that the revenue officers involved could work more efficiently and productively at the official New Orleans District Office due to the availability of more research materials and information. Mr. Phillips did acknowledge, however, that despite the November 22nd order, group supervisors were still empowered to continue to authorize at home work on a case by case basis. Thus, it appears that if a particular case involved a tax delinquent located closer to a revenue officer's home rather than the office, then the revenue officer would be allowed to work the particular case from his home as had been the practice prior to November 22.

Although the November 22 order did not result in a change in the revenue officers actual duties it did in fact change the methods by which such duties were to be accomplished and accordingly, had an impact on the employees working conditions.

Discussion and Conclusions

While Section 11(a) of the Executive Order generally imposes upon an Agency the obligation to meet and confer with the certified Union with respect to changes in personnel policies and practices and matters affecting working conditions of unit employees, Sections 11(b) and 12(b) of the Order make it clear, however, that the initial decision on certain specified subjects does not fall within the Agency's general bargaining obligation. As to these latter excepted subjects, the Assistant Secretary has concluded that the exclusive representative should be afforded the opportunity to meet and confer, to the extent consonant with law and regulations, as to the procedures management intends to observe in effectuating its decision

on the excepted subject, and as to the impact of such decision on those employees adversely affected. Failure to give reasonable notice to the exclusive representative prior to implementation of a decision on an excepted subject is violative of Sections 19(a)(1) and (6) of the Order. Federal Railroad Administration, A/SLMR No. 418; Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 828.

Section 12(b) of the Order provides that management officials of the agency retain the right to "(5) determine the methods, means, and personnel by which such operations are to be conducted." Section 11(b) of the Order provides that "the obligation to meet and confer does not include matters with respect to the technology of performing its work"

It seems clear that the Respondent's decision as to where the employees are to perform their respective jobs falls within the above quoted language of Sections 11(b) and 12(b) of the Executive Order. Accordingly, I find that the Respondent was not obligated or required to bargain with the Union with respect to its initial decision concerning the cessation of the practice by the unit employees of working at home rather than at Respondent's office.

As noted above, Respondent was required, however, under the Order to give the Union reasonable notice of its decision prior to implementing same so that the Union could have ample opportunity to explore fully the decision prior to its implementation and decide whether or not it desired bargaining with respect to the impact and/or the manner of implementation. Federal Railroad Administration, supra. In this latter regard, the record reveals that Respondent ordered the immediate cessation of the practice of working at home without any prior notification to the Union.

Accordingly, in the absence of any evidence of an overriding exigency which would have required immediate action, Respondent's action in not giving the Union ample advance notice of its decision so that the Union could request, if desired, negotiations and/or discussions concerning the manner of implementation of the decision and/or the impact on unit employees affected constituted a violation of Section 19(a)(6) of the Order. Further, Respondent's action in the above respect tends to interfere with, restrain, or coerce employees in the exercise of their

rights assured by the Order and, therefore, also constitutes a violation of Section 19(a)(1) of the Order. Social Security Administration, Bureau of Hearing and Appeals, supra.

While I would normally recommend as a remedy a return to the status quo ante by rescinding the order which caused the immediate cessation of the practice of working at home, I note that in other cases involving similar changes, the Assistant Secretary has seen fit to merely issue an order providing for bargaining, upon request, over procedures for implementation and impact on adversely affected employees and prohibiting any similar future changes without notification and bargaining. Department of Treasury, Internal Revenue Service, Manhattan District, A/SLMR No. 841. Accordingly, a return to the status quo ante will not be included in my recommended order.

Recommendation

Having found that the Respondent has engaged in conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following order.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26 of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, New Orleans District shall:

1. Cease and desist from:

(a) Instituting a change in the location where Revenue Agents perform their daily duties without first notifying the National Treasury Employees Union, Chapter 6, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such change, and on the impact the change will have on the employees adversely affected by such action.

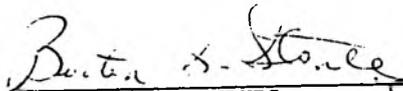
(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request by the National Treasury Employees Union, Chapter 6, meet and confer, to the extent consonant with law and regulations, concerning the implementation of the decision to prohibit, contrary to past practice, employees from performing their official duties at their homes and the impact of such change on adversely affected employees.

(b) Post at all Department of Treasury, Internal Revenue Service, New Orleans facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the New Orleans District and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.


BURTON S. STERNBURG
Administrative Law Judge

Dated: October 12, 1977
Washington, D.C.

BSS:yw

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a change in the location where Revenue Agents perform their daily duties, without first notifying the National Treasury Employees Union, Chapter 6, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such change, and on the impact the change will have on the employees adversely affected by such action.

WE WILL NOT in any like or related matter, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Executive Order.

WE WILL, upon request by the National Treasury Employees Union, Chapter 6, meet and confer, to the extent consonant with law and regulations, concerning the implementation of the decision to prohibit, contrary to past practice, employees from performing their official duties at their homes and the impact of such change on adversely affected employees.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor whose address is: 911 Walnut Street, Kansas City, Missouri 64106.

March 2, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION,
REGION 3,
WASHINGTON, D.C.
A/SLMR No. 996

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 2151, (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order based on its unilateral change in established terms and conditions of employment by not implementing a grievance settlement agreement, which was reached under the parties' negotiated grievance procedure, authorizing environmental differential pay for "high work."

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (6) of the Order when it rescinded the grievance settlement agreement. In his view, the Respondent properly rescinded the settlement agreement on the ground that a unilateral mistake of fact was made by the Respondent.

Contrary to the Administrative Law Judge, the Assistant Secretary found that the Respondent violated Section 19(a)(1) and (6) of the Order when it unilaterally withdrew its authorization for "high work" environmental differential pay, thereby rescinding the parties' grievance settlement agreement in the matter. The Assistant Secretary viewed the grievance settlement agreement as having the same standing as an arbitration award, and, as such, constituted an extension of the parties' negotiated agreement and an established term and condition of employment. The Assistant Secretary found further that the Civil Service Commission's (CSC) verbal response to the Respondent's request for an interpretation of "high work" did not constitute a CSC policy interpretation that the settlement agreement reached by the parties was invalid under the pertinent provisions of the Federal Personnel Manual (FPM), but rather was a possible interpretation of the guidelines established by the FPM and, therefore, could not serve as a basis for rescinding the grievance settlement agreement.

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

A/SLMR No. 996

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 3, WASHINGTON, D.C.

Respondent

and

Case No. 22-7414 (CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2151 1/

Complainant

DECISION AND ORDER

On September 1, 1977, Administrative Law Judge George A. Fath issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. 2/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in the subject case, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation, only to the extent consistent herein.

The complaint herein alleged, in essence, that the Respondent violated Section 19(a)(1) and (6) of the Order when it unilaterally changed an established term and condition of employment by not implementing a grievance settlement agreement, which was reached under the parties' negotiated grievance procedure, authorizing environmental differential pay for "high work."

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (6) of the Order when it rescinded the instant grievance settlement agreement. In his view, the Respondent properly rescinded the settlement agreement on the ground that a unilateral mistake of fact was made by the Respondent.

1/ The name of the Complainant appears as amended at the hearing.

2/ The Complainant filed untimely exceptions to the Administrative Law Judge's Recommended Decision which were not considered.

The essential facts of the case, which are not in dispute, are set forth, in detail, in the Administrative Law Judge's Recommended Decision, and I shall repeat them only to the extent necessary.

The record reveals that during the times material herein, the Respondent and the Complainant have been parties to two negotiated agreements, including the current agreement, covering employees in the bargaining unit for which the Complainant is the exclusively recognized bargaining representative. 3/ Each agreement contains certain provisions authorizing additional pay for employees exposed to various degrees of hazards, physical hardships, and working conditions of an unusual nature at the Respondent's facilities. Such payments are authorized by statute and by the implementing regulations of the Civil Service Commission, hereinafter called CSC, which are found in the Federal Personnel Manual Supplement 532-1, hereinafter referred to as FPM. The relevant directives appear in Sub-Chapter 8-7 and Appendix J of the FPM Supplement, which are incorporated by reference in the current negotiated agreement. The FPM indicates that the situations listed in Appendix J, which contains a schedule of specific differential rates and categories for employees working under adverse conditions, are illustrative only, and the parties may negotiate additional coverage for local situations or negotiate additional categories not included in Appendix J.

The instant grievance, initially filed with the Buildings Manager of the Central Heating Plant on May 3, 1974, cited Article 23 of the then existing negotiated agreement, which became Article 24-Environmental Differential Pay - of the current negotiated agreement, and alleged that employees in the Central Heating Plant were entitled to environmental differential pay for "dirty work." Thereafter, the parties engaged in prolonged negotiations concerning the resolution of the grievance.

On or about May 20, 1975, as a result of the above noted grievance, the Respondent initiated a study of hazardous working conditions at the Central Heating Plant. This study was conducted in September, October, and November 1975. On September 1, 1975, in a letter to the Acting Director, Management Operations Division, the Complainant expanded the grievance to include the categories of "hot work" and "toxic chemicals." The grievance was moved to Step 3 of the parties' negotiated grievance procedure 4/ on October 1, 1975, after the parties were unable to resolve the matter at the District Heating Field Office level. On October 8, 1975, the Acting Director, Management Operations Division, in a letter

3/ The current negotiated agreement was effective August 19, 1975.

4/ Article XXI of the agreement provides, in pertinent part:

Section 5. Step 3 If the grievance is not settled at the Buildings Manager level, the Union representative may, within seven (7) working days, forward the grievance to the Buildings Manager who will expedite it through channels to the Director,
(Continued)

to the Complainant concerning resolution of the instant grievance at Step 3, stated, "if the study indicates that certain employees in the Central Heating Plant are eligible for hazardous duty pay, employee claims will be honored including claims for retroactive pay" 5/

On February 26, 1976, the Compensation Branch of the Respondent, in its REPORT ON THE WORKING CONDITIONS OF PERSONNEL IN THE CENTRAL HEATING PLANT, HEATING OPERATION AND TRANSMISSION AREA, determined, among other things, that ". . . a payment of 25 percent differential for actual exposure is warranted for work on the roof of the Central Plant in accordance with the criteria for high work of working on any structure at least 100 feet above the ground." 6/ Subsequently, on March 8, 1976, the Respondent's Regional Personnel Officer, hereinafter called RPO, sent a memorandum to the Regional Commissioner, Public Buildings Service, hereinafter called RCPBS, and a copy to Complainant, in which he stated that "as a result of the [Compensation Branch's] study, we have authorized payment of differentials to GSA wage employees at the Central Plant who are exposed to the specific working conditions for which differentials have been authorized." 7/ Thereafter, on March 15, 1976, that part of the grievance remaining which pertained to environmental differential pay for "dirty work," "hot work," and "toxic chemicals" was arbitrated and subsequently denied.

4/ Management Operations Division, for further consideration. The Director, Management Operations Division, will review the grievance and give the Union representative his written answer within ten (10) working days after receipt of the grievance.

Section 6. Step 4 If the grievance is not satisfactorily settled at the Director, Management Operations Division level, the Union may refer the matter to Arbitration. All time limits in this article may be extended by mutual consent.

5/ As noted above, the Respondent's Compensation Branch reviewed the exposure of all personnel in the Central Heating Plant to hazardous working conditions. At the time the study was conducted, the Complainant requested, and Respondent agreed, that the study review not only the exposure of employees to "dirty work," "hot work" and/or "toxic chemicals," but also to "high work."

6/ The Report further determined that payment of a differential to employees for exposure to "dirty work," "hot work" and/or "toxic chemicals" was not warranted.

7/ On page 7 of his Recommended Decision, the Administrative Law Judge inadvertently referred to the date of the grievance settlement agreement as May 8, 1976, instead of March 8, 1976. This inadvertence is hereby corrected.

The record further reveals that the RPO, in response to comments from the RCPBS, reconsidered his previously announced payment authorization for "high work" environmental differential pay and obtained from the CSC a verbal interpretation of "high work" as the term is used in FPM Supplement 532-1, Appendix J (2)(a). As a result, on June 28, 1976, in a memorandum to the RCPBS, with a copy sent to the Complainant, the RPO rescinded his authorization for "high work" environmental differential pay.

After the Complainant filed the pre-complaint charge in this matter on July 8, 1976, the Respondent, on July 12, 1976, rescinded its June 28, 1976, decision not to pay the environmental differential and asked the Complainant ". . . to meet and confer with appropriate agency representatives and to bring to our attention any information which you feel should be considered in making our final decision." The parties subsequently met but were unable to resolve their different viewpoints regarding the use of mid-term contract negotiations to settle this matter. Consequently, on August 17, 1976, the RPO, in a memorandum to the RCPBS, with a copy sent to the Complainant, concluded that environmental differential pay for "high work" performed at the Central Heating Plant could not be authorized.

The Respondent contends, among other things, that (1) the issue of environmental differential pay for "high work" was not part of the original grievance in this matter and, therefore, the grievance settlement was not a product of the negotiated grievance procedure; (2) a grievance settlement, unlike an arbitration award, is not an extension of a negotiated agreement; (3) the Respondent, by law, was required to withhold payment of the environmental differential when it concluded that conditions at the Central Heating Plant did not meet the CSC's interpretation of "high work" as the term is used in FPM Supplement 532-1, Appendix J (2)(a); and (4) no unilateral change in the terms and conditions of employment occurred because no personnel practice had been established since no environmental differential payments had been made. On the other hand, the Complainant contends, among other things, that (1) "high work" became part of the instant grievance when the Respondent's Compensation Branch personnel included it in their study of the Central Heating Plant at the request of the Complainant's representative; and (2) the grievance settlement became an extension of the parties' negotiated agreement and, therefore, it could not be unilaterally changed by the Respondent.

Under the particular circumstances herein, I find, contrary to the Administrative Law Judge, that the Respondent violated Section 19(a)(1) and (6) of the Order when it unilaterally terminated its authorization for environmental differential pay for "high work" for certain employees represented by the Complainant herein. Thus, when the Respondent, in agreement with the request by Complainant, included "high work" in its study of exposure of Central Heating Plant personnel to hazardous working conditions, it, in effect, agreed to include "high work" as an

integral part of the grievance which was the catalyst for conducting the study. 8/ Therefore, when the Respondent issued its report, finding that environmental differential pay was warranted for those employees engaged in "high work," and subsequently notified the Complainant that such payments were authorized, the Respondent was, in effect, offering a partial settlement of the grievance, which was accepted by the Complainant.

It has been held previously that a valid arbitration award constitutes an extension of the parties' negotiated agreement, which may be modified only by the mutual agreement of the parties, and that a unilateral termination or alteration of such award constitutes a violation of the Order. 9/ In my view, a grievance settlement agreement reached by the parties in the operation of their negotiated grievance procedure has the same standing as an award by an arbitrator, and, in effect, such agreement constitutes an extension of the parties' negotiated agreement and an established term and condition of employment. In my view, to hold otherwise would be to denigrate the negotiated grievance process. Thus, neither party would be confident in attempting resolution of grievances short of arbitration if the other party could, with impunity, alter or refuse to honor a grievance settlement. Such a result would not effectuate the purposes and policies of the Order which, in my view, are aimed at encouraging parties to bilaterally resolve their differences short of litigation before a third party.

Nor am I persuaded to a contrary result by the Respondent's argument that it was required by law to withhold payment of the environmental differential as a result of the verbal opinion solicited by the Respondent from the CSC. Thus, there is no showing that the CSC's response to Respondent's inquiry was intended to reflect a CSC policy interpretation that the settlement reached by the parties herein was invalid under the pertinent provisions of the FPM. Rather, noting the informal nature of the inquiry, I find that the response of the CSC merely reflected a possible interpretation of the guidelines established by the FPM, and was not intended to reflect a CSC policy interpretation in this specific case. 10/

8/ In reaching this conclusion, it was noted that the Respondent earlier allowed the grievance to be expanded to include the categories of "hot work" and "toxic chemicals," and that the October 8, 1975, letter from Respondent's Acting Director, Management Operations Division, to the Complainant, concerning the resolution of the grievance at Step 3 of the grievance procedure, did not limit the Respondent's offer to pay any environmental differential found warranted by the study.

9/ See Naval Air Rework Facility, Pensacola, Florida, 6 A/SLMR 67, A/SLMR No. 608 (1976).

10/ See Naval Air Rework Facility, Pensacola, Florida, cited above.

Applying these principles to the instant case, I conclude that the Respondent, by its action of June 28, 1976, rescinding its authorization to pay environmental differential pay for "high work," unilaterally terminated the partial settlement of a grievance which was the product of the parties' negotiated grievance procedure in violation of Section 19(a)(1) and (6) of the Order. 11/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that:

The General Services Administration Region 3, Washington, D.C., shall:

1. Cease and desist from:

(a) Refusing to implement the grievance settlement agreement of March 8, 1976, reached under the negotiated grievance procedure contained in the negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 2151, the exclusive bargaining representative of its employees.

(b) Changing terms and conditions of employment resulting from grievance settlement agreements reached pursuant to the terms of a negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 2151, or any other labor organization certified as the exclusive bargaining agent of its employees, unless there is mutual agreement to change such terms and conditions of employment.

(c) In any like or related matter interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

11/ Inasmuch as the Respondent, under the circumstances herein, could not, without the consent of the Complainant, change the terms and conditions of employment established by the grievance settlement agreement, it follows that the Respondent could not absolve itself of its unfair labor practice by thereafter affording the Complainant an opportunity to meet and confer on the impact of this improper action. Accordingly, I find that the Complainant's rejection of the Respondent's request for mid-term contract negotiations on this matter, after being notified by the Respondent of its unilateral action, does not require a contrary result.

(a) Reinstate the grievance settlement of March 8, 1976, and, to the extent consonant with law, regulations, and decisions of the Comptroller General, reimburse each of the affected employees all monies withheld from them since November 1, 1970, 12/ by reason of the refusal to pay the environmental differential authorized pursuant to the grievance settlement agreement regarding "high work."

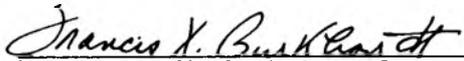
(b) In the future, abide by grievance settlement agreements reached under negotiated grievance procedures contained in any negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 2151, or any other labor organization certified as the exclusive bargaining agent of its employees.

(c) Post at its facility at the Central Heating Plant, Washington, D.C., copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Administrator, General Services Administration, Region 3 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 of the Central Heating Plant are customarily posted. The Regional Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.

March 2, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

12/ In the March 8, 1976, memorandum from the RPO to the RCPBS, with a copy of the Report of the Compensation Branch attached, the RPO stated that "payments may be made retroactively to the first pay period beginning on or after November 1, 1970, to eligible GSA wage employees who were exposed to the authorized conditions at the Central Plant from that date to present." In view of the above determination by the Respondent, November 1, 1970, was considered the appropriate date on which reimbursement should commence for the affected employees.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended,

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to implement the grievance settlement agreement of March 8, 1976, reached under the negotiated grievance procedure contained in the negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 2151, the exclusive bargaining representative of our employees.

WE WILL NOT change the terms and conditions of employment resulting from grievance settlement agreements rendered pursuant to the terms of a negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 2151, or any other labor organization certified as the exclusive bargaining agent of our employees, unless there is mutual agreement to change such terms and conditions of employment.

WE WILL NOT in any like or related matter interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL reinstate the grievance settlement of March 8, 1976, and to the extent consonant with law, regulations and decisions of the Comptroller General, reimburse each of the affected employees all monies withheld from them since November 1, 1970, by reason of the refusal to pay the environmental differential authorized pursuant to the grievance settlement agreement regarding "high work."

WE WILL, in the future, abide by grievance settlement agreements reached under a negotiated grievance procedure contained in any negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 2151, or any other labor organization certified as the exclusive bargaining agent of our employees.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



Region on a complaint alleging violations of Section 19(a)(1) and (6) of the Order.

..... :
In the Matter of :
: GENERAL SERVICES ADMINISTRATION, :
REGION 3 :
Respondent :
and : Case No. 22-7414(CA)
: AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, LOCAL 2151 :
Complainant :
..... :

On August 10, 1976, Local 2151, American Federation of Government Employees, AFL-CIO (hereinafter called the Union) filed a complaint against General Services Administration, Region 3 (hereinafter called the Respondent) charging that management officials of the Respondent violated Sections 19(a)(1) and (6) of the Order by willfully withholding authorized payments of 25% environmental differential to certain employees who have [been] and are working on the roof of the Central Heating Plant in Washington, D.C. The issue as stated by the Regional Administrator and upon which the hearing was conducted is as follows:

Whether the Respondent violated Sections 19(a)(1) and (6) of Executive Order 11491, as amended, by failing to meet and confer in good faith with the American Federation of Government Employees, District 14 when, on June 28, 1976, it unilaterally rescinded certain portions of the grievance settlement/environmental differential pay; authorization of March 8, 1976.

The following findings, conclusions and recommendations are based upon the entire record, and include credibility determinations based on the observation of witnesses, their demeanor, and evaluation of their testimony.

Findings of Fact

The Union is the exclusive bargaining representative of the non-supervisory employees of Respondent. There is a labor-management agreement between the parties effective August 19, 1975. Through Union demand for environmental differential pay predates the effective date of this agreement, it was placed in evidence by the parties and relied on as controlling their rights and duties in this case.

In a letter dated May 3, 1974, addressed to Respondent, Lawrence Clark, Shop Steward, citing Article XIII, Section 1 of the existing Agreement, requested payment to the employees of environmental differential pay. As authority for the request, Mr. Clark quoted the agreement: "The employer agrees to pay environmental differential to employees in the unit when such differential is authorized by FPM Supplement 532-1."

Edward P. Denney, Esquire
Labor Relations Officer
General Services Administration, Region 3
7th and D Streets, S.W., Room 1007
Washington, D.C. 20407

For the Respondent

Donald MacIntyre, Esquire
Joseph Wilson, Esquire
American Federation of Government Employees
8020 New Hampshire Avenue
Hyattsville, Maryland 20783

For the Complainant

Before: GEORGE A. FATH
Administrative Law Judge

RECOMMENDED DECISION

This case arises under Executive Order 11491, as amended (hereinafter called the Order). A Notice of Hearing on Complainant was issued on January 6, 1977 by the Regional Administrator for Labor-Management Relations for the Philadelphia

The record indicates that the subject matter of Clark's letter was discussed by the parties for over a year.

In a letter dated September 1, 1975, addressed to Respondent, Clark detailed the "hazardous working conditions" at the plant. This report of conditions arose out of a meeting between the Union and Respondent. There was no mention of differential pay for work on the roof of the plant.

In reply to the Clark letter, the Respondent informed the Union that it was conducting a study of conditions at the plant, and "if the study indicates that certain employees are eligible for hazardous duty pay, employees claims will be honored, including claims for retroactive pay in accordance with Appendix J (FPM Supplement 532-1) 1/ and the availability of records."

A detailed study, dated February 26, 1976, reported by the Compensation Branch of Respondent, in pertinent part, contains the following recommendation: "... that a payment of 25 percent differential for actual exposure is warranted for work on the roof of the Central Heating Plant in accordance with the criteria for high work of working on any structure at least 100 feet above the ground."

1/ 2. High Work.

- a. Working on any structure at least 100 feet above the ground, deck, floor or roof, or from the bottom of a tank or pit;
- b. Working at a lesser height:
 - (1) If the footing is unsure; or the structure is unstable; or
 - (2) If safe scaffolding, enclosed ladders or other similar protective facilities are not adequate (for example, working from a swinging stage, boatswain chair, a similar support; or
 - (3) If adverse conditions such as darkness, steady rain, high wind, icing, lightning or similar environmental factors render working at such height(s) hazardous.

The study group recommended against payment of environmental differential pay for dirty work, exposure to chemicals in the chemical storage room and chemical tanks. It recommended further study of employees exposure to hot work and coal dust.

On March 8, 1976, the Respondent transmitted the report to the Union and stated: "As a result of this study, we have authorized payment of differentials to GSA wage employees at the Central Plant who are exposed to the specific working conditions for which differentials have been authorized."

The parties moved the differential pay dispute, as over "dirty work" framed by the study and the Union letters of May 3, 1974 and September 1, 1975 into arbitration. The case was heard in arbitration on March 15 and 16, 1976. The arbitrator denied the Union grievances in issue.

On June 28, 1976, the Respondent voided the authorization to pay a 25 percent environmental differential for wage employees of the Central Plant when they perform work on the roof on the ground that the roof is surrounded by a wall and, therefore, work on the plant roof is not hazardous. In a letter to the Union dated July 12, 1976, the Respondent rescinded the letter (decision) of June 28, 1976, and stated that it was reconsidering the "original determination in this matter." Respondent invited the Union to meet and confer before it took any final action.

On July 16, 1976, in reply to the management letter the Union stated its position: "The settlement reached under the grievance procedure became an extension of the Labor-Management Agreement and is a part thereof" The Union asked for Respondents views on why the Agreement should be reopened at this time.

On July 26, the Respondent wrote to the Union and set out in detail the reasons for denying the differential pay. It pointed out that conditions on the roof had not been sufficiently considered in making the authorizations. It further stated:

- (1) There is a 5-foot wall on the west end of the roof and a 2 foot wall on the east end.
- (2) Most of the work on the roof is performed within

an area surrounded on all sides by a 30-foot wall.

(3) In the area surrounded by the 30-foot wall there are enclosed ladders and permanent catwalks that were found to be stable.

(4) The U. S. Civil Service Commission has provided an informal interpretation of the "high work" section of Appendix J to the effect that, in measuring heights, the level to which an employee might fall would be the criterion. Under the circumstances this level appears to the plant roof and not the ground as previously thought.

The parties met on August 4, 1976 to discuss the rescission. The matter was concluded on August 17, 1976, when the Respondent wrote: "After careful consideration of the union's views, we have concluded that under the provisions of Appendix J, FPM Supplement 532-1, environmental differential pay for high work at the Central Heating Plant is unwarranted and therefore cannot be authorized."

The complaint duly followed the impasse.

Issue

The issue as framed by the Regional Commissioner is as follows:

Whereer the Respondent violated Sections 19(a) (1) and (6) of Executive Order 11491, as amended, by failing to meet and confer in good faith with the American Federation of Government Employees, District 14 2/ (sic) when, on June 28, 1976, it unilaterally rescinded certain portions of the grievance settlement/environmental differential pay authorization of March 8, 1976.

Conclusions

The issue as framed by the Regional Commissioner and addressed by the parties is misconceived. The issue presented

2/ This is a misnomer. The proper party is Local 2151.

by this case is whether the Respondent had a right (duty) to rescind its commitment to pay environmental differential pay for high work on the roof of the Central Heating Plant because of a mistake of fact.

If the Respondent had a right to rescind the agreement based on a mistake of fact, the question of whether or not the Order was violated is not reached.

The study group understood the height of the roof of the plant to be 130 feet above the ground. It applied Appendix J, which authorizes environmental differential pay for work on any structure at least 100 feet above the ground, deck, floor or roof, or from the bottom of a tank or pit. Not considered was the fact that the roof of the plant is surrounded by a protective wall, and there is no hazard to the employees attendant upon height alone.

When the Respondent became aware of the mistake it took action to rectify the error. In doing so it invited the Union to confer and to offer any facts which might alter the proposed rescission. The record does not contain evidence that the Union responded directly to the question submitted to it by Respondent. Instead, the evidence is that the Union took an intractable position that the settlement became a part of the Labor-Management Agreement and was unchangeable.

The Union's position is opportunistic and legally unacceptable. It seeks to take unfair advantage of Respondent by insisting on environmental differential pay for high work where clearly it is not authorized. There is no hazard shown. The Union does not present an arguable case for application of Appendix J, "high work" to the conditions on a roof surrounded by a wall. Further, the Union does not consider or assess the affect of a mistake of fact on its position. The Respondent had a right to void the high work pay authorization, and it did so. Once the settlement was legally voided, it was dead for all purposes and could not be resurrected by making it an extension of the Agreement as the Union contends. Whether or not intended, the Union successfully diverted attention from the real issue mistake of fact. It focused on the fact of settlement alone without regard to the absurdity of the substance of the settlement, and thereupon builds its case on an irrelevancy.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

At the time the Respondent offered high work differential pay for work on the roof of the Central Heating Plant, the Union must have known that no hazard was presented by the height of the roof because of the surrounding wall. It was certainly aware of the requirements of Appendix J of the Federal Personal Manual. Yet, there is no evidence that it either disclosed the facts or questioned the accuracy of Respondent's conclusions on the matter of height. In accepting the authorization for high pay knowing the inherent deficiencies of the in Respondent's premises, the Union took a calculated risk that the settlement might be avoided. Under these circumstances, the Union's complaint that it was deprived of an opportunity to arbitrate high work pay cannot be taken seriously. While other maxims in Equity may be more appropriate, it is sufficient here to say simply, "He who seeks equity must do equity."

Under the circumstances of this case, work on the roof of the Central Heating Plant is hardly more hazardous than living (working) on the penthouse of a ten story building. This is not to say that work on the roof of the Plant is never dangerous, but speculation on such possibilities is not necessary to a decision in this case. The definitions of hazards on the roof of the Central Heating Plant, within the meaning of Appendix J, are best left to future dealings between the parties.

The legal principle applicable to this case is simple and indisputable: An agreement can be rescinded, at the option of a party, upon mistake of fact whether the mistake be unilateral or mutual. Here, the Respondent properly rescinded the settlement agreement of May 8, 1976 authorizing environmental pay on the ground of a unilateral mistake of fact.

Recommendation

Upon consideration of the issues, evidence, and arguments of the parties, it is recommendation that the charges against the Respondent of violation the Order be dismissed.


GEORGE A. FATH
Administrative Law Judge

Dated: September 1, 1977
Washington, D.C.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
REGION III
A/SLMR No. 997

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3631, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by establishing and implementing a safety committee (which included unit employees) at the Respondent's Annapolis Field Office without affording the AFGE an opportunity to meet and confer concerning the establishment and implementation of the committee or its impact on unit employees. The Respondent contended that its obligation to meet and confer concerning the establishment of the committee and its implementation and impact was negated by an "emergency" situation which required the closing of the Laboratory.

The Administrative Law Judge found that there was no "emergency" situation which would have precluded, under Section 12(b) of the Order, the Respondent's obligation to meet and confer concerning the establishment of such committee, which included unit employees and, thus, the Respondent's failure to meet and confer constituted a violation of Section 19(a)(1) and (6) of the Order.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations and issued an appropriate remedial order which included the disestablishment of the existing Committee. He also imposed certain bargaining obligations on the Respondent with respect to the actions of the previously established Committee and in the event of the establishment of any new safety committee which included unit employees.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ENVIRONMENTAL PROTECTION AGENCY,
REGION III

Respondent

and

Case No. 20-06137(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3631, AFL-CIO

Complainant

DECISION AND ORDER

On November 29, 1977, Administrative Law Judge David W. Pelkey issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations as modified herein.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Environmental Protection Agency, Region III, shall:

1. Cease and desist from:

(a) Refusing to meet and confer with the American Federation of Government Employees, Local 3631, AFL-CIO, on the implementation and impact of any recommendations of the Annapolis Field Office Safety Committee which have been adopted and put into effect.

(b) Establishing an Annapolis Field Office Safety Committee, which includes unit employees, without first meeting and conferring with the American Federation of Government Employees, Local 3631, AFL-CIO, or any other exclusive representative, concerning the establishment of such committee.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Disestablish the presently constituted Annapolis Field Office Safety Committee.

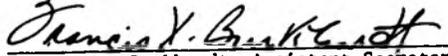
(b) Upon request, meet and confer with the American Federation of Government Employees, Local 3631, AFL-CIO, with respect to the implementation and impact of any recommendations of the Annapolis Field Office Safety Committee which have been adopted and put into effect.

(c) Prior to establishing a safety committee which includes unit employees, meet and confer with the representatives of the American Federation of Government Employees, Local 3631, AFL-CIO, or any other exclusive representative, with respect to the establishment of such committee, the procedures for its implementation, and its impact on unit employees.

(d) Post at its U.S. Environmental Protection Agency, Region III, facilities, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Administrator, Region III, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(e) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
March 2, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer with the American Federation of Government Employees, Local 3631, AFL-CIO, on the implementation and impact of any recommendations of the Annapolis Field Office Safety Committee which have been adopted and put into effect.

WE WILL NOT establish an Annapolis Field Office Safety Committee, which includes unit employees, without first meeting and conferring with the American Federation of Government Employees, Local 3631, AFL-CIO, or any other exclusive representative, concerning the establishment of such committee.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL disestablish the presently constituted Annapolis Field Office Safety Committee.

WE WILL, upon request, meet and confer with the American Federation of Government Employees, Local 3631, AFL-CIO, with respect to the implementation and impact of any recommendations of the Annapolis Field Office Safety Committee which have been adopted and put into effect.

WE WILL, prior to the establishment of a safety committee which includes unit employees, meet and confer with the representatives of the American Federation of Government Employees, Local 3631, AFL-CIO, or any other exclusive representative, with respect to the establishment of such committee, the procedures for its implementation, and its impact on unit employees.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, Gateway Building, 3535 Market Street, Philadelphia, PA 19104.

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



..... :
 IN THE MATTER OF: :
 :
 U. S. ENVIRONMENTAL PROTECTION :
 AGENCY, REGION III (EPA-3) :
 Respondent :
 and :
 AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES, LOCAL 3631 :
 Complainant :

Case No. 20-06137(CA)

WILLIAM T. WISNIEWSKI
 6th and Walnut Street
 Philadelphia, PA 19106
 For the Respondent

DR. DAVID LANGFORD, PRESIDENT
 AFGE Local 3631
 c/o EPA, Region III
 6th and Walnut Streets,
 Philadelphia, PA

E. RALPH JOHNSON
 AFL-CIO
 4847 N. Broad Street, Suite 201
 Philadelphia, PA 19141
 For the Complainant

Before: DAVID W. PELKEY
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Background

In an Amended Complaint filed on June 3, 1977, Complainant alleged that Respondent had engaged in violations of Subsections 19(a)(1) (hereafter 19(a)(1)) and 19(a)(6) (hereafter 19(a)(6)) of Executive Order 11491, as amended (the Order). By its terms, 19(a)(1) provides that an agency's management shall not interfere

with, restrain or coerce an employee in the exercise of the right, freely and without fear of penalty or reprisal, to form, to join and to assist a labor organization; or to refrain from any such activity. By its terms 19(a)(6) provides that an agency's management shall not refuse to consult, to confer or to negotiate with a labor organization by refusing to meet with, at reasonable times, and to confer with, in good faith, with respect to personnel policies and practices, and matters affecting general working conditions.

The basis of Complainant's allegation that Respondent violated the Order is reflected in so much of the Amended Complaint as reads:

"During the second half of 1976, a Safety Committee was set up and made to function at the Annapolis Field Station, without Union input."

A Notice of Hearing on Complaint issued on June 21, 1977, and, on August 2 and 3, 1977, I conducted hearings on the Complaint in accordance with the provisions of 5 U.S.C. 554. At the beginning of such hearings, the parties adopted and submitted the following issues for resolution:

- A) Whether, in the establishment and implementation of a safety committee at Annapolis, Maryland, consideration of membership of the committee was effected without meeting and conferring with Complainant, in violation of Subsections 19(a)(1) and (6) of the Order.
- B) Whether, in connection with the establishment and implementation of the safety committee at Annapolis, Maryland, Respondent did not afford Complainant a timely opportunity to negotiate the impact of the establishment and implementation of the safety committee, in violation of Subsections 19(a)(1) and (6) of the Order.

Such issues will be discussed and resolved in connection with my consideration of the pertinent facts I find to be established as a result of my examination and evaluation of the entire record established herein. The facts found to be established follow.

Findings of Fact

- 1) At all pertinent times, Complainant was the exclusive representative of Respondent's non-professional employees.
- 2) A June 8, 1976, Environmental Protection Agency occupational safety and health manual required formation of a safety committee, composed of management and employee repre-

sentatives, to advise management on employee safety and health matters and to recommend improvement of policies and procedures for its safety and health program.

3) On July 28, 1976, representatives of Respondent and Complainant met to discuss the safety and health program. Employee participation in the program, to include representation from Complainant, was included in the discussion.

4) Complainant, in an August 10, 1976, written communication, addressed the subject of the basis on which its committee representative would be determined.

5) On August 17, 19 and 20, 1976, an Occupational Health Program Manager evaluated, for health hazards, the laboratory work environment at Respondent's Annapolis, Maryland, Field Office (Laboratory).

6) The Manager's findings, set forth in a written report to a Chief, Occupational Safety and Health, identified several environmental hazards considered to constitute immediate and serious challenges to specific and to overall well-being of a worker in the laboratory. His general recommendation was that an in-depth industrial hygiene/occupational health survey be conducted at the laboratory "as soon as possible."

7) On August 20, 1976, the agency's Assistant Administrator for Planning and Management suspended all laboratory operations at the Laboratory "because of unsafe working conditions." He nominated members of his Occupational Safety and Health Staff to assist Respondent's Administrator "in establishing the conditions under which laboratory operations may be safely resumed."

8) On August 24, 1976, the Laboratory Director told his Chief, Chemistry Section, to appoint a safety committee composed of representatives from each operating section. Reportedly, the committee was then to be designed to effect a more safety-conscious atmosphere than had existed in the past; to assist in effecting correction of deficiencies that had been revealed; to be a "contract point" in connection with future inspections; and to assist in the accomplishment of physical examinations of workers at the Laboratory.

9) In connection with the establishment and implementation of the committee and its functions, and although formation of such a committee had been discussed at the July 28 meeting, Respondent gave Complainant no opportunity to discuss the membership of the committee or the impact of the implementation of committee activity on workers represented by Complainant.

10) In an August 25, 1976, report, an Acting Chief, Occupational Safety and Health Staff, identified "lack of proper housekeeping" as the most obvious problem at the Laboratory. He made several suggestions designed to effect proper housekeeping. He recommended that the Laboratory be kept "closed" until certain deficiencies were corrected and another inspection was accomplished.

11) September and November 1976 progress reports dealt with corrections of identified hazards and contained recommendations as to dates on which Laboratory operations could be resumed.

12) On November 12, 1976, the agency's Assistant Administrator for Planning and Management authorized "limited resumption of Laboratory operations." Such operations were undertaken.

13) The Laboratory safety committee held its first meeting on November 23, 1976. Minutes of that meeting were designated for distribution to all Laboratory employees on November 29.

14) All Laboratory operations were resumed on or about December 1, 1976.

15) Representatives of Complainant and Respondent discussed the committee at a December 14, 1976, meeting. Minutes of the meeting state: "This is a HQ matter and we are awaiting HQ reaction."

16) In a January 31, 1977, memorandum, Respondent invited Complainant to designate a unit member (one who worked at the Laboratory was suggested) to serve on the committee. The invitation indicated that, because the committee was established under emergency conditions, the invitation had not been tendered at an earlier date.

Discussion

Respondent acknowledges that it gave Complainant no opportunity to participate in the formation of the safety committee and the implementation and impact of its activities until January 1977. Further, Respondent acknowledges that, under other than the situation that existed on August 24, 1976, it had a obligation to afford Claimant the opportunity so to participate or an obligation to grant a request that Complainant be given the opportunity to participate prior to such formation and implementation.

However, Respondent submits that formation and implementation attended a situation at the Laboratory wherein environmental conditions constituted such serious hazards to the health of workers as to require suspension of laboratory activities, and one wherein suspension of laboratory activities rendered the Laboratory incapable of accomplishment of its mission. Respondent submits that the situation existed from the day laboratory activities were suspended until the day they were resumed. Respondent adopts the posture that the formation and implementation were required as a result of the development and recognition of an emergency situation at the Laboratory that dictated corrective action within a time-frame that reasonably precluded consultation and/or negotiation with Complainant relative thereto.

In connection with the foregoing, Respondent references Section 12(b)(6) of the Order. That provision announces the proposition that, even though a matter is one that is subject to a labor-management agreement under the Order, management retains the right to take whatever actions are necessary to carry out the mission of an agency in emergency situations. Respondent proposes that, because of the emergency situation at the Laboratory, formation of the committee and implementation of its activities, without participation by Complainant, were necessary to enable the Laboratory to carry out its mission.

Were I, contrary to fact, to find that the need for formation of the committee was dictated by the emergency situation existing on August 24, 1976, I would not find Respondent's proposal, so far as it relates to organization and implementation and impact of activities, to be decisionally persuasive. I adopt Complainant's submission that, so far as health hazards were concerned, no emergency situation existed after laboratory activities were suspended on August 20. Further, I attach significant decisional weight to so much of the Laboratory Director's testimony as reflected his opinion that negotiation on the implementation and impact of the committee, between the date the Laboratory "closed" and the date it "reopened," would have caused no significant delay in reopening. My evaluation of the foregoing and my review and evaluation of all other record evidence are found to be supportive of the finding that the actions and inactions of Respondent, relative to implementation and impact of the activities of the committee, were so without reason and excuse as to constitute an unfair labor practice. I so conclude.

I find Respondent's proposal, that the formation of the committee was dictated by the emergency situation existing on August 24, 1976, to be without merit. Examination and evaluation of the record, in a light I consider to reflect most

favorably upon Respondent, result in my acceptance of the proposition that formation of the committee was occasioned, but not dictated, by recognition of, what reasonably was considered to be, an emergency situation.

The record reveals that formation of a safety committee, membership of which was to include employee representatives, was dictated by the requirements of the agency's June 8, 1976, occupational safety and health manual. The record reveals that, on July 28, 1976, Respondent was aware of the mandate to form such a committee and knew that Complainant was exclusive representative of its non-professional employees. My evaluation of the foregoing and my review and evaluation of all other record evidence are found to be supportive of the finding that the actions and inactions of Respondent, relative to formation of the committee, were so without reason and excuse as to constitute an unfair labor practice. I so conclude.

The foregoing conclusions follow recognition and evaluation of Respondent's argument that the complaint should be dismissed because, after Complainant was notified of establishment of the committee, it failed to advise Respondent that negotiation was desired. Assuming, for the purpose of argument, Complainant's obligation to advise, I read the record of events attending the July 28, 1976, meeting as establishing the argument to be without merit.

Recommendation

Having found that Respondent has engaged in conduct that is violative of Sections 19(a)(1) and 19(a)(6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary, to effectuate the purposes and policies of that Order, adopt the Recommended Order that follows.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that U.S. Environmental Protection Agency, Region III (EPA-3) shall:

1. Cease and desist from:

a) Establishing and implementing the activities of a Safety Committee at its Annapolis Field Station without notifying Local 3631 of American Federation of Government Employees and affording such representative the opportunity to meet and confer on the establishment and implementation and impact of the activities of the committee.

b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2) Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

a) Notify Local 3631 of American Federation of Government Employees that it will, upon request, meet and confer in good faith on the establishment and implementation and impact of the activities of a Safety Committee at its Annapolis Field Office.

b) Post at its U.S. Environmental Protection Agency, Region III, facilities, copies of the attached notice marked " Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Administrator, Region III, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.



David W. Pelkey
Administrative Law Judge

Dated: November 29, 1977
Washington, D.C.

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith with Local 3631 of American Federation of Government Employees, relative to the establishment and implementation of the activities of a Safety Committee at Annapolis Field Office, upon request by Local 3631.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or 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 its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, Gateway Building, 3535 Market Street, Philadelphia, PA 19104

March 3, 1978

A/SLMR No. 998

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE
A/SLMR No. 998

INTERNAL REVENUE SERVICE

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union, Chapter 8, et al. (NTEU) alleging that the Respondent had violated Section 19(a)(1) and (6) of the Order by unilaterally declaring terminated 61 provisions of the parties' expired Multi-District Agreement. This was done after the Complainant declared negotiations for a new agreement to be at impasse and announced its intention to request the services of the Federal Service Impasses Panel. The Respondent defended its action by asserting that the cancelled provisions represented "institutional benefits" accruing to the Complainant as an institution, arising solely from the agreement and, therefore, not surviving the expiration thereof. The Respondent also urged that the complaint be dismissed for failure to name an appropriate respondent, contending that because the bargaining relationship between the Respondent and the NTEU existed at the district office level, the district offices were indispensable parties to this complaint.

The Administrative Law Judge concluded that only certain specific provisions of the agreement expired automatically when the agreement ended. Except for those items, he found that the items cancelled by the Respondent had become terms or conditions of employment which could not be changed unilaterally after expiration of the agreement. He noted further the requirement that such terms may not be changed after impasse is reached without giving the NTEU an opportunity to invoke the services of the Federal Service Impasses Panel. The Administrative Law Judge also concluded that where, as here, agency management above the organizational level of exclusive recognition is responsible for improper conduct, it commits a violation of Section 19(a)(6) as well as Section 19(a)(1) of the Order.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations with respect to those provisions of the negotiated agreement which the Administrative Law Judge found had survived the agreement and had, therefore, been improperly terminated by the Respondent. Accordingly, he ordered that the Respondent cease and desist from the conduct found violative of Section 19(a)(1) and (6) of the Order and that it take certain affirmative remedial actions.

Respondent

and

Case No. 22-7717(CA)

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 8, ET AL.

Complainants

DECISION AND ORDER

On October 6, 1977, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent and the Complainants filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. 1/ Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting

1/ Among other things, the Respondent excepted to the consideration of post-complaint conduct and the remedy thereto recommended by the Administrative Law Judge. I find, in agreement with the Administrative Law Judge, that such evidence was properly considered as background with respect to the alleged unfair labor practice herein. Cf. National Labor Relations Board, Region 17, 3 A/SLMR 427, 429-430, A/SLMR No. 295 (1973), and Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, A/SLMR No. 878 (1977). Further, the fact that the Respondent's subsequent misconduct flowed directly from the unfair labor practices alleged in the complaint and found herein makes it appropriate to specifically remedy such conduct.

briefs filed by the parties, I hereby adopt the findings, conclusions 2/ and recommendations 3/ of the Administrative Law Judge.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service shall:

1. Cease and desist from:

(a) Making unilateral changes in personnel policies and practices after the expiration of a negotiated agreement containing such personnel policies and practices in the absence of a bargaining impasse or, if a bargaining impasse exists, without affording the National Treasury Employees Union, Chapter 8, et al., or any other exclusive representative, the opportunity to invoke the services of the Federal Service Impasses Panel at a time prior to the implementation of such changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Proceed to grievance-nonadvisory arbitration in any case in which the past refusal to do so was predicated upon the expiration of the Multi-District Agreement between the Internal Revenue Service and the National Treasury Employees Union, Chapter 8, et al., upon appropriate request, within 21 days after the date of this order.

2/ Under the circumstances, the provision for advisory arbitration expired upon the termination of the parties' negotiated agreement. Compare Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 859 (1977) in which final arbitration was found to continue as a term and condition of employment after the expiration of a negotiated agreement, absent agreement of the parties that arbitration terminates or in the event of a post-impasse change. Absent contract language to the contrary, dues withholding also would have expired. See Internal Revenue Service, Ogden Service Center, et al., A/SLMR No. 806 (1977). However, the agreement herein specifically provided for the continuation of dues withholding for 56 days after the termination of the agreement.

3/ While the Administrative Law Judge inadvertently failed to make a specific finding that the Respondent violated Section 19(a)(1) and (6) of the Order, it is clear from a reading of his Recommended Decision and Order that the Administrative Law Judge intended to make such a finding. Cf. California National Guard, State Military Forces, Sacramento, California, 4 A/SLMR 103, 105, A/SLMR No. 348 (1974). This inadvertance is hereby corrected.

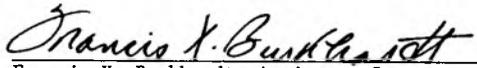
-2-

(b) To the extent consonant with law and regulations, restore all benefits, including annual leave, denied due to unilateral changes in personnel policies and practices after the expiration of the May 3, 1974, negotiated agreement, for the period November 8, 1975, to December 23, 1975.

(c) Post at the District Offices of the Internal Revenue Service that were parties to said Multi-District Agreement, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of each said District Office and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Said Directors shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days of the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
March 3, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT make unilateral changes in personnel policies and practices after the expiration of a negotiated agreement containing such personnel policies and practices in the absence of a bargaining impasse, or, if a bargaining impasse exists, without affording the National Treasury Employees Union, Chapter 8, et al., or any other exclusive representative, the opportunity to invoke the services of the Federal Service Impasses Panel at a time prior to the implementation of such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL proceed to grievance-nonadvisory arbitration in any case in which the past refusal to do so was predicated upon the expiration of the Multi-District Agreement between the Internal Revenue Service and the National Treasury Employees Union, Chapter 8, et al., upon appropriate request, within 21 days of this order.

WE WILL, to the extent consonant with law and regulations, restore all benefits, including annual leave, denied due to unilateral changes in personnel policies and practices after the expiration of the May 3, 1974 negotiated agreement, for the period November 8, 1975, to December 23, 1975.

(Agency or Activity)

Dated: _____ By: _____ (Signature)

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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of :
INTERNAL REVENUE SERVICE :
Respondent :
and :
NATIONAL TREASURY EMPLOYEES UNION, :
CHAPTER 8, ET AL. :
Complainants :
..... Case No. 22-7717 (CA)

Appearances:
Robert M. Tobias
General Counsel
National Treasury Employees Union
1730 K Street, N.W.
Washington, D.C. 20006
For the Complainants

Michael Sussman, Attorney
Stuart E. Seigel, Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This case arises under Executive Order 11491 as amended. It was initiated by a complaint filed January 10, 1977 alleging a violation of Sections 19(a)(1) and (6) of the Executive Order. The violation was alleged to consist of the Respondent unilaterally declaring terminated 61 provisions of an expired Multi-District agreement when the Complainant advised the Respondent that negotiations were at an impasse and that it intended to request the services of the Federal Service Impasses Panel.

The Respondent filed a response to the complaint in which it stated that the provisions of the agreement that were cancelled were those that concern benefits or duties accruing directly to the Complainant as an institution, which benefits and duties arose solely from the negotiated agreement and did not survive the expiration of the agreement. The response argued that the cancellation of such rights of the union therefore was not in violation of the Executive Order.

On April 14, 1977 the Acting Regional Administrator issued a Notice of Hearing to be held in Washington, D.C. on May 31, 1977. Pursuant to an Order Rescheduling Hearing, a hearing was held in Washington on June 15, 1977. Both parties were represented by counsel. They introduced a stipulation and joint exhibits. The Complainant offered in evidence thirteen exhibits, the authenticity of which the Respondent conceded, but the admissibility of which the Respondent opposed. Eleven of them were received in evidence. Neither party offered any witnesses and both waived closing argument. Both sides filed briefs.

FACTS

1. On June 8, 1976, the Internal Revenue Service acting on behalf of 57 IRS District Offices throughout the United States, and the National Treasury Employees Union acting on behalf of its chapters and joint councils that represented unit employees of IRS in those 57 offices, began negotiations on a successor collective bargaining to replace the Multi-District Agreement covering approximately 30,000 employees in the aforementioned 57 IRS District Offices.

2. The agreement sought to be negotiated would be the third such multi-unit agreement between the parties and was to be known as Multi-District Agreement III (MDA III).

3. The parties met and negotiated on approximately 40 separate occasions between June and September 1976 in an effort to reach agreement.

4. The expiration date of MDA II was August 3, 1976. On July 28, 1976 the parties were still in negotiation on MDA III and they extended MDA II to September 3, 1976. On August 27, 1976 they again extended it subject to either party filing a request with the Federal Service Impasses Panel. The August 27 agreement extended MDA II "until such time as the Union invokes Impasse as provided for in Executive Order 11491, as amended" and further provided:

"... Each party reserves the right, subsequent to the termination of 'mediation' or the termination of direct negotiations between the parties, to serve upon the other party in writing a five-day notice of termination of this extension agreement. The agreement will then terminate at midnight of the fifth (5th) calendar day after receipt by either party of a notice of termination. The Union agrees to give the the Employer five (5) days notice in writing prior to exercising its right to invoke the Impasse Procedures referred to above. ..."

5. On November 2, 1976, NTEU National President, Vincent L. Connery, informed the Commissioner of the Internal Revenue Service, Donald C. Alexander, that NTEU was terminating the August 27 extension and informed him that it would be proceeding to the Federal Service Impasses Panel by filing a request with PSIP after five days as provided in the August 27 extension agreement.

6. By letter dated November 5, 1976 Billy J. Brown, IRS Director of Personnel, acknowledged the NTEU communication of November 2 and informed NTEU President Connery that IRS considered the contract terminated and that the termination ended the "institutional benefits" to the Union contained in the contract. A list of the "institutional benefits" was attached. It stated also that other benefits in the agreement that accrue to individual employees would continue in effect. 1/

7. On November 8, 1976 NTEU by letter to Commissioner Alexander charged IRS with violating Sections 19(a)(1) and (6) of the Executive Order by its letter of November 5, 1976.

8. On November 8, 1976 NTEU by letter to Commissioner Alexander requested a meeting with IRS to discuss the IRS letter of November 5, 1976 and its attachment.

9. On November 19, 1976 a meeting was held by representatives of IRS and NTEU to try to resolve the issues raised by the IRS letter of November 5, 1976 and the NTEU unfair-labor-practice charge of November 8, 1976. No agreement was reached.

10. On December 7, 1976 the IRS Director of the Personnel Division by letter informed the NTEU National President of

1/ J. Exh. 6.

the IRS final decision that no violation of the Executive Order had occurred.

11. On December 17, 1976 NTEU President Connery executed the complaint in this case and the same day NTEU General Counsel Tobias mailed it to the Area Director. It was filed January 10, 1977.

12. On December 23, 1976 the parties agreed that effective that date MDA II would again become effective immediately "until the implementation date of the Multi-District III agreement" which had been negotiated and was pending ratification. MDA III was ratified and became effective May 1, 1977, replacing the reinstated MDA II.

13. During the period MDA II was not in effect preceding the effective date of MDA III, November 8 to December 23, 1975, the Respondent denied to the Complainant what it considered "institutional benefits" of MDA II. Thus administrative time to stewards was denied on three occasions, 2/ IRS denied permission to post a union publication on a bulletin board, 3/ it denied permission to hold a chapter meeting in an IRS meeting room, and it held grievances not subject to arbitration if the grievance was filed during that period although arbitration was not invoked until after MDA II was reinstated on December 23, 1976. 4/

DISCUSSION

I. The Proper Parties

I. The Agency contends that the complaint should be dismissed because not filed against the proper parties, i.e., the exclusive recognition is by 57 separate District Offices which have the bargaining relationship, either certified or recognized, and they are indispensable parties, while the complaint here is against the National Internal Revenue Service.

The conduct complained of was directed by the National IRS which also engaged in the negotiations on behalf of the District Offices. It was the National IRS office that declared the "institutional benefits" terminated at the expiration of MDA II, and determined its consequences.

2/ C. Exhs. 2, 4, 11.
3/ C. Exh. 9.
4/ C. Exhs. 3, 5, 6, 7, 8.

A priori, and on the authority of several decisions of the Assistant Secretary, 5/ an agency need not have a bargaining relationship with a union to commit a violation of section 19(a)(1) of the Executive Order. Just about anyone could be guilty of interfering with, restraining, or coercing an employee in the exercise of his rights assured by the Executive Order. So at most this position of the Respondent could plausibly have been directed only to dismissing the complaint with respect to its 19(a)(6) aspect, -- for whatever purpose that would have served.

But since the decision of the Federal Labor Relations Council in Naval Air Rework Facility, Pensacola, Florida and Secretary of the Navy and American Federation of Government Employees, AFL-CIO, Local 1960, FLRC No. 76A-37 (May 4, 1977) and of the Assistant Secretary in the same case on remand, A/SLMR No. 873 (August 4, 1977), it is settled that agency management above the organizational level of exclusive recognition commits a violation of section 19(a)(6) as well as 19(a)(1) when it is responsible for the improper conduct alleged.

The complaint should not be dismissed for failure to name the appropriate respondent.

II. The Merits

II. The Respondent contends that for the period MDA II expired and was not extended or reinstated by agreement, it expired "in its entirety, and nothing is left." 6/ It concedes, however, that the terms of the agreement that were required subjects of bargaining became established working conditions and could not be changed unilaterally without bargaining for their rescission. It takes the position that the provisions of the agreement it declared of no effect were only those that conferred "institutional benefits", i.e., benefits to the union which existed only because of the existence of the agreement. The Assistant Secretary has addressed himself to this problem or related problems at least three times.

In U.S. Army Corps of Engineers, Philadelphia District and American Federation of Government Employees, Local 902, AFL-CIO, A/SLMR No. 673 (June 23, 1976), the parties engaged in good faith bargaining until they reached impasse. Neither

5/ See e.g., the Adjutant General, State of Illinois, Illinois Air National Guard and Illinois Air Chapter, A.C.T.; National Guard Bureau and Illinois Air Chapter, A.C.T., A/SLMR No. 598, fn. 4.
6/ Respondent's brief, p. 16.

party invoked the services of the Federal Service Impasses Panel. The Assistant Secretary said that in such situation the agency had the right unilaterally to change existing conditions of employment which change did not exceed the scope of the change it proposed during the negotiations. The agency did make a change that did not exceed the scope of what it proposed. However, it did so abruptly without notice to the union in time to give it "ample opportunity" to invoke the services of the Panel. The union then invoked the services of the Panel and filed a complaint under the Executive Order. The Assistant Secretary held that such conduct by the agency violated Sections 19(a)(1) and (6) of the Executive Order. The reason it was found to be such a violation was that the union must be given an opportunity to invoke such services and if it does "it will effectuate the purposes of the Order to require that the parties must, in the absence of an overriding exigency, maintain the status quo and permit the processes of the Panel to run its course before a unilateral change in terms or conditions of employment can be effectuated."

It is observed that in the instant case the Complainant was under contractual obligation to give the Respondent five days notice of its intent to invoke the services of FSIP. ^{7/} It did so on November 2, 1976, and only three days later, before the Complainant could lawfully carry out its intent, the Respondent by letter of November 5 advised the Complainant that what it considered "institutional benefits" conferred by the agreement were no longer in effect. ^{8/} (It is observed also that among what the Respondent designated as "institutional benefits" no longer in effect was the right of an employee to invoke arbitration of a grievance if he was unsuccessful in the preceding four steps of processing the grievance as provided in the agreement.)

Internal Revenue Service, Ogden Service Center, et al. and National Treasury Employees Union, NTEU Chapter No. 066, et al., A/SLMR No. 806 was decided March 1, 1977, after the critical events in this case, and the parties did not have the benefit of its teaching to guide their conduct

So far as the issues in that case are relevant to the issues in this case, the material facts are the same in both cases except that that case did not involve the question

^{7/} Exh. J 4.
^{8/} Exh. J 6.

of resort to FSIP. The agreement that expired in that case was a Multi-Center Agreement (MCA) instead of a Multi-District Agreement. The Internal Revenue Service declared certain provisions of MCA no longer in effect. Among them were provisions for administrative leave for union representatives to prepare grievances, posting on bulletin boards, permission to the union to address new employees and training classes, and the allowance of appeals of grievances to arbitration. The Administrative Law Judge recommended that the unilateral termination of such arrangements upon expiration of the agreement be held not violative of the Executive Order. In disagreement with the ALJ the Assistant Secretary held:

"... the unilateral elimination of those agreement provisions characterized by the Respondent as 'institutional benefits' accruing to the union qua union was violative of Section 19(a)(1) and (6) of the Order. Thus, in my view, only those rights and privileges which are based solely on the existence of a written agreement -- e.g., checkoff privileges -- in effect, terminated with the expiration of a negotiated agreement. On the other hand, other rights and privileges accorded to exclusive representatives continue in effect until such time as they as they are modified or eliminated pursuant to negotiations or changed after a good faith bargaining impasse has been reached. Under these circumstances, I find that the Respondent Service Centers' unilateral elimination of other agreement provisions related to the NTEU's rights, such as posting privileges, etc., constituted an improper unilateral change in personnel policies and practices in violation of Section 19(a)(1) and (6) of the Order." [Footnotes omitted.]

A still later decision of the Assistant Secretary involving essentially the same parties, is Department of the Treasury, Internal Revenue Service, Brookhaven Service Center and National Treasury Employees Union and Chapter 099, NTEU, A/SLMR No. 859, decided June 29, 1977. In that case the underlying facts were the same as in A/SLMR No. 806, i.e., the same MCA had expired. The Respondent had refused arbitration as the last step in grievance procedure because of its position that with the expiration of the agreement that provision

had become inoperative as an "institutional benefit" of the expired agreement. The Assistant Secretary held:

"... arbitration is not one of those rights or privileges uniquely tied to a written agreement which terminates upon the expiration of a Federal sector negotiated agreement. Rather ... arbitration, once agreed upon by the parties as the final step for the settling of disputes arising under a negotiated agreement, continues thereafter as a term and condition of employment . . ."

The Assistant Secretary added a footnote that this holding did not mean that an activity could not unilaterally change a condition of employment if such change did not exceed the scope of its proposals in prior negotiations and the parties had bargained to impasse over such proposal and the matters had not been submitted to FSIP, citing U.S. Army Corps of Engineers, Philadelphia District, supra.

I conclude that very little contained in an expired agreement expires with the agreement automatically other than the dues withholding provisions. The provisions the Respondent asserted were no longer effective after expiration are set forth in the attachment to Joint Exhibit 6. It would unreasonably prolong this Recommended Decision to discuss them serially. The complaint describes them as some 61 separate provisions in the "MDA II". On the basis of the decisions discussed above, I conclude that only Article 34, providing for advisory arbitration of adverse actions which the Complainant concedes expired with the expiration of the agreement; ^{9/} the last sentence of Article 35, Section 3(A), authorizing the union to initiate a grievance when it believes it has been denied a right under the agreement; Article 37, providing for a Labor-Management Relations Committee consisting of representatives of the union and representatives of Management; and Article 38, providing for dues withholding, expired with the expiration of the agreement. ^{10/} I do not consider those provisions to be included in the phrase

^{9/} Plaintiff's brief, p. 12, fn. 4.

^{10/} Article 35, Section 3B, providing that the Union would have the right to be present at formal discussions between an employee and management concerning a grievance, survives not because it is a provision of the agreement but because it is mandated by the last sentence of Section 10(e) of the Executive Order.

"terms or conditions of employment" as used in U.S. Army Corps of Engineers, Philadelphia District, supra, and hence not within the interdiction of that case against an agency unilaterally changing a contract provision after impasse without giving the union an opportunity to invoke the services of the Federal Service Impasses Panel. Also, Article 39, setting forth the duration and termination of the agreement, became obsolete with its expiration.

III. The Remedy

The complaint complains of "some 61 separate provisions in the" MDA that were unilaterally cancelled. The charge preceding the complaint charged a violation of Sections 19(a)(1) and (6) in the Respondent announcing its intention to ignore 61 provisions of the expired agreement.

The Respondent objected to the admission in evidence of eleven Complainant exhibits showing eleven instances of the Respondent carrying out its announced intention, on the ground that they postdated the original charge and in most cases the complaint. I do not believe it would further the purposes of the Order or the Regulations to require a charge and complaint to sustain an unfair labor practice allegation when an agency announces its intention to commit an unfair labor practice and then to require another charge and complaint to permit the complainant to show each instance of the agency carrying out its announced intention. Such evidence is not so much evidence of an additional unfair labor practice but is more in the nature of evidence of the damages flowing from the originally alleged unfair labor practice.

Some of the instances of improperly carrying out the announced unlawful intention are irreparable, such as denying bulletin posting and denying space for a union meeting, except insofar as ordering the Respondent to desist from such conduct in the future should the same situation arise again may be considered remedial. The denial of administrative leave to a steward to discuss a grievance or present it, which was authorized by the agreement but denied on the ground that "institutional benefits" had terminated is remediable if the steward took annual leave, by restoring such leave. The refusal to proceed to arbitration with a grievance can be remedied to the extent that the Respondent can be ordered to proceed to arbitration upon request of the Complainant made within 21 days ^{11/} of the date of the order in this case.

^{11/} The period allowed for invoking arbitration in MDA II. Jt. Exh. 1, Art. 36, Section 8.

RECOMMENDATION

Accordingly, I recommend that the Assistant Secretary order the Respondent to cease and desist similarly to the cease and desist order in A/SLMR No. 806, order the Respondent to restore annual leave charged to employees when administrative leave was authorized by the agreement but denied because of the expiration of MDA II, and order the Respondent to proceed to arbitration if requested by the Complainant within 21 days in any case in which the past refusal to do so was predicated on the expiration of MDA II.

A proposed Order so ordering is attached hereto as Attachment A, and a notice to be posted is attached hereto as Appendix A.



MILTON KRAMER
Administrative Law Judge

Dated: October 6, 1977
Washington, D.C.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations issued thereunder, the Assistant Secretary of Labor for Labor-Management Relations orders that the Internal Revenue Service shall:

1. Cease and desist from:

(a) Making unilateral changes in personnel policies and practices after the expiration of a negotiated agreement containing such personnel policies and practices in the absence of a bargaining impasse over such policies and practices.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Restore annual leave charged to employees when administrative leave was authorized by the Multi-District Agreement dated May 3, 1974 between it and the National Treasury Employees Union but denied because of the expiration of that Agreement.

(b) Upon request of said Union or its chapters within 21 days after the date of this order, proceed to arbitration in any case in which the past refusal to do so was predicated on the expiration of said Agreement.

(c) Post at the District Offices of the Internal Revenue Service that were parties to said Multi-District Agreement, copies of the attached notice marked "Appendix A" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Director of each said District Office and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notice to employees are customarily posted. Said Directors shall take reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

Attachment A (cont'd)

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days of the date of this Order, what steps have been taken to comply herewith.

FRANCIS X. BURKHARDT
Assistant Secretary fo Labor for
Labor Management Relations

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

We hereby notify our employees that:

WE WILL NOT make any change in the negotiated grievance-arbitration, the negotiated provision concerning administrative leave to a steward to prepare or present a grievance, the negotiated provision for the posting of union notices, the negotiated provision for the use of agency space for the holding of a union meeting, or any other term or condition of employment which is not based solely on the existence of a written agreement, following the expiration of the negotiated agreement, without notifying and upon request meeting and conferring on such matters with the National Treasury Employees Union, the exclusive representative of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 questions concerning this Notice of compliance with its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

March 3, 1978

A/SLMR No. 999

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ENVIRONMENTAL PROTECTION AGENCY,
REGION III
A/SLMR No. 999

U.S. ENVIRONMENTAL PROTECTION AGENCY,
REGION III

Respondent

and

Case No. 20-06138(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3631, AFL-CIO

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3631, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by (1) unilaterally implementing a reduction-in-force (RIF) involving a unit employee without bargaining on the implementation of the RIF and its impact on that employee, and (2) by refusing to furnish information sought by the AFGE in furtherance of its determination of whether the employee in question was a unit member. The Respondent contended that the subject employee was a management official and, thus, not within the AFGE's exclusively recognized unit.

The Administrative Law Judge found, and the Assistant Secretary concurred, that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing information relevant and necessary to the AFGE in performance of its representational duties. The Administrative Law Judge also found that the Respondent had not violated the Order by refusing to meet and confer on the implementation of the RIF and its impact on the subject employee. In the Administrative Law Judge's view, "determination of...[an employee's] status was a condition precedent to the ripening of Respondent's obligation (or the absence thereof) to negotiate the impact of the RIF." In this connection, he found that the Respondent's expressed willingness to seek the Assistant Secretary's determination of the employee's status "satisfied its then obligation" to meet and confer.

The Assistant Secretary noted, contrary to the Administrative Law Judge, that an agency acts at its peril when it unilaterally determines the unit status of employees and acts in accordance with such determination. He also noted that, in fact, no petition was filed seeking unit clarification under the Assistant Secretary's Regulations concerning the status of the employee in question. Thus, the refusal to meet and confer on the impact and implementation of the RIF on the employee involved would be violative of the Order if the employee, in fact, was within the bargaining unit. The Assistant Secretary reviewed the duties of the employee in question and concluded that the employee was not a management official and, therefore, was within the AFGE's exclusively recognized unit. Thus, the Respondent's refusal to bargain over the implementation of the RIF and its impact on the employee involved was found to be violative of Section 19(a)(1) and (6) of the Order.

Accordingly, the Assistant Secretary issued an appropriate remedial order.

On November 21, 1977, Administrative Law Judge David W. Pelkey issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, to the extent consistent herewith.

The Administrative Law Judge found, and I agree, that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to furnish relevant and necessary information to the Complainant concerning an employee "reached" in a reduction-in-force procedure (RIF) who, the Respondent claimed, was a management official, but whom the Complainant contended was an employee within the unit. ^{1/} The Administrative Law Judge found further that the Respondent had not violated Section 19(a)(1) and (6) by refusing to meet and confer with the Complainant concerning the implementation of the RIF and its impact on the adversely affected employee. In this regard, he concluded "that determination of... [an employee's] status was a condition precedent to the ripening of Respondent's obligation

^{1/} The Respondent did not file exceptions to any part of the Administrative Law Judge's Recommended Decision and Order.

(or the absence thereof) to negotiate the impact of the RIF" and that the Respondent's willingness to seek the Assistant Secretary's determination of the employee's status, as indicated by the record, "reasonably satisfied its then obligation under the Order." 2/ I disagree.

It is well established that an agency acts at its peril when it unilaterally determines the unit status of employees and acts in accordance with such determination. 3/ Thus, the refusal to meet and confer on the impact and implementation of the RIF on the employee involved herein would be violative of the Order if the employee, in fact, was a member of the bargaining unit. 4/ I must, therefore, make a determination as to the employment status of the subject employee in order to determine if the Respondent's refusal to meet and confer on the implementation and impact of the RIF was violative of the Order.

The record indicates that at the time of the RIF the subject employee, Mr. T. P. Gorman, was employed as a GS-301-15 Program Management Specialist in the Office of the Regional Administrator and performed job functions involving studies relating to data processing programs, including tracking and information retrieval systems. Gorman's duties were undertaken pursuant to the direction and under the supervision of the Regional Administrator and his subordinate, the Deputy Regional Administrator. The record reveals, that Gorman performed his studies within established guidelines, that he submitted his recommendations to his supervisor, and that, in fact, his recommendations were frequently rejected.

Under these circumstances, I find that the subject employee was not a management official within the meaning of the Order. Thus, in my view, the evidence establishes that Gorman served as an expert or resource person rendering information and recommendations with respect to implementing existing policies, as distinguished from actively participating

2/ Although the Respondent expressed a willingness to seek a determination of the employee's status through the procedures provided under the Order and the Assistant Secretary's Regulations, in fact, no petition seeking unit clarification was filed in this connection. It should be noted that it is not necessary that other parties concur in seeking such a determination through the Assistant Secretary's procedures, as implied by the Administrative Law Judge. Further, in my view, the Respondent's proposal relative to submitting the eligibility question to the Assistant Secretary for resolution and its commitment relative to action following such review would not absolve it from its bargaining obligations should it, as here, act in accordance with its erroneous conclusion.

3/ See U.S. Marine Corps Air Station, El Toro, 5 A/SLMR 606, A/SLMR No. 560 (1975), FLRC No. 75A-115 (1976).

4/ See U.S. Marine Weapons Station, Seal Beach, California. Department of the Navy, A/SLMR No. 827 (1977).

in, or influencing effectively, the ultimate determination of what policy with respect to personnel, procedures, or programs should be. 5/

As Gorman was not a management official and, consequently was included within the exclusively recognized unit, I find, contrary to the Administrative Law Judge, that the Respondent's failure to meet and confer concerning the implementation and impact of the RIF on Gorman was violative of Section 19(a)(1) and (6) of the Order.

Accordingly, I shall modify the Administrative Law Judge's Recommended Order to include the additional violation found herein and issue an appropriate remedial order.

ORDER 6/

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Environmental Protection Agency, Region III, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request by the American Federation of Government Employees, Local 3631, AFL-CIO, the employees' exclusive representative, such information as is necessary and relevant to enable it to perform its representational duties.

(b) Instituting a reduction-in-force procedure involving T. P. Gorman, or any other adversely affected employee represented exclusively by the American Federation of Government Employees, Local 3631, AFL-CIO, without notifying the American Federation of Government Employees, Local 3631, AFL-CIO, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the implementation of such procedure and its impact on adversely affected employees.

5/ See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, 2 A/SLMR 83, A/SLMR No. 135 (1972).

6/ The record indicates that Mr. Gorman has appealed his reduction-in-force (RIF) pursuant to a statutory appeal procedure. In Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, FLRC No. 74A-52 (1976), the Federal Labor Relations Council held that, under Section 19(d) of the Order, the existence of a statutory appeal procedure, such as that utilized by Mr. Gorman, precludes the Assistant Secretary from disposing of such issues as the propriety of the RIF, or fashioning such attendant remedies as reevaluation of the layoff or reinstatement, in an unfair labor practice proceeding. In my opinion, the principles enunciated by the Council in the Yuma case are equally applicable herein and I have fashioned my remedial order accordingly.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, furnish such information as is necessary and relevant to the American Federation of Government Employees, Local 3631, AFL-CIO, to enable it to perform its representational duties.

(b) Upon request, meet and confer with the American Federation of Government Employees, Local 3631, AFL-CIO, to the extent consonant with law and regulations, on the impact of any prior reduction-in-force on T. P. Gorman, or any other adversely affected employee represented exclusively by such representative.

(c) Notify the American Federation of Government Employees, Local 3631, AFL-CIO, of any intended reduction-in-force procedures and afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the implementation of such procedures and their impact on adversely affected employees.

(d) Post, at its U.S. Environmental Protection Agency, Region III facilities, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Regional Administrator and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(e) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
March 3, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to furnish, upon request by the American Federation of Government Employees, Local 3631, AFL-CIO, the employees' exclusive representative, such information as is necessary and relevant to enable it to perform its representational duties.

WE WILL NOT institute a reduction-in-force procedure involving T. P. Gorman, or any other adversely affected employees represented exclusively by the American Federation of Government Employees, Local 3631, AFL-CIO, without notifying the American Federation of Government Employees, Local 3631, AFL-CIO, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the implementation of such procedure and its impact on adversely affected employees.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, furnish such information as is necessary and relevant to the American Federation of Government Employees, Local 3631, AFL-CIO, to enable it to perform its representational duties.

WE WILL, upon request, meet and confer, with the American Federation of Government Employees, Local 3631, AFL-CIO, to the extent consonant with law and regulations, on the impact of any prior reduction-in-force on T. P. Gorman, or any other adversely affected employee represented exclusively by such representative.

WE WILL notify the American Federation of Government Employees, Local 3631, AFL-CIO, of any intended reduction-in-force procedures and afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the implementation of such procedures and their impact on adversely affected employees.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, 3535 Market Street, Philadelphia, PA 19104.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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IN THE MATTER OF: :
:
: U.S. ENVIRONMENTAL PROTECTION :
: AGENCY, REGION III, :
: Respondent : Case No. 20-06138(CA)
:
: and :
:
: AMERICAN FEDERATION OF GOVERNMENT :
: EMPLOYEES, AFL-CIO, LOCAL 3631 :
: Complainant :
. . . . . :

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WILLIAM T. WISNIEWSKI,
6th and Walnut Streets
Philadelphia, Pennsylvania 19106
For the Respondent

DR. DAVID LANGFORD
AFGE-Local 3631
6th and Walnut Streets
Philadelphia, Pennsylvania 19106

E. RALPH JOHNSON,
AFL/CIO
4847 North Broad Street, Suite 201
Philadelphia, Pennsylvania
For the Complainant

Before: DAVID W. PELKEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

In an Amended Complaint filed on June 17, 1977, Complainant alleged that Respondent had engaged in violations of Subsections 19(a)(1) (hereafter 19(a)(1)) and 19(a)(6) (hereafter 19(a)(6)) of Executive Order 11491, as amended (the Order). By its terms, 19(a)(1) provides that an agency's management shall not interfere with, restrain or coerce an employee in the exercise of the right,

freely and without fear of penalty or reprisal, to form, to join and to assist a labor organization; or to refrain from any such activity. By its terms, 19(a)(6) provides that an agency's management shall not refuse to consult, to confer or to negotiate with a labor organization by refusing to meet with, at reasonable times, and to confer with, in good faith, with respect to personnel policies and practices, or other matters affecting general working conditions.

The alleged violations of the Order arise out of a reduction-in-force action Respondent effected involving an employee whose status as a management official (as determined by Respondent) was challenged by Complainant.

A Notice of Hearing on Complaint issued on June 17, 1977, and, on August 2 and 3, 1977, I conducted hearings on the Complaint in accordance with the provisions of 5 U.S.C. 554. During the hearings, the parties adopted and submitted the following issues for resolution:

A) Whether Respondent violated Subsections 19(a)(1) and (6) of the Order on December 7, 1976, by refusing to supply relevant and necessary information to Complainant in connection with a determination of whether T. P. Gorman was a management official.

B) Whether Respondent violated Subsections 19(a)(1) and (6) of the Order by unilaterally declaring that T.P. Gorman was a management official and hence excluded from the exclusive unit.

C) Whether Respondent violated Subsections 19(a)(1) and (6) of the Order by refusing to bargain with Complainant concerning the procedures to be utilized in, and the adverse impact of, a reduction-in-force involving T.P. Gorman.

Such issues will be discussed and disposed of in connection with my consideration of the pertinent facts I find to be established as a result of my examination and evaluation of the entire record developed herein. The facts, found to be established, follow.

Findings of Fact

1) At all pertinent times, Complainant was the exclusive representative of Respondent's non-professional employees.

2. Among Respondent's employees was one T.P. Gorman, who, beginning May 20, 1973, was a GS-15 Program Management Specialist. As such a specialist, Gorman served as a special assistant to the Regional Administrator in the accomplishment of a variety of special studies and projects and in the representation of the Regional Administrator in contacts with states in the region.

3) As a consequence of an agreement between the concerned parties, Gorman had been found eligible to vote as a non-professional in the May 26, 1976, representation election. No probative record evidence references an agreement, at the time of the election, as to whether Gorman was a management official.

4) During 1975 and 1976, Gorman was given three work assignments by the Deputy Regional Administrator. Each assignment required application of Gorman's technical knowledge and expertise in the field of automatic data processing.

5) On October 18, 1976, Gorman was notified that he had been "reached for release" from his position under reduction-in-force (RIF) regulations. He was offered a position as a GS-12 Computer Systems Analyst. He did not accept the position.

6) Respondent did not give Complainant prior notification of issuance of the RIF notice to Gorman.

7) On November 5, 1976, and by way of a notice of intention to file an unfair labor practice charge, Claimant requested a meeting with Respondent. The meeting was requested for the purpose of effecting an informal resolution of Complainant's charge that, by failing to confer, consult and negotiate with it with respect to the impact of the RIF on Gorman, Respondent effected a violation of the Order.

8) On November 9, 1976, Complainant and Respondent met pursuant to Complainant's request. At the meeting and as a result thereof:

A) Respondent adopted the position that it had no obligation to negotiate with Complainant relative to the impact of the RIF on Gorman because, as a management official, he was not a member of the unit Complainant represented.

B) Complainant adopted the position that it could produce evidence to establish that Gorman was a member of the unit.

C) At the meeting, Respondent offered Gorman's position description to Complainant as assistance in effecting a determination that Gorman was a management official. Complainant refused access to the document for that purpose.

D) Respondent proposed that its position be reviewed by the Department of Labor (DOL) and that, if DOL determined that Gorman was a member of the unit, the RIF action would be cancelled. As an alternate, Respondent proposed negotiation of the impact that the RIF had on the unit.

E) Complainant proposed that Respondent's position be reviewed by the Civil Service Commission (CSC). As an alternate, Complainant proposed negotiation of the impact of the RIF on Gorman.

9) The record does not establish submission of the position for review by DOL prior to November 20, 1976. It establishes CSC's election not to review the position prior to that date.

10) The record does not establish either that Complainant accepted the proposal to negotiate the RIF impact on the unit, or that Respondent accepted the proposal to negotiate the RIF impact on Gorman.

11) On November 11, 1976, and at Gorman's request and pursuant to his suggestions, the Gorman position description was amended to include documentation reflecting details of the work assignments that he accomplished during 1975 and 1976.

12) Pursuant to RIF procedures, Gorman was separated on November 20, 1976.

13) Complainant and Respondent met on December 7, 1976, relative to the Gorman matter. Respondent proposed that the position description determined management official status. Complainant proposed that the criteria set forth in A/SLMR No. 135 and an examination of the duties performed governed the determination. At the meeting, Respondent denied Complainant access to such records as reflected duties that had been performed by Gorman.

Discussion

Issue: Whether Respondent violated 19(a)(1) and (6) of the Order on December 7, 1976, by refusing to supply relevant and necessary information to Complainant in connection with a determination of whether Gorman was a management official.

Respondent admits that, on December 7, there was information in its files that would have been helpful to Complainant in effecting a determination of whether Gorman was a management official. Further, Respondent admits that it refused access to the position description and other information at the December 7 meeting. However, Respondent submits that the denial of access was justified.

In support of the submission, Respondent asserts that it offered Complainant access to and use of the Gorman position description and the agency's manual on labor-management relations at the November 9 meeting; that Complainant refused the offer; and that, by December 7, Respondent "was tired of playing games."

I find the submission to be without merit. I evaluate the record as establishing that Complainant considered the duties performed by Gorman, as opposed to duties prescribed by his position description, to be persuasive, if not controlling, in determining whether he was a management official. Its reference to and reliance upon Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135, is found to constitute a reasonable basis for its "did do" versus "should do" position. Accordingly, I believe that "did do" information was relevant and necessary.

I note that, as of November 9, Gorman's position description was a "should do" document that was not reflective of "did do" information. I note that, on that date, Respondent was in possession of the latter information. I note that "did do" information was not incorporated in the description until November 11, two days after Respondent's offer of access to and use of the document. The ineluctable conclusion is that the information offered on November 9 was not the information that was relevant and necessary to Complainant's inquiry. Accordingly, by its refusal to accept and use that information, Complainant did not effect a rejection of relevant and necessary information.

I evaluate the record as establishing that, on December 7, Complainant requested and Respondent denied access to information that included a position description in which was incorporated "did do" information that was relevant and necessary. Respondent's lack of capacity, properly for "playing games" under the Order, resulted in its violation of the rules of the "game."

Conclusion: Respondent's December 7, 1976, refusal to supply relevant and necessary information to Complainant violated the Order.

Issue: Whether Respondent violated 19(a) (1) and (6) of the Order by unilaterally declaring that Gorman was a management official and hence excluded from the exclusive unit.

I consider Complainant as having abandoned the issue in the course of the August 3 hearing. During Complainant's cross-examination of a witness who was involved in the RIF action, the following conversational exchange took place between the examiner and me:

"Judge Pelkey: Okay. Whether or not they were accurate in declaring him a management official is not one of the issues you submitted here.

"Dr. Langford: Respondent violated 19A1 and 19A6 by unilaterally declaring --

"Judge Pelkey: By unilaterally declaring that he was a management official, not whether it was right but whether they were right in unilaterally declaring it. That's what you submitted to me. Isn't it?

"Dr. Langford: Yes. Making that unilateral determination that he was a management official, we have no objection. If he was not, then the Assistant Secretary of Labor held that management proceeds at its peril in doing this" (Transcript: Page 2-31, Lines 13-25; Page 2-32, Line 1).

Dr. Langford's last statement referenced the decision in U.S. Naval Weapons Station, Seal Beach, California, Department of the Navy, A/SLMR No. 827. That decision reflected the propositions A) that a unilateral determination of status is within an agency's authority and B) that the agency acts in peril of violation of the Order if that determination is erroneous.

In connection herewith, I note that Section 10(b) of the Order provides that a unit, such as is involved herein, shall not include any management official. It also provides that questions involving "the appropriate unit and related issues may be referred to the Assistant Secretary for decision." Further, Section 6(a) of the Order directs the Assistant Secretary of Labor for Labor-Management Relations to decide questions "as to the appropriate unit...and related issues submitted for his consideration."

I read the posture adopted by Complainant as being reflective of a determination that the parties' dispute relative to Gorman's status should have been the subject of a petition filed for the purpose of clarifying that status.

Conclusion: No decisional purpose will be served by a determination of whether Respondent's unilateral declaration constituted a violation of the Order.

Issue: Whether Respondent violated 19(a)(1) and (6) of the Order by refusing to bargain with Complainant concerning the procedures to be utilized in, and the adverse impact of, a reduction-in-force involving Gorman.

My examination and evaluation of the record are found to be supportive of the determination that there is substantial persuasive evidence to support the finding that Respondent did not so refuse to bargain with Complainant. I so find.

I recognize the fact that the RIF action was initiated without notification to or solicitation of input by Complainant. I believe that no significant purpose is to be served by a determination of the propriety thereof. Rather, I find decisional persuasion in the circumstances and events attending Complainant's November 5 request and the November 9 meeting.

I find that each party's position relative to Gorman's status was reasonably supportable. I find that determination of that status was a condition precedent to the ripening of Respondent's obligation (or the absence thereof) to negotiate the impact of the RIF. I find that Respondent's proposal relative to DOL review and its commitment relative to action following such review reasonably satisfied its then obligation under the Order. I find that Complainant's refusal to concur in and to participate in action on the proposal was not reasonably supportable. Finally, I find that Respondent's actions attending Complainant's subsequent proposal that Gorman's status be reviewed by CSC reflected a willingness to effect a resolution of the dispute existing between the parties relative thereto.

Conclusion: Respondent did not refuse to bargain with Complainant concerning the procedures to be utilized in, and the adverse impact of, the Gorman RIF in violation of the Order.

Recommendations

Upon the basis of the foregoing findings and conclusions, I recommend that so much of the Amended Complaint as alleges Respondent's violations of Subsections 19(a)(1) and (6) of the Order:

A) by unilaterally declaring that T.P. Gorman was a management official and hence excluded from the exclusive unit, and

B) by refusing to bargain with Complainant concerning the procedures to be utilized in, and the adverse impact of, a reduction-in-force involving T.P. Gorman be dismissed.

Having found that Respondent, by refusing to supply relevant and necessary information to Complainant on December 7, 1976, in connection with a determination of whether T.P. Gorman was a management employee, has engaged in conduct that is violative of Subsections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary, to effectuate the purposes and policies of that Order, adopt the following Recommended Order.

Recommended Order

Pursuant to Section 6(a) of Executive Order 11491, as amended, and Section 203.26(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations orders that, so far as it alleges Respondent's violations of Subsections 19(a)(1) and (6) of the Order:

A) by unilaterally declaring that T.P. Gorman was a management official and hence excluded from the exclusive unit, and

B) by refusing to bargain with Complainant concerning the procedures to be utilized in, and the adverse impact of, a reduction-in-force involving T.P. Gorman, the Amended Complaint be, and the same is hereby, dismissed.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that U.S. Environmental Protection Agency, Region III, shall:

1) Cease and desist from:

a) Withholding or failing to provide, upon request by American Federation of Government Employees, Local 3631, any information relative to its determination of whether T.P. Gorman was a management official, which information is necessary to enable Local 3631 to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

b) Interfering with, restraining or coercing its employees in the exercise of their rights assured by the Executive Order by denying Local 3631 information necessary to enable such labor organization, as the exclusive representative, to discharge its obligation to represent effectively all employees in the exclusively recognized unit.

c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2) Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

a) Upon request, make available to Local 3631 all information relevant to its determination of whether T.P. Gorman was a management official, which information is necessary to enable the Local to discharge its obligations as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

b) Post, at the Region III office facilities, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Regional Administrator and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.


David W. Pelkey
Administrative Law Judge

Dated: November 21, 1977
Washington, D.C.

NOTICE TO ALL EMPLOYEES

APPENDIX

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT withhold or fail to provide, upon request by American Federation of Government Employees, Local 3631, any information relative to its determination of whether T.P. Gorman was a management official, which information is necessary to enable Local 3631 to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Executive Order.

WE WILL, upon request, make available to American Federation of Government Employees, Local 3631, all information relative to its determination of whether T.P. Gorman was a management official, which information is necessary to enable Local 3631 to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(Agency or 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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, 3535 Market Street, Philadelphia, PA 19104.

March 3, 1978

A/SLMR No. 1000

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

SHEPPARD TECHNICAL TRAINING CENTER,
3750th AIR BASE GROUP,
SHEPPARD AIR FORCE BASE, TEXAS
A/SLMR No. 1000

This case involved a joint petition for clarification of unit filed by the Activity and the National Federation of Federal Employees, Independent, Local 779, (NFFE) seeking to clarify the unit eligibility of several groups of employees. The Activity contended that two groups of employees are management officials and that the remaining groups are supervisors within the meaning of the Order. The NFFE, which is the exclusive representative of certain employees of the Activity, contended that none of the employees in question are management officials or supervisors and, therefore, they all are eligible for inclusion within its recognized unit.

The Assistant Secretary found that the employees asserted to be management officials are not management officials within the meaning of the Order. He also found that incumbents in five of the remaining groups are supervisors within the meaning of Section 2(c) of the Order. The other groups of employees were found to be eligible to be included in the existing unit.

The Assistant Secretary clarified the unit accordingly.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SHEPPARD TECHNICAL TRAINING CENTER,
3750th AIR BASE GROUP,
SHEPPARD AIR FORCE BASE, TEXAS

Activity-Petitioner

and

Case No. 63-7369(CU)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, INDEPENDENT, LOCAL 779

Labor Organization-Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Joel D. Reed. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Activity, the Assistant Secretary finds:

The Activity, Sheppard Technical Training Center, 3750th Air Base Group, Sheppard Air Force Base, Texas, and the National Federation of Federal Employees, Independent, Local 779, herein called NFFE, are joint petitioners herein seeking to clarify the unit eligibility of various groups of employees. 1/ The Activity contends that two groups of employees

1/ At the hearing in this matter, the parties agreed on the unit eligibility of three groups of employees. There is no record evidence that the stipulations with respect to these groups were improper. It should be noted that such stipulations, in the context of a unit clarification petition, are viewed as motions to amend the petition to delete and, in effect, withdraw the petition as to the stipulated employees. Under these circumstances, I grant the motions to amend and, therefore, find it unnecessary to clarify the status of the three groups of stipulated employees. Cf. Overseas Private Investment Corporation, A/SLMR No. 917, (1977); U.S. Department of Transportation, St. Lawrence Seaway Development Corporation, A/SLMR No. 839 (1977); and New Jersey Department Of Defense, 1 A/SLMR 587, A/SLMR No. 121 (1971).

are management officials and that the remaining groups are supervisors within the meaning of the Order. The NFFE, which is the exclusive representative of certain employees of the Activity, contends that the employees in question are neither management officials nor supervisors and that, therefore, they are eligible for inclusion within its unit. 2/

The Activity is one of four technical training centers of the Air Training Command of the Air Force. Its mission is primarily to provide training to officers, noncommissioned officers, and airmen who study basic and advanced fields, ranging from pharmacy to power production and from aircraft maintenance to budget and data systems.

Group 1: Training Specialists (Instructor and/or Measurement Personnel)

This group consists of three positions whose incumbents are alleged to be management officials. 3/ The incumbents are involved in the instruction and/or measurement functions of the two Sheppard Air Force Base Schools. Group 1 incumbents monitor the application of directives from the Air Training Command regarding training policies. They suggest modification of teaching techniques and otherwise make recommendations within the existing training policies and accepted practices of the command. Although virtually all of their recommendations regarding instruction within the foregoing context are accepted by the Section Chief involved, Group 1 incumbents do not have the authority to direct changes regarding training policy.

Under the foregoing circumstances, I find that the incumbents of Group 1 are not management officials within the meaning of the Order. Thus, although the Group 1 incumbents exercise discretion and independent judgment in their recommendations to modify teaching techniques, the record shows that such recommendations are consistent with existing command training policies. The evidence establishes that the Group 1 incumbents do not have the authority to make or influence effectively Activity policies with respect to personnel, procedures, or programs. Rather, they serve as experts or resource persons rendering resource information or recommendations with

2/ The NFFE was granted recognition for the unit herein on February 12, 1965. The unit description contained in the present negotiated agreement between the parties indicates that the unit is composed of all General Schedule employees serviced by the Central Civilian Personnel Office at Sheppard Air Force Base, Texas, excluding management officials, supervisors, employees engaged in civilian personnel work other than those in a purely clerical capacity, employees serving in temporary, time-limited appointments, and all personnel located at Vance Air Force Base, Oklahoma.

3/ The joint petitioners stipulated that only a limited number of representative witnesses from each group would be called to testify at the hearing, and that unit eligibility would be determined on the basis of the testimony of such representative witnesses.

2-

respect to the implementation of existing policies. 4/ Accordingly, I find that the incumbents in Group 1 positions should be included in the exclusively recognized unit.

Group 2: Training Specialists (Branch Advisors)

This group consists of 18 positions 5/ whose incumbents are alleged to be management officials. Each incumbent is assigned to a branch within the 3700th Technical Training Wing and each branch is responsible for a specific area of instruction.

Branch Chiefs and their Branch Advisors work as a team. While the Branch Chief is concerned primarily with military matters, one of the major duties of the Branch Advisor is to advise the Branch Chief on training and technical problems referred by instructors and supervisory personnel. Branch Advisors monitor the in-service training program for instructors and schedule such training. They monitor all training literature written by branch personnel, including workbooks, study guides, plans of instruction, lesson plans, and other course control documents, for conformity to Air Training Command regulations. Although the Branch Advisor advises the Branch Chief and the latter's instructor supervisors concerning training matters, and such recommendations are generally accepted by the Branch Chief, the record reveals that such recommendations are within the existing training policies and accepted practices of the command.

Under the foregoing circumstances, I find that the incumbents in Group 2 are not management officials within the meaning of the Order. Thus, although the Group 2 incumbents exercise discretion and independent judgment in their recommendations regarding training, training literature, and technical problems, the record shows that such recommendations are consistent with existing command training policies. The evidence establishes that Group 2 incumbents do not have the authority to make or influence effectively Activity policies with respect to personnel, procedures, or programs. Rather, they serve as experts or resource persons rendering resource information or recommendations with respect to the implementation of existing policies. Accordingly, I find that the incumbents in Group 2 positions should be included in the exclusively recognized unit.

4/ See United States Patent and Trademark Office, A/SLMR No. 856 (1977); Department of the Army, Tooele Army Depot, Tooele, Utah, 6 A/SLMR 501, A/SLMR No. 717 (1976); Energy Research and Development Administration, Headquarters, 6 A/SLMR 164, A/SLMR No. 634 (1976); Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, District Office, Minneapolis, Minnesota, 6 A/SLMR 120, A/SLMR No. 621 (1976); Department of Health, Education and Welfare, Office of the Secretary, Headquarters, 5 A/SLMR 753, A/SLMR No. 596 (1975); and Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, 2 A/SLMR 83, A/SLMR No. 135 (1972).

5/ One position in Group 2 is vacant. Under these circumstances, I make no finding at this time regarding any future incumbent's unit eligibility. See Army and Air Force Exchange Service, Golden Gate Exchange Region, Storage and Distribution Branch, Norton Air Force Base, California, 2 A/SLMR 424, 425, A/SLMR No. 190 (1972).

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Group 3: Instructor Supervisors

This group consists of 27 positions whose incumbents are alleged to be supervisors. Group 3 incumbents are in charge of at least 8 to 10 military and civilian personnel and, in this regard, responsibly assign the work of these employees. They also have made effective recommendations with respect to intrablock or shift transfers affecting employees under their supervision.

Under these circumstances, I find that Group 3 incumbents are supervisors within the meaning of Section 2(c) of the Order as the evidence establishes that they have the authority to transfer and assign employees, or to effectively recommend such actions utilizing independent judgment. Accordingly, I shall exclude them from the exclusively recognized unit.

Group 6: 6/ Supervisors of Clerical Positions

This group consists of 11 positions whose incumbents are alleged to be supervisors. The record shows that Group 6 incumbents maintain and make entries on Air Force Form 971, which is the supervisor's record of employee actions; also, they approve leave and sign time cards. There is no record evidence, however, that the incumbents exercise independent judgment in assigning or directing the work of employees. In this connection, the record reflects that employees establish their own work priorities and that the assigning and direction of their work is of a merely routine or clerical nature. Further there is no evidence that the incumbents have the authority to transfer, suspend, lay off, recall, promote, discharge, reward or discipline employees, or to adjust their grievances, or effectively to recommend such action.

As the evidence is insufficient to establish that Group 6 incumbents exercise any supervisory authority requiring the use of independent judgment, or have the authority to effectively recommend such action, I find that they are not supervisors within the meaning of Section 2(c) of the Order, and should be included in the exclusively recognized unit.

Group 7: Supervisors of Accounting Clerks

This group consists of eight positions whose incumbents are alleged to be supervisors. Group 7 incumbents also maintain and make entries on Air Force Form 971, are the rating officials for employee appraisals, approve leave, and maintain, but do not sign, time cards. There is no record evidence, however, that they exercise independent judgment in assigning or directing the work of employees, or make effective recommendations with respect to awards or transfers. Further, there is no evidence that Group 7 incumbents have the authority to suspend, lay off, recall, promote, discharge, or discipline employees, or to adjust their grievances, or effectively to recommend such action.

6/ As indicated above at footnote one, the parties herein stipulated as to the unit eligibility of three groups of employees. These three groups constituted groups 4, 5, and 12.

As the evidence does not establish that Group 7 incumbents either exercise supervisory authority requiring the use of independent judgment, or effectively recommend such action, I find that they are not supervisors within the meaning of Section 2(c) of the Order, and should be included in the exclusively recognized unit.

Group 8: Supervisors of Clerical-Typing Positions

This group consists of seven positions whose incumbents are alleged to be supervisors. Group 8 incumbents are in charge of at least three or more employees and the record reveals that they responsibly assign the work of these employees. The evidence also establishes that Group 8 incumbents have exercised the authority, utilizing independent judgment, to hire employees.

Under these circumstances, I find that Group 8 incumbents are supervisors within the meaning of Section 2(c) of the Order as they have the authority, utilizing independent judgment, to hire and assign employees. Accordingly, I shall exclude them from the exclusively recognized unit.

Group 9: Supervisors with less than three subordinates

This group consists of nine positions whose incumbents are alleged to be supervisors. Group 9 incumbents are in charge of one or two employees, and the record reveals that they responsibly assign the work of these employees. In addition, the evidence establishes that they have exercised the authority, utilizing independent judgment, to discipline employees, and have made effective recommendations to hire employees.

Under these circumstances, I find that Group 9 incumbents are supervisors within the meaning of Section 2(c) of the Order as they have the authority to discipline and assign employees, and have effectively recommended the hiring of employees. Accordingly, I shall exclude them from the exclusively recognized unit.

Group 10: Supervisors of Military Medical Technicians

This group consists of six positions whose incumbents are alleged to be supervisors. Group 10 incumbents are in charge of at least three or more employees, and the record reveals that they responsibly assign the work of these employees and have made effective recommendations with respect to hiring and transferring employees.

Under these circumstances, I find that Group 10 incumbents are supervisors within the meaning of Section 2(c) of the Order as they have the authority to hire, transfer and assign employees, or to effectively recommend such actions utilizing independent judgment. Accordingly, I shall exclude them from the exclusively recognized unit.

Group 11: Supervisors with less than three appropriated fund civilian employees

This group consists of six positions whose incumbents are alleged to be supervisors. Group 11 incumbents are in charge of varying combinations

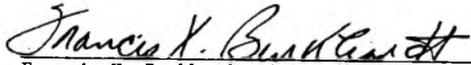
of employee categories, including military, civilian nonappropriated fund employees, and civilian appropriated fund employees. Group 11 incumbents responsibly assign the work of these employees. In addition, the record reveals that they have exercised the authority, utilizing independent judgment, to discipline employees and have made effective recommendations to hire and discharge employees.

Under these circumstances, I find that Group 11 incumbents are supervisors within the meaning of Section 2(c) of the Order as they have the authority to hire, discharge, assign, and discipline, or to effectively recommend such actions utilizing independent judgment. Accordingly, I shall exclude them from the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit of exclusive recognition sought to be clarified herein, represented by the National Federation of Federal Employees, Independent, Local 779, and described in the present negotiated agreement between the parties, be, and it hereby is, clarified by including in said unit the incumbents in positions in Groups 1, 2, 6, and 7 above, and by excluding from said unit the incumbents in positions in Groups 3, 8, 9, 10, and 11 above.

Dated, Washington, D. C.
March 3, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

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March 7, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE
A/SLMR No. 1001

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU), in behalf of certain of its chapters, alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to furnish the NTEU with a summary of the statistical data obtained by the Respondent's Personnel Division, in accordance with instructions to agencies from the U. S. Civil Service Commission (Commission) with regard to the Commission's inauguration of a new method for developing classification standards for all General Schedule positions, i.e. the Factor Evaluation System (FES). The Commission requested the agencies to apply the applicable Draft Standards in their review of field offices, on a trial basis, to a representative sample of positions.

The Respondent contended that the complaint should be dismissed as the matter involved disagreement over the interpretation of the parties' negotiated agreement and, therefore, should be resolved through the negotiated grievance procedure provided therein, that the data requested is a privileged interagency communication, and that the complaint was moot because the deadline for comments had passed.

The Administrative Law Judge concluded that, under the circumstances of the case, the Complainant was not precluded from filing an unfair practice complaint rather than seeking a determination of its rights through the grievance procedures of the negotiated agreement. He found further that for the NTEU to have soundly based input in the decision-making process of the Commission's adoption of final occupational standards under FES and to represent the interests of affected employees with specific reference to potential reclassification thereunder, the knowledge of the results of the test application was necessary and relevant. With regard to the Respondent's contention that the complaint should be dismissed as moot, the Administrative Law Judge found that the FES is still in the process of implementation and that it had not yet resulted in the actual reclassification of any positions. Consequently, there is still opportunity for some input in the ultimate decision on the grade level of particular positions. He noted also that the data, which is necessary and relevant, would not become privileged merely because it was sent by one government agency to another. He concluded, therefore, that the Respondent violated Section 19(a)(1) and (6) of the Order by its refusal to furnish specific data which he had examined in camera.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations, and ordered that the Respondent cease and desist from conduct found violative of the Order and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE

Respondent

and

Case No. 22-07579(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

On December 5, 1977, Administrative Law Judge Robert J. Feldman issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service shall:

1. Cease and desist from:

(a) Withholding or failing to provide, upon request by the National Treasury Employees Union, copies of the following summary data compiled in the 1976 Internal Revenue Service Review of Drafts of Proposed

FES Occupational Standards: the summary of Impact Data for the five standards test-applied and reviewed; and the Assessment and Summary Data comprising Part IV of Experimental CSC Form 1249 as submitted to the U. S. Civil Service Commission for each position at each office or facility of the Service to which a test application was made, which information is necessary and relevant to the exclusive representative's discharge of its representational obligations.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

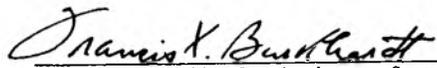
2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, make available to the National Treasury Employees Union, copies of the following summary data compiled in the 1976 Internal Revenue Service Review of Drafts of Proposed FES Occupational Standards: the summary of Impact Data for the five standards test-applied and reviewed; and the Assessment and Summary Data comprising Part IV of Experimental CSC Form 1249 as submitted to the U. S. Civil Service Commission for each position at each office or facility of the Service to which a test application was made, which information is necessary and relevant to the exclusive representative's discharge of its representational obligations.

(b) Post at the Office of the Internal Revenue Service, Washington, D. C., copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commissioner of the Internal Revenue Service, and shall be posted and maintained by the Commissioner for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
March 7, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT withhold or fail to provide, upon request by the National Treasury Employees Union, copies of the following summary data compiled in the 1976 Internal Revenue Service Review of Drafts of Proposed FES Occupational Standards: the summary of Impact Data for the five standards test-applied and reviewed; and the Assessment and Summary Data comprising Part IV of Experimental CSC Form 1249 as submitted to the U. S. Civil Service Commission for each position at each office or facility of the Service to which a test application was made, which information is necessary and relevant to the exclusive representative's discharge of its representational obligations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, make available to the National Treasury Employees Union, copies of the following summary data compiled in the 1976 Internal Revenue Service Review of Drafts of Proposed FES Occupational Standards: the summary of Impact Data for the five standards test-applied and reviewed; and the Assessment and Summary Data comprising Part IV of Experimental CSC Form 1249 as submitted to the U. S. Civil Service Commission for each position at each office or facility of the Service to which a test application was made, which information is necessary and relevant to the exclusive representative's discharge of its representational obligations.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania, 19104.

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



its review of field office applications of CSC standards to actual positions. Upon all the evidence adduced, I make the findings of fact and reach the conclusions of law set forth below.

FINDINGS OF FACT

.....
In the Matter of :
INTERNAL REVENUE SERVICE :
Respondent :
and :
NATIONAL TREASURY EMPLOYEES UNION :
Complainant :
.....

Case No. 22-07579 (CA)

Michael J. Riselli and
Stuart E. Parker
General Legal Services Division
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224
For the Respondent

Hayward Reed
National Treasury Employees Union
1730 K Street, N.W.
Washington, D.C.
For the Complainant

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is an unfair labor practice proceeding in which a formal hearing of record was held pursuant to Executive Order 11491, as amended (hereinafter referred to as "the Order") and 29 CFR Part 203.

Respondent Internal Revenue Service (IRS) is charged with violating Sections 19(a)(1) and 19(a)(6) of the Order by refusing to furnish to Complainant National Treasury Employees Union (NTEU) a summary of the statistical data obtained by Respondent's personnel division on Civil Service Commission (CSC) Form 1249 in

1. On May 3, 1974 (effective August 3, 1974), a collective bargaining agreement, referred to as the Multi-District Agreement (MDA), was entered into between Respondent IRS, representing 57 specifically identified district offices (all but one of the IRS District Offices then extant) as the Employer, and Complainant NTEU, representing its local chapters holding exclusive recognition in each of such 57 district offices as the Union.

2. Article 13 of the MDA provides as follows:

Section 1. The Union may make recommendations and present supporting evidence concerning the adequacy and equity of a standardized position description or position classification standard. The Employer agrees to review the presentation and advise the Union of the results of its review.

Section 2. The Employer agrees to inform the Union as soon as possible when significant changes will be made in the duties and responsibilities of positions held by employees in the unit due to reorganization or when changes in position classification standards result in classification changes or when changes will be made in position classification standards which could result in classification changes. The Employer further agrees to furnish the Union copies of proposed classification standards for Bargaining Unit jobs referred to the Employer by the Civil Service Commission for comment.

Section 3. The Employer agrees that the position description for each position will accurately reflect the actual duties of the employee filling that position.
(The above provision is also included in MDA III, effective May 1, 1977)

3. Pursuant to the Job Evaluation Policy Act of 1970 (Pub. L. No. 91-216, 84 Stat. 72), the Civil Service Commission inaugurated in December, 1975, a new method, called the Factor Evaluation System (FES), for developing classifications standards and

classifying most of the positions on the General Schedule. It was anticipated that full implementation would take place over the next five years.

4. Early in 1976, the Treasury Department received from the CSC and turned over to IRS for review and comment the first eight Drafts of Proposed Occupational Standards, consisting of the following:

Mail and File Series	GS-305
Clerk-Stenographer and Reporter	GS-312
Secretary Series	GS-318
Clerk-Typist and Transcriber Series	GS-322
Accounting Technician	GS-525
Nurse Series	GS-610
Dental Therapy Technician	GS-681
Mechanical Engineer	GS-830

5. The covering letter and accompanying instructions for the above Draft Standards included among other things: a request that each agency with a significant number of positions in the occupation review the applicable Draft Standard by applying it on a trial basis to a representative sample of positions; a suggestion that in planning the time frame for the review, consideration be given to communication with unions (in accordance with local policy or negotiated agreement); directions to complete experimental CSC Form 1249, "Standards Review Data Sheet", to which there is to be attached both the present position description and a revised description in the factor/format in each case in which the position is evaluated at a higher or lower grade as a result of the trial application, or is point-rated by use of the primary standard; a list of items to be included in agency reports to the CSC, among which were total positions in the occupation, total sampled, projected total of positions with grade changes (how many up and how many down), number of potential matches, a Form 1249 for each sample position evaluated by the draft standard (including necessary attachments), and other appropriate information. There was notice that comments on the draft standards and any comments on the system would be due not later than July 19, 1976.

6. IRS distributed the standards to all of its seven regions, and test applications were made in a total of twenty IRS offices (4 regional offices, 11 district offices and 5 service centers). Each office had at least one occupation which was evaluated at all grade levels (applications were limited to the first five proposed occupational standards, since those for the nurse series, dental therapy technician and mechanical engineer were clearly of insufficient prevalence in the IRS).

7. On May 21, 1976, the Director of the IRS Personnel Division forwarded to NTEU copies of the eight proposed CSC

Occupational Standards (as well as copies of the CSC instructional guides), with the request that any comment by the Union on the adequacy or equity of the Draft Standards be sent to IRS not later than June 18, 1976.

8. On June 14, 1976, the National President of NTEU advised te Acting Director of the IRS Personnel Division of the Union's position that the results of the IRS review must also be furnished to NTEU in order that it might properly weigh the equity and adequacy of the Standards, specifically requesting "a summary of the statistical data, obtained by the Personnel Division on CSC Form 1249 in its review of field office applications of the CSC standards to actual positions".

9. On July 8, 1976, the Director of IRS Personnel Division, referring to Sections 1 and 2 of Article 13 of the MDA, informed the National President of NTEU that because of the tentative form of the proposed Standards, no changes in classification had been authorized, and that consequently IRS considered that it was not obliged to furnish the information requested, and it declined to do so.

10. On or about July 19, 1976, the IRS Personnel Division forwarded to the CSC through Treasury the completed 1249 Forms it had received from the regional offices. The narrative comments that had been requested were sent to CSC on or about July 23, 1976.

11. NTEU had at least three employees who received CSC training in FES classification qualifying them to interpret the trial application data requested.

12. Under date of July 6, 1976, NTEU requested IRS to furnish the same summary of statistical data under the Freedom of Information Act (5 U.S.C. § 552 as amended). On September 2, 1976, such request was refused by the Commissioner of Internal Revenue. NTEU did not seek judicial review of that administrative determination.

13. By letter dated September 8, 1976, NTEU charged IRS with violating Sections 19(a) (1) and 19(a) (6) of the Order by refusing to furnish the summary of statistical data requested. On October 18, 1976, IRS denied the charge.

14. The Complaint herein was filed on November 4, 1976. After the response of IRS was filed, containing a motion to dismiss for lack of standing, an amended complaint dated December 7, 1976, was filed alleging that the full name of the party filing the complaint is "National Treasury Employees Union on behalf of each Chapter listed in Appendix A of MDA".

15. IRS has continued to withhold from NTEU any and all of the information that it furnished to CSC pertaining to the proposed occupational standards under FES or the test applications thereof to positions in the IRS.

16. In February, 1977, the CSC circulated copies of the classification standards for the Mail and File Series, GS-305, and the Nurse Series, GS-610, developed under FES and approved by the CSC Standards Division. Recipients were cautioned, however, that such standards should not be used as a basis for any personnel action until official notification for their use has been given by the CSC. Since revisions had been made in the draft FES standards originally furnished and in the instructions for applying them, agencies, unions and organizations were provided with an opportunity for a second review of the first eight FES standards before they are printed in final form. Objections to the revised standards were requested to be submitted for consideration by the Director of the CSC Bureau of Policy and Standards.

CONCLUSIONS OF LAW

Respondent's challenge to Complainant's lack of standing to bring and maintain this proceeding is no longer viable. The amended complaint makes it perfectly clear that NTEU brings the proceeding in a representative capacity, which is consonant with the party designations of the MDA, and no evidence has been adduced to indicate that anything in the NTEU constitution or by-laws would inhibit such procedure. See Internal Revenue Service Washington, D.C., A/SLMR No. 831 (1977). With respect to the contention that because of an alleged absence of national recognition or national consultation rights, an unfair labor practice must be brought at the local level instead of the national level, it should be noted that in the principal cases relied upon by Respondent on this point, the Assistant Secretary expressly declined to pass upon the administrative law judge's finding to that effect. Department of the Treasury, Internal Revenue Service and National Treasury Employees Union, A/SLMR No. 550, Note 2 (1975); Internal Revenue Service and National Treasury Employees Union, A/SLMR No. 731, Note 1 (1976). Any question in this regard has been clearly resolved by the decision of the Federal Labor Relations Council holding that when the Assistant Secretary finds acts or practices which constitute unfair labor practices by "agency management", as defined in Section 2(f) of the Order, the Order provides no basis for drawing artificial distinctions between organizational levels of such agency management so as to relieve them of the responsibility for their acts which would otherwise be violative of the Order. Naval Air Rework Facility, Pensacola, Florida, and Secretary of the Navy, Washington, D.C., FLRC No. 76A-37 (1977). See also Internal Revenue Service and National Treasury Employees Union, Chapter 8, et al., No. 22-7717(CA), Kramer, ALJ (October 6, 1977).

Respondent also contends that this is a disagreement over interpretation of a negotiated agreement, and therefore should be resolved through the grievance procedure provided therein, instead of in the context of an unfair labor practice. It should be noted, however, that although the complaint refers to Article 13 of the MDA, the basic allegation is that Respondent's refusal to furnish the requested summary of statistical data violated Sections 19(a)(1) and 19(a)(6) of the Order. The issue is whether the refusal interfered with or restrained the Union in the exercise of its right and responsibility under Section 10(e) of the Order to represent the interests of all employees in the unit. Whether the same act or omission on the part of Respondent may also constitute a breach of contract may well be determinable under a grievance procedure, but that circumstance does not preclude an unfair labor practice. Under Section 19(d) of the Order, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure, but not under both. No grievance procedure having been instituted with respect to the withholding of the information in question, Complainant has elected to go the unfair labor practice route despite the guidelines contained in Article 35, Section 1 B of the MDA, the wording of which clearly indicates that its provisions are permissive rather than mandatory. Respondent has withdrawn the defense that in view of the Union's prior request under the Freedom of Information Act, the issues herein can properly be raised under an appeals procedure and are hence barred under Section 19(d).

It is further contended that the complaint should be dismissed as moot because the deadline for comments has long since passed, and that the data requested should not be disclosed because it is a privileged inter-agency communication. Neither of these positions is tenable. Only one of the five Draft Occupational Standards tested by the IRS has been revised and resubmitted for further consideration. FES is still in the process of implementation and it has not yet resulted in the actual reclassification of any positions. Consequently, there is still opportunity for some input in the ultimate decision on the grade level of particular positions. Although there is some exemption in the Freedom of Information Act [5 U.S.C. § 552(b)] with respect to certain inter-agency communications, the notion that a document not otherwise privileged by law may be withheld from examination by a labor organization merely because it was sent by one government agency to another is singularly lacking in both authority and merit. I agree that the Civil Service Commission is not agency management with respect to IRS employees, but that merely reinforces the conclusion reached above in connection with standing that agency management in the context of

this proceeding is IRS at the national level. All that was requested by NTEU was a summary of statistical data obtained solely by IRS employees. Nothing is sought from the Commission, which is not a party to this proceeding.

Coming finally to consideration of the merits of the complaint, there are three elements that should be weighed: (a) the nature and extent of the information requested; (b) whether such information is necessary and relevant to the Union's exercise of rights or discharge of obligations under the Order; and (c) whether there is any valid reason for withholding such information.

A. Identification of the Data Requested

In its letter of June 14, 1976 (Jt. Ex. G) NTEU requested "a summary of the statistical data, obtained by the Personnel Division on CSC Form 1249 in its review of field office applications of the CSC Standards to actual positions ..." The amended complaint (Asst. Secretary's Formal Ex. 1) states that "NTEU requested information collected by IRS on CSC Form 1249 concerning the classifications". It is apparent from the documents submitted to me in camera (Respondent's Exs. C and D for identification) that clarification of the specific data requested is in order. Reference to the introduction or instructional guides to the Factor Evaluation System of position classification and to Experimental Form 1249 attached thereto discloses only two items that correspond to the NTEU request: the general information to be included in the agency's Report to the Civil Service Commission (Ex. E, p. 11) and Part IV of Form 1249 entitled "Assessment and Summary Data". We are not concerned with anyone's comments on FES or on the Draft Standards, which, being neither requested nor necessary in the performance of any Union function, were properly withheld. Consequently, with the exception of the table of Impact Data appearing on the first page of Exhibit C, none of the material submitted for in camera inspection is found to be responsive to the request or to be sufficiently comparable to the specific data or information requested so as to constitute an acceptable substitute therefor. Cf. Department of Justice, Immigration and Naturalization Service, A/SLMR No. 902 (1977). In considering the information refused, we are concerned solely with the Impact Data above referred to and, with respect to each position in each office or facility of the IRS to which a test application of Draft FES Standards was made, the Assessment and Summary Data required in answer to Part IV of Form 1249.

B. Necessity and Relevance of the Data Requested

In determining whether the above-defined data is necessary and relevant, we find guidance in the Assistant Secretary's recent

expression of the view that to enable a labor organization to intelligently perform its bargaining duties, it is not required that the documents sought be the sole basis for proposals, or that they form the basis for fixed, final proposals, before they become necessary and relevant. See Department of Justice, Immigration and Naturalization Service, supra, at p. 2. To have any soundly based input into the decision-making process that will eventuate in the Civil Service Commission's adoption of final occupational standards under FES, and to represent the interests of affected employees with respect to potential reclassification thereunder, there can be little doubt that knowledge of the results of the test applications is essential. The Union has the right and corresponding obligation under the Order to participate in administering and policing the terms of the negotiated agreement so as to fairly and adequately represent the interests of all employees in the unit, as well as to meet and confer with the agency with respect to personnel policies and practices. In the performance of those functions, with specific reference to the impact of potential reclassification inherent in adopting FES, the data requested is clearly necessary and relevant. See Department of Defense, State of New Jersey, FLRC No. 73A-59, Report No. 71 (1975); Department of Health, Education and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 411 (1974).

C. The Existence of Valid Reasons for Denying the Request

Although Respondent has advanced numerous defenses, technical and otherwise, to the complaint, it has, in my view, failed to come forward with any valid reason for refusing the information requested. In this day and age of free access to information and virtually unlimited discovery in both the public and private sectors, the old cry of "fishing expedition" is a bit hollow. It seems to me, especially in the context of maintaining sound labor-management relations, that a refusal to disclose pertinent statistical data to a union without some legitimate reason therefor should not be sustained. See General Services Administration, Region 3, A/SLMR No. 734 (1976).

Additionally, it should be noted that the results of the test applications in IRS are not otherwise available to NTEU without unnecessary duplication of effort and undue expense. The statistical data circulated by the CSC comprises the consolidated results of all agencies and cannot provide the specific results of the IRS tests which are needed to fairly assess potential reclassification of the employees represented by NTEU. As to any waiver of rights on the part of the Union, it must be

borne in mind that a waiver is an intentional relinquishment of a known right, so that the omission from Article 13 of the MDA of any reference to specific summaries of data obtained in connection with a projected factor evaluation system hardly meets the requirements of a clear and unmistakable waiver. See NASA, Kennedy Space Center, Florida, A/SLMR No. 223 (1972).

In view of all of the foregoing, I conclude that Respondent's refusal to provide the Complainant with the information contained in (a) the Impact Data table and (b) the Assessment and Summary Data comprising Part IV of Experimental CSC Form 1249 for each position at each office or facility of the IRS at which test applications were made is in violation of Sections 19(a)(1) and (6) of the Order.

RECOMMENDATION

Having found that Respondent has engaged in conduct violative of Sections 19(a)(1) and (6) of the Order, I recommend that the Assistant Secretary adopt the order hereinafter set forth, which is designed to effectuate the policies of the Order.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, shall:

1. Cease and desist from:

(a) Withholding or failing to provide, upon request by National Treasury Employees Union, copies of the following summary data compiled in the Internal Revenue Service Review of Drafts of Proposed FES Occupational Standards: the summary of Impact Data for the five standards test-applied and reviewed; and the Assessment and Summary Data comprising Part IV of Experimental CSC Form 1249 as submitted to the Civil Service Commission for each position at each office or facility of the Service to which a test application was made.

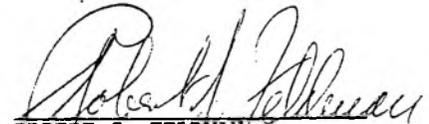
(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Executive Order:

(a) Upon request, make available to National Treasury Employees Union copies of the following summary data compiled in the Internal Revenue Service Review of Drafts of Proposed FES Occupational Standards: the summary of Impact Data for the five standards test-applied and reviewed; and the Assessment and Summary Data comprising Part IV of Experimental CSC Form 1249 as submitted to the Civil Service Commission for each position at each office or facility of the Service to which a test application was made.

(b) Post at the Office of the Internal Revenue Service Washington, D.C. copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commissioner of Internal Revenue, and they shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other materials.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 20 days from the date of the Order as to what steps have been taken to comply therewith.


ROBERT J. FELDMAN
Administrative Law Judge

Dated: December 5, 1977
Washington, D.C.

APPENDIX

APPENDIX CONTINUED

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT withhold or fail to supply, upon request by National Treasury Employees Union, copies of the following summary data compiled in the Internal Revenue Service Review of Drafts of Proposed FES Occupational Standards: the summary of Impact Data for the five standards test-applied and reviewed; and the Assessment and Summary Data comprising Part IV of Experimental CSC Form 1249 as submitted to the Civil Service Commission for each position at each office or facility of the Service to which a test application was made.

WE WILL NOT in any like or related manner interfere with restrain, or coerce our employees in the exercise of their rights assured by the Executive Order.

WE WILL, upon request make available to National Treasury Employees Union, copies of the following summary data compiled in the Internal Revenue Service Review of Drafts of Proposed FES Occupational Standards: the summary of Impact Data for the five standards test-applied and reviewed; and the Assessment and Summary Data comprising Part IV of Experimental CSC Form 1249 as submitted to the Civil Service Commission for each position at each office or facility of the Service to which a test application was made.

(Agency or Activity)

Dated: _____ By: _____
(Signature and 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 of compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, U.S. Department of Labor, Suite 3515, 1515 Broadway, New York, New York 10036.

March 8, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE INTERIOR,
U.S. GOVERNMENT COMPTROLLER FOR GUAM,
TRUST TERRITORY OF THE PACIFIC ISLANDS
A/SLMR No. 1002

This case involved a representation petition filed by the American Federation of Government Employees, Local 1689, AFL-CIO (AFGE) seeking an election in a unit consisting of all professional and nonprofessional employees of the U.S. Government Comptroller's Office, Guam, Trust Territory of the Pacific Islands. The Activity contended that the professional employees, who are auditors, should be excluded from the unit for the reason that they are managerial employees and/or supervisors within the meaning of the Order and that the proposed unit is not appropriate for the purpose of exclusive recognition under the Order as it will not promote effective dealings and efficiency of agency operations.

The Assistant Secretary found that the claimed unit is appropriate for the purpose of exclusive recognition under the Order. In this regard, he noted that the claimed employees share a clear and identifiable community of interest as they enjoy common overall supervision, common personnel policies and practices, similar working conditions, essentially similar job classifications, skills and duties, and share the same area of consideration for promotion and competitive area for reduction in force procedures.

He also found that such unit would promote effective dealings and efficiency of agency operations. In making this determination he noted the unique auditing function given to the Comptroller of Guam under the Organic Act of Guam, and the fact that due to the Activity's extreme distance from its supervisory and servicing offices the Comptroller exercises substantial discretion and effective control over matters affecting the general working conditions of employees and personnel practices and policies.

With respect to the Activity's contention that all of the auditors should be excluded from the unit as managerial officials, the Assistant Secretary found that these employees are not management officials within the meaning of the Order. In this regard, he concluded that, although the auditors are involved to some degree in policy formulation with respect to the various activities audited, they are not involved with policy formulation within the Activity.

As to the Activity's contention that the auditors at the GS-11, GS-12 and GS-13 levels should be excluded from the unit as supervisory employees in that they spend a substantial portion of their time acting as Auditors-in-Charge (AIC) for individual audits, the Assistant Secretary found that while an auditor is acting as the designated AIC, and possesses indicia of supervisory authority, he is a supervisor within the meaning of Section 2(c) of the Order and should be excluded from the unit. However, when the auditors are performing as a member of an audit team, and are not acting as AICs, they should be included in the unit. As a result, the Assistant Secretary found that the voting eligibility of employees classified as Auditors GS-11, GS-12, and GS-13 should be determined by their status at the time of the election.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE INTERIOR,
U.S. GOVERNMENT COMPTROLLER FOR GUAM,
TRUST TERRITORY OF THE PACIFIC ISLANDS

Activity

and

Case No. 73-938(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1689, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Dale L. Bennett. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the case, including the brief filed by the Activity, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. In its petition, the American Federation of Government Employees, Local 1689, AFL-CIO, hereinafter called AFGE, seeks an election in a unit consisting of all professional and nonprofessional employees of the U.S. Government Comptroller's Office, Guam, Trust Territory of the Pacific Islands, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors. The Activity takes the position that the claimed professional employees, who are auditors, should be excluded from the unit for the reason that they are managerial employees and/or supervisors within the meaning of Executive Order 11491, as amended. Further, it contends that the proposed unit is not appropriate for the purpose of exclusive recognition under the Order as it will not promote effective dealings and efficiency of agency operations.

The Activity, a component of the Department of Interior, is charged with audit responsibilities for the Government of Guam, the Government of the Trust Territories of the Pacific Islands and the Government of the Northern Marianas. Headquartered in Guam, it has a sub-office in

Saipan, and services a geographical area of approximately 3 million square miles. The Activity is under the administrative supervision of the Office of the Director of Territorial Affairs, hereinafter called ODOTA, which is a component of the Department of the Interior.

Both the ODOTA and the Personnel Office of the Secretary of the Interior, hereinafter called Personnel Office, which services the Activity, are located in Washington, D.C. The Activity's auditing responsibilities are derived from the Organic Act of Guam, as amended, hereinafter called the Act, which provides for a civil government for the Island of Guam. Section 9-A(a) of the Act requires the Secretary of Interior to appoint from within the Department of Interior, a Comptroller for Guam, who shall not be part of the Guam Government. The Activity's audit functions are required to be conducted so as to improve the efficiency and economy of programs of the Government of Guam and discharge Congress' responsibility to insure that the substantial revenues which are converted into the Treasury of Guam are properly audited and accounted for. The Activity performs both the traditional fiscal type of audit as well as a management type audit. The fiscal audit is basically an audit of the governmental entities' financial statement, similar to the financial audit of a private concern by an independent certified public accountant, and the management type audit is to assure that the Government, in performing its duties, does so in an economical and efficient manner. Besides performing audits for the Government of Guam and the Trust Territories of the Pacific Islands, the Activity will, at the request of other agencies of the U.S. Government, perform audits of their respective grant funds utilized in Guam and the Trust Territories.

The Comptroller is responsible for the day-to-day activities of the auditors and audits within his office, and is assisted by two Supervisory Auditors, GS-14. Due to the extreme distances between Guam and Washington, D.C., which hampers close communications between the Comptroller and the ODOTA, the Comptroller has a great deal of discretion in handling the mission of his office. The Comptroller works closely with his Supervisory Auditors in designating Auditors-in-Charge, hereinafter called AIC, and assigning auditors 1/ to perform specified audits under a schedule which the Comptroller has prepared. While the ODOTA and the Personnel Office have final approval authority on personnel actions, the record reveals that the recommendations of the Comptroller in the areas of hiring, promoting, disciplining, rewarding, discharging and reassigning employees are effective. The Supervisory Auditors have general supervision over the audits and the individual auditors assigned to their supervision.

When an audit is conducted, one of the auditors, normally a GS-11, 12 or 13, 2/ is selected as the AIC and, as such, he has complete control and responsibility for that audit. In many instances, one of the

1/ At the hearing the parties stipulated that all Auditors, GS-5 through GS-13, were professional employees.

2/ The record indicates that the GS-13's function as the AIC about 78 percent of their time, the GS-12's function as the AIC about 68 percent of their time and the GS-11's function as the AIC about 35 percent of their time.

other auditors may be designated to work for him, or he may have auditors of the activity being audited working with him. After a preliminary survey of problems, the AIC writes an audit plan and assigns subordinate auditors to particular tasks. If a written report is required, the AIC will prepare and sign it. The AIC also works closely with the management being audited, suggesting solutions to any problems that the audit has disclosed. While conducting the audit, the AIC has the authority to grant leave and transfers, handle grievances, institute disciplinary actions, effectively recommend employees for merit promotions and prepare performance evaluations of all his subordinates. The AIC also has the responsibility for training new auditors and works closely with them in order to build their expertise.

When they are not functioning as the AIC, the auditors perform audits under the direction of another AIC, conducting various phases of the audit as directed by the AIC under guidelines established by the General Accounting Office. The record discloses that at the time of the hearing herein there was only one nonprofessional employee in the claimed unit, who is a clerical employee performing clerical work for the auditors, as well as handling other clerical functions in the Comptroller's office.

The employees of the Activity enjoy common personnel policies and practices and labor relations policies established and administered by the ODOTA and the Personnel Office. Essentially all the employees in the claimed unit enjoy similar working conditions, have similar job classifications, skills and duties, and share the same areas of competition for promotion and reduction in force.

Based on the foregoing circumstances, I find that the unit sought in the subject case is appropriate for the purpose of exclusive recognition under the Order. Thus, the record reflects that the claimed employees sought enjoy common overall supervision, common personnel policies and practices, similar working conditions, essentially similar job classifications, skills and duties, and share the same area of consideration for promotion and competitive area for reduction in force procedures. Consequently, I conclude that the employees assigned to the office of the U.S. Government Comptroller for Guam, Trust Territory of the Pacific Islands, share a clear and identifiable community of interest.

With regard to whether the proposed unit will promote effective dealings and efficiency of agency operations, noted particularly is the unique auditing function given to the Comptroller of Guam under the Organic Act of Guam and the effective control of the Comptroller with respect to the day-to-day operations of the Activity. While the Activity, headquartered in Guam, is under the administrative supervision of the ODOTA and serviced by the Personnel Office, both of which are located in Washington, D.C., normal close supervision and servicing at such extreme distances would appear to be highly difficult and costly. Thus, although ODOTA and the Personnel Office have final approval authority on personnel

actions, the record is clear that based, in part, on the extensive distances involved, the Comptroller's personnel and managerial recommendations are ordinarily accepted by higher authority and that he exercises substantial discretion and effective control over the Activity's day-to-day operations and personnel actions. Accordingly, as there is substantial and effective control of personnel policies and practices and other matters affecting the general working conditions of employees in the petitioned for unit at the organizational level at which recognition is sought herein, in my view the claimed unit will promote effective dealings and efficiency of agency operations.

Eligibility Issues

The Activity contends that all of the auditors should be excluded from the unit as management officials. In this regard, the record reveals that during the course of their assigned audits, they work with the management being audited in formulating policy which will alleviate problems discovered by the audits. While the record indicates that the auditors are involved in some degree in policy formulation with respect to the various activities audited, they are not involved with policy formulation within the Activity. Accordingly, as the auditors do not participate in the formulation or determination of Activity policies, I find that they are not management officials within the meaning of the Order. 3/

The Activity also contends that the auditors at the GS-11, GS-12, and GS-13 levels should be excluded from the unit as supervisory employees. In this regard, the record reveals that they spend a substantial portion of their time acting as the designated AIC for individual audits, and, when so acting, the Activity alleges they are authorized to perform and exercise supervisory duties. As noted above, the record reveals that the AIC has complete control and responsibility for the audit to which he is assigned and possesses the authority to assign work, grant leave and transfers, handle grievances, initiate disciplinary action, effectively recommend employees for merit awards and promotions, train new auditors, and prepare performance evaluations for all subordinates employed by the Activity.

Under these circumstances, I find that when an auditor is acting as the designated AIC for an individual audit, he is a supervisor within the meaning of Section 2(c) of the Order, and should be excluded from the unit. However, since the record indicates that none of the employees in the disputed classifications spend all of their time as a designated AIC, but rather spend, in some cases, significant portions of their time as members of an audit team doing the same work as the other auditors in the unit, I find that when they are not acting as AICs, they should be included in the unit found appropriate herein. Accordingly, these employees should be deemed eligible to vote in the election ordered herein

3/ Cf. Portland Area Office, Department of Housing and Urban Development, 1 A/SIMR 522, A/SIMR No. 111 (1971).

providing that they are not in a supervisory status at the time of the election. Therefore, I find that the voting eligibility of employees classified as Auditors GS-11, GS-12, and GS-13 should be determined by their status at the time of the election. 4/

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended:

All professional and nonprofessional employees of the U.S. Government Comptroller's Office, Guam, Trust Territory of the Pacific Islands, excluding all management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

It is noted that the unit found appropriate includes professional employees and that the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in the unit with employees who are not professionals unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in the unit with nonprofessional employees must be ascertained. I shall, therefore, direct separate elections in the following groups:

Voting Group (a): All professional employees of the U.S. Government Comptroller's Office, Guam, Trust Territory of the Pacific Islands, excluding all nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

Voting Group (b): All nonprofessional employees of the U.S. Government Comptroller's Office, Guam, Trust Territory of the Pacific Islands, excluding all professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the American Federation of Government Employees, Local 1689, AFL-CIO.

4/ Cf. Department of Transportation, United States Coast Guard Support Center, Third District, Governors Island, New York, A/SLMR No. 785 (1977), and Department of Interior, Bureau of Land Management, District Office, Lakeview, Oregon, 2 A/SLMR 516, A/SLMR No. 212 (1972).

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 1689, AFL-CIO. In the event that the majority of the valid votes in voting group (a) are cast in favor of inclusion in the same unit as the nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as the nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether or not the American Federation of Government Employees, Local 1689, AFL-CIO was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then upon the result of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees of the U.S. Government Comptroller's Office, Guam, Trust Territory of the Pacific Islands, excluding all management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following groups of employees constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order: 5/

5/ As noted above, the record indicates that the Activity employs only one nonprofessional employee. If at the time of the election herein there is only one nonprofessional employee, and if a majority of the professional employees votes for a separate unit, the remaining unit of one nonprofessional employee cannot be certified. See Report On A Ruling No. 44, where it was found "that units of more than one employee were contemplated by the Order and consequently . . . a single employee unit is not appropriate for the purposes of collective bargaining." Accordingly, in the event that there is only one nonprofessional employee, and a majority of the professional employees does not vote for inclusion in the nonprofessional unit, the Area Administrator is directed to dismiss the petition as to the nonprofessional employee unit.

March 9, 1978

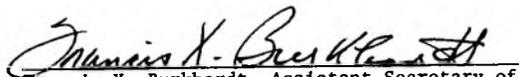
a. All professional employees of the U.S. Government Comptroller's Office, Guam, Trust Territory of the Pacific Islands, excluding all nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

b. All nonprofessional employees of the U.S. Government Comptroller's Office, Guam, Trust Territory of the Pacific Islands, excluding all professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the units found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 1689, AFL-CIO.

Dated, Washington, D.C.
March 8, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD
A/SLMR No. 1003

This case involved an unfair labor practice complaint filed by the Coppersmiths' Local 463, AFL-CIO, (Complainant) alleging that the Respondent violated Section 19(a)(1), (2), (3), and (6) of the Order by holding unauthorized meetings with unit employees over matters related to personnel policies and procedures and general working conditions concerning work assignments involving the coppersmith craft, and by discouraging membership in a labor organization while assisting another labor organization.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the Respondent had violated Section 19(a)(1) and (6) of the Order when it met with unit employees on March 24, 1976, without first notifying the exclusive representative and giving it the opportunity to be represented at such meeting, as the meeting constituted a formal discussion within the meaning of Section 10(e) of the Order.

However, the Assistant Secretary found, contrary to the Administrative Law Judge, that the Respondent did not violate Section 19(a)(2) and (3) of the Order, nor had its conduct constituted an independent violation of Section 19(a)(1).

Accordingly, the Assistant Secretary issued a remedial order for the Section 19(a)(1) and (6) violations he had found.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD

Respondent

and

Case No. 71-3805(CA)

COPPERSMITHS' LOCAL 463, AFL-CIO

Complainant

DECISION AND ORDER

On August 17, 1977, Administrative Law Judge Ben H. Walley issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations, only to the extent indicated herein.

This case arose as a result of a complaint filed by the Sheet Metal Workers' International, Coppersmiths' Local No. 463, AFL-CIO, (Complainant), an affiliate of the exclusive representative, the Bremerton Metal Trades Council, alleging that the Respondent violated Sections 19(a)(1), (2), (3), (5) and (6) of the Order 1/ by having unauthorized meetings with unit employees over matters related to personnel policies and procedures and general working conditions concerning work assignments involving the coppersmith craft, and by discouraging membership in a labor organization while assisting another labor organization.

1/ The Section 19(a)(5) allegation was dismissed by the Regional Administrator and, therefore, was not considered by the Administrative Law Judge.

On March 24, 1976, Melvin Chandler, Superintendent of Shop 56 at the Respondent Shipyard, called a meeting with employees rated as coppersmiths for the purpose of discussing, among other things, their general working conditions and assignment of work. Neither the Complainant, nor the Bremerton Metal Trades Council (BMTC), the exclusive representative of both the coppersmiths' and pipefitters' crafts, as well as other crafts represented in the locals which comprise the BMTC at the Respondent Shipyard, were notified or given an opportunity to represent their members at this meeting. 2/ At the meeting, Chandler discussed the future of the coppersmiths' trade and indicated that some 40 percent of the coppersmiths had requested transfers to the pipefitters' craft, that there had been a noticeable decline in the work historically performed by the coppersmiths, that there were limited promotional opportunities for members of the coppersmith craft, and that members of the coppersmith craft could, upon request, transfer to the pipefitter rating. 3/

A second meeting was held on April 14, 1976, at the request of the Complainant for the purpose of discussing why the March 24, 1976, meeting had been held. The Respondent explained that the March 24 meeting was held because of an order from the Civil Service Commission which required the Respondent to verify all job descriptions and to give the coppersmith employees the opportunity to ask any questions they might have with regard to the impact upon them. A third meeting was held on April 27, 1976, at which time the Respondent once again gave the coppersmiths the opportunity to transfer to a pipefitter rating if they so desired.

I agree with the Administrative Law Judge's conclusion that the Respondent violated Section 19(a)(1) and (6) of the Order with respect to the March 24, 1976, meeting with its employees. Thus, this meeting involved a discussion between management and unit employees concerning personnel policies and practices and other matters affecting general

2/ The record reveals that among the coppersmiths attending this meeting were several officials of the Complainant and a member of the BMTC. The evidence establishes that these employees attended as coppersmith employees and were not invited to the meeting by the Respondent as representatives of the unit employees.

3/ In his Recommended Decision and Order, the Administrative Law Judge finds or infers that the discussions held by management encouraging a transfer from the coppersmith rating to the pipefitter rating actually involved a suggestion that members of the Coppersmiths' Local acquire membership in the Pipefitters' Local. (See e.g. the last paragraph on page 7 of the Recommended Decision and Order.) It is clear from the complaint and the record herein that the meetings and discussions which form the basis of the complaint concerned the propitiousness of transfer from one craft to another, rather than a direct encouragement to transfer from one union local to another.

working conditions and, as such, constituted a formal discussion between management and employees within the meaning of Section 10(e) of the Order. As the Respondent did not afford the Complainant prior notification of such a meeting and an opportunity to be represented therein, I find that it violated Section 19(a)(1) and (6) of the Order. 4/

However, under the particular circumstances herein, I reject the conclusions of the Administrative Law Judge with respect to his findings that the Respondent also violated Sections 19(a)(2) and (3) of the Order and his finding of an independent Section 19(a)(1) violation. With respect to the Section 19(a)(2) allegation, I find no evidence to support the contention that the Respondent encouraged or discouraged membership in a labor organization by discrimination against employees in regard to their hiring, tenure, promotion, or other conditions of employment because of their membership in the Coppersmiths' Local. Thus, at the March 24 meeting, the Respondent only encouraged the coppersmiths to change their rating to a pipefitter rating because of changing work requirements and the problems arising as a result thereof and did not suggest they change union membership. 5/ The coppersmiths could conceivably have changed their ratings and still remained members of the Complainant. Indeed, the record indicated that some pipefitters were members of the Complainant. Furthermore, and as indicated above, the employees of the Complainant's Local and the Pipefitters' Local were both affiliate members of the same exclusive representative, the BMTC. Thus, there is no evidence that the coppersmith employees were discriminated against because of membership in the Coppersmiths' Local. Consequently, I shall dismiss the Section 19(a)(2) portion of the complaint.

With regard to the Section 19(a)(3) allegation, I find no evidence that the Respondent improperly attempted to sponsor, control, or otherwise assist a labor organization not having equivalent status. The record clearly establishes that the coppersmiths were given the opportunity to change ratings, not unions. Further, the coppersmiths, if they did transfer to the pipefitter rating, would continue to be represented by the same exclusive representative of the Respondent's employees, the BMTC. Therefore, I also shall dismiss the Section 19(a)(3) portion of the complaint.

4/ The Administrative Law Judge found no such violation of Section 19(a)(1) and (6) in connection with the meetings of April 14 and April 27, and no exceptions were filed with respect to this determination.

5/ See footnote 3, above.

With respect to the Administrative Law Judge's finding of an independent Section 19(a)(1) violation based on alleged economic coercion of coppersmith employees, I find, contrary to the Administrative Law Judge, that such form of coercion, if it did exist, does not constitute an interference with those rights which are accorded employees under the Order, absent evidence that anti-union considerations are involved. Thus, while economic coercion may be a threat to an employee's financial well being, standing alone, it would not constitute interference with employee rights assured under the Order. 6/ As there is no record evidence that the Respondent's actions were based on the union membership or affiliation of the affected employees, I find no independent violation of Section 19(a) (1) of the Order and shall dismiss this portion of the complaint.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Navy, Puget Sound Naval Shipyard shall:

1. Cease and desist from:

(a) Conducting formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the exclusively recognized unit without giving the employees' exclusive representative the opportunity to be represented at such discussions by its own representative.

(b) Interfering with, restraining, or coercing its employees by failing to provide the employees' exclusive representative the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the exclusively recognized unit.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Executive Order:

(a) Notify the employees' exclusive representative of, and give it the opportunity to be represented at, formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the exclusively recognized unit.

6/ Cf. Office of Economic Opportunity, Region V, Chicago, Illinois, 3 A/SLMR 668, A/SLMR No. 334 (1973).

(b) Post at its facility at Department of the Navy, Puget Sound Naval Shipyard, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, Department of the Navy, Puget Sound Naval Shipyard and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint in Case No. 71-3805(CA), insofar as it alleges violations of Sections 19(a)(2) and (3) and an independent violation of Section 19(a)(1) be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 9, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the exclusively recognized unit without giving the employees' exclusive representative the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Order by failing to provide the employees' exclusive representative the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the exclusively recognized unit.

WE WILL notify the employees' exclusive representative of, and give it the opportunity to be represented at, formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the exclusively recognized unit.

(Agency)

Dated: _____ By: _____
(Signature)

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 any employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 9061, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

211 Main Street, Suite 528
San Francisco, California 94105



Recommended Decision and Order

Statement of the Case

Pursuant to a Complaint filed on June 3, 1976, by Sheet Metal Workers' International Association, Copper-smiths Local #463, AFL-CIO, Bremerton Washington, against Puget Sound Naval Shipyard, Department of the Navy, Bremerton, Washington, a Notice of Hearing on said Complaint was issued on March 4, 1977, by the Regional Administrator for Labor-Management Services Administration, San Francisco Region, U. S. Department of Labor, and a hearing was held before the undersigned on March 28, 1977, in Bremerton, Washington.

The Complaint was filed pursuant to the provisions of Executive Order 11491, as amended, and the Complaint alleges a breach of said Order, particularly Section 19(a), Subsections (1), (2), (3), (5) and (6), as follows:

On March 24, 1976 Mr. Melvin Chandler, Pipe-Copper Shop Superintendent called an unauthorized meeting, interfered with, restrained and coerced the Coppersmiths in exercise of their rights, by informing them they had two (2) days to transfer to the Pipefitters craft as their craft was being eliminated, and further that they had no chance for advancement or promotion in the Coppersmith craft. On April 27, 1976 he called an additional unauthorized meeting and further informed the Coppersmith employees by signing a memo you can get a Form 50 to transfer to Pipefitters, repeating again this was the only way to advance or be promoted. As to the question what happens to the bona fide apprentices, no answer was given. Those meetings were held by Mr. Chandler without ever any consultation with either the certified bargaining agent, the Bremerton Metal Trades Council Representatives or its affiliated Copper-smiths, Local Union #463.

After investigation and on February 10, 1977, the Regional Administrator advised Complainant that he had found no basis for further proceedings on the alleged violation of Section 19 (a)(5), dismissed that allegation and advised that such dismissal did not affect the remaining allegations of the Complaint (Asst. Sec. Exhibit 1(b)).

(202) 653-5092
(415) 556-0555

In the Matter of)

DEPARTMENT OF NAVY)
PUGET SOUND NAVAL SHIPYARD)
Respondent)

and)

COPPERSMITHS LOCAL 463;)
AFL-CIO)
Complainant)

CASE NO. 71-3805(CA)

Steven B. Frank, Esquire
506 Second Avenue
Seattle, Washington 98104
For the Complainant

Richard Wells
Senior Labor Advisor
Department of the Navy
Office of Civil Personnel, WFD
760 Market Street
San Francisco, California 94102
For the Respondent

Before: BEN H. WALLEY
Administrative Law Judge

At the hearing on March 28, 1977, all parties were afforded full opportunity to be heard, to offer, examine and cross-examine witnesses and to introduce evidence considered relevant to their respective positions in the premises.

After hearing the testimony of the witnesses and observing their demeanor, having reviewed the exhibits and based upon the entire record, I make the following Findings of Fact, Conclusions and Recommendations.

Findings of Fact

1. An Agreement (hereinafter referred to as Agreement) negotiated under Executive Order 11491, as amended (herein called the Order), covering the parties hereto, was entered into on June 5, 1975 by and between Bremerton Metal Trades Council, AFL-CIO, Bremerton, Washington, (hereinafter referred to as Council), and Puget Sound Naval Shipyard, Department of Navy, Bremerton, Washington (hereinafter referred to as Employer-Respondent), and at all times material to the issues involved said Agreement was in full force and effect.

2. The Preamble to the agreement recites, among other things, that:

The Council is composed of affiliated local unions of National or international organizations. Those affiliated locals having members employed in the Shipyard are listed in Appendix 1 hereto.

1/ It is at this point I observe that the Complaint was not filed by Bremerton Metal Trades Council, but by Coppersmiths Local 463, an organization affiliated with the Council and incorporated in the Agreement and listed in Appendix 1 thereto. Respondent raised this objection in its Brief for the first time. The record is silent as to any objections made during the administrative process to resolve the problem. There were no objections made at the time of the hearing. Therefore, I conclude the Complainant has standing to file the Complaint.

Appendix 1 lists the named Complainant (Exhibit J-1, page 103).

Article one, Section 1 of said agreement provides:

The Employer hereby recognizes that the Council is the exclusive representative of all employees in the unit as defined in Section 2 below and the Council hereby recognizes the responsibility of representing the interests of all such employees.

"Employees in the unit as defined in Section 2 below" includes all employee members of the Coppersmiths, Local 463 (Exhibit J-1, page 1 and 2).

3. On March 24, 1976, there was a meeting of Coppersmiths held pursuant to request of Melvin J. Chandler, Superintendent of Shop 56, for reasons stated as follows:

A. Basically there were several reasons for the March 24 meeting. I will enumerate them. One, I had about, I would say close to 40 per cent of the population of the copper-smith trade request a transfer to the pipe shop; two (sic), I had quite a few rebuttals from I.R.O. of coppersmith applications to other positions, which they turned them down because they said they were not qualified; and three, I thought I was acting for the good of the people involved. Those are the main reasons. (TR. page 131)

4. The notice of the aforesaid meeting was informal and was transmitted to the employees (Coppersmiths) by their foremen on instructions from Mr. Chandler. There were a total of eighteen Coppersmiths present. Some of those in attendance, in addition to being Coppersmiths by craft, were officers of Local 463 and one a member of the Council. Too, there were two foremen from the pipefitters' shop in attendance. However, it was brought out in testimony that each member attending did so as an employee and not as an officer of his union nor as a member or representative of the Council.

5. There was conflicting testimony as to what actually transpired at the meeting on March 24, 1976.

Generally, the witnesses for Complainant testified that Mr. Chandler effectually advised those present that the trades of Coppersmiths and pipefitters were so closely related that there wasn't any reason to have two crafts and that the Civil Service Commission, or some higher authority, was eliminating the Coppersmiths' rate; that promotional opportunities for Coppersmiths were limited, if existent at all; if anyone present desired to transfer to pipefitters he would assist in processing their request; and, that those desiring a transfer had two days within which to make the request. Mr. Chandler, the only witness for Employer that attended the meeting, testified that he called the meeting; advised those present the purpose of the meeting; discussed the decline in work normally performed by Coppersmiths; the limited chances for promotions; and, the fact that about 40% of the Coppersmiths had asked for a transfer. However, he specifically denied that he had used the time limitation of "two days." Instead, he said "five days" and we will get back together. Too, he said at no time did he discuss "the elimination of the Coppersmith rate." Mr. Clifton Craycraft, Foreman, Copper-smith, generally corroborated the testimony of Mr. Chandler.

6. Cross-examination of the witnesses did not remove the apparent inconsistent views of what actually transpired at the March 24, 1976 meeting. Particularly there remains unresolved: (1) the time within which a decision to make a request for transfer should be made; and (2) whether the "Coppersmiths' rate" would be eliminated. Regardless of these inconsistencies, for reasons herein-after stated, I find it unnecessary to resolve them.

7. It has been admitted that a meeting was called on March 24, 1976, to discuss the future of the "Coppersmiths' trade;" that some 40% of the Coppersmiths had requested transfers to pipefitters' craft; and that there had been a noticeable decline in the work historically performed by Coppersmiths. There were some 16 members of the Coppersmiths present and all witnesses for Complainant testified that they attended as employees (and not as officials of their own union or as members of the "Council"), and this was not refuted. It is a further fact that those present were advised that if they desired to transfer to the pipefitters' union they could make a request, in writing, and he, Mr. Chandler, would process the request through Personnel Operations Division. The results obtained by this offer is the reason I have concluded that it is immaterial whether they were given "two days" or a "few days" within which to decide on making the request to transfer.

8. Immediately following the offer of assistance in making a transfer, several of those in attendance contacted officers of the Coppersmiths' Union and members of the Council to find out what was going on. As a result of these contacts management was advised of the concern and a meeting was arranged for and held on April 14, 1976, to explain to the Coppersmiths the problems involved and the reasons for the action taken by Mr. Chandler on March 24, 1976. Explanations by Respondent were made at the April 14, meeting by Richard Blakey, Head of Personnel Operations Division, and Al McFall, Head of Employee-Management Relations Division and Administrator of the Labor-Relations Program. Mr. Blakey explained that they were only complying with OCMM Notice 12532, dated 6 February 1976 (Respondent Exhibit 1), which required verification of job descriptions and the "general purpose of that particular meeting (April 14) was to outline to the union and to the membership that was in attendance at that point in time the basic reason behind our initial request for the revised job description and to give those individuals an opportunity to ask any questions they might have as regards the impact upon them" (TR. 168). It was developed through this witness that the revision of the "job description" had been in process for some time and all parties, Coppersmiths, pipefitters and Council members had been involved. Too, Blakey testified that the final effort had not been implemented and that it is "not anticipated that they (Coppersmiths) will lose their rating, so long as they are performing Coppersmiths' duties" (TR. page 176). This testimony was basically corroborated by Mr. McFall except he observed: "The meeting started to turn into a representation of a hearing and I had to interject that this was for the purpose of having Mr. Blakey explain the various reasons for the actions that had been taken, it was not a hearing." (TR. 180).

9. On April 27, 1976, a third meeting was held, being the second meeting with Mr. Chandler and the Coppersmiths. In response to inquiry, Mr. Chandler stated the purpose of that meeting as follows:

A. In between the two meetings and after the April 14 meeting, the production officer called me to his office and told me that I should proceed with my actions as far as transferring the people who wanted to be transferred from coppersmith to pipefitter, and do it right away. I also met with Mr. Blakey, and he told me the same thing, and that was the main purpose of the April 27 meeting. (TR. page 137)

He further testified:

A. Well, I might add that after the first meeting, I let all the people stay in the conference room to have any discussion that they wanted to, and on the April 27 meeting, it was a very short meeting, it lasted less than five minutes I would say, and I told them at that time that all I was going to do was to give the people who wanted to the opportunity to say they wanted to transfer to a pipefitter rating just by merely giving me a handwritten memo assigning it and so stating that they wanted to change over. (TR. page 138)

This meeting produced results complained about and on that date (April 27), five (5) coppersmiths requested a transfer (Claimant's Exhibit 4) and during the year of 1976 a total of twelve (12) were suspended for withdrawing authorization to withhold dues (Claimant's Exhibit 5). The transfer of these twelve (12) members of Local 463, Coppersmiths, to the pipefitters' union reduced the membership from twenty-six (26) to fourteen (14) members.

Conclusions

A. The meeting on March 24, 1976, called by Mr. Chandler, was held for the primary purpose of discussing the plight of the individual members of Coppersmiths' Local 463. There was testimony to suggest that the action was required by the "Civil Service Commission or some higher authority" but because of the discussion at the meeting, the results ultimately obtained and the manner in which it was done, it appears to be and I so find that it was because of the paucity of the kind of work existing at the shipyard traditionally performed by Coppersmiths and the problems arising as a result thereof. This necessitated a discussion of the "hiring, tenure, promotion, or other conditions of employment" within the meaning of Section 19(a)(2) of the Order. To aid, if not solve the problems, Mr. Chandler pointed to the pipefitters' union and offered to process any written request to transfer (to the pipefitters' union). The offer to assist in the "transfer" would be beneficial to the pipefitters' union (by increasing membership) and equally, if not more so, detrimental to Coppersmiths' Local 463 (by a corresponding loss in membership), within the provisions of Section 19 (a)(3) of the Order. Because of the casual but effective

mention of the sheer numbers, the normally expected attrition, the limited, if not prohibitive, chance of promotions, and the quota system in effect, those in attendance could very vividly see the gloomly picture of the future. This was economic coercion in its simplest form and within Section 19(a)(1) of the Order.

B. The meeting of April 14, 1976, was to "outline to the Union and to the membership that was in attendance at that point in time the basic reason behind our initial request for the revised job description and to give these individuals an opportunity to ask any questions they might have as regards the impact upon them" (TR. page 168). "This was for the purpose of having Mr. Blakey explain the various reasons for the actions that had been taken, it was not a hearing" (TR. page 180). Thus, the meeting was in response to the concerns expressed about the meeting of March 24, 1976, but it was not responsive to those concerns. The explanations made were that what had been done was required by the Civil Service Commission. Yet, the directive was cancelled and never put into effect. The "impact upon them" was considered only secondarily, if at all, and the "purpose" of the meeting of March 24, 1976, remained the primary consideration.

C. On April 27, 1976, after a call from the production officer, a Captain Martin, who instructed Mr. Chandler to proceed to transfer "the people who wanted to be transferred from Coppersmiths to pipefitter, and do it right away," and after having "met with Mr. Blakey, and he told me the same thing," a meeting was held and "it was a very short meeting, it lasted less than five minutes I would say, and I told them that all I was going to do was to give the people who wanted to the opportunity to say they wanted to transfer to a pipefitter rating just by merely giving me a handwritten memo assigning (sic) it and so stating that they wanted to change over" (TR. page 138). Following this meeting and during the year of 1976, twelve Coppersmiths summarily transferred to pipefitters, without following prescribed personnel procedures, by making a simple request.

D. The meeting of March 24, 1976, was a "discussion between management and employees ... concerning grievances, personnel policies and practices, or other matters affecting ... employees in the unit" and was considerably more than a counseling session as discussed in Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, FLRC No. 74A-11. Too, it was considerably

more than an "investigative" meeting found to exist in and excluded from the provisions of Section 10(e) of the Order in Internal Revenue Service, Washington, D. C., Assistant Secretary Case No. 224056(CA), FLRC No. 74A-23. Therefore, I conclude that the meeting of March 24, 1976, was a "formal discussion" within the meaning of Section 10(e) of the Order, and the failure to give the employees (Coppersmiths) an opportunity to be represented constituted a violation of Section 19(a)(1) and (6) of the Order and was an unfair labor practice. Also, this meeting dealt with the limited opportunities for promotions and other conditions of employment within the meaning of Section 19(a)(2) of the Order.

E. The meeting of April 14, 1976, was a "formal discussion" within the meaning of Section 10(e) of the Order and all proper parties were present. However, it appears to have been a pro forma meeting only inasmuch as the meeting of March 27, 1976, was called because Captain Martin directed Mr. Chandler to proceed with his actions to "transfer" those making the request, "and do it right away," which was confirmed by Mr. Blakey. Thus, the transfer of those Coppersmiths in a manner inconsistent with personnel policy procedures and without regard to the impact on the union or its members was contrary to the provisions of Section 19(a)(3) of the Order. Previous requests to "transfer" to pipefitters had been denied by the Industrial Relations Office (I.R.O.) and the method used was nothing more than a unilateral act of command classification in total disregard of the rights of Coppersmiths' Local 463 and a gross departure from Respondents' own personnel policies and procedures.

Based upon the foregoing findings of fact and conclusions, and therein having found that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1), (2), (3) and (6) of Executive Order 11491, as amended, I shall recommend that an order be entered directing the Respondent to cease and desist therefrom and take specified affirmative actions set forth below designed to effectuate the policies of said Order.

Recommended Order

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Puget Sound Naval Shipyard, Department of the Navy, Bremerton, Washington shall:

1. Cease and desist from:

A. Coercing, encouraging and/or assisting any employee who is a member of Sheet Metal Workers' International Association (Coppersmiths, Local 463), to transfer membership to Sheet Metal Workers' Local 274 or to Pipefitters Local 631; or

B. Meeting with employee members of Coppersmiths, Local 463 for the purpose of discussing with them the promotional opportunities within their trade, or the elimination of the Coppersmiths craft or trade, or that the similarity of the pipefitters trade and the Coppersmiths trade is such as to render it unnecessary to maintain both trades at the shipyard, without first giving the affected unions (Coppersmiths, Sheet Metal and/or Pipefitters) an opportunity to be represented at such discussions; or

C. Aiding or otherwise assisting any employee member of Coppersmiths, Local 463 in processing any request, in writing or otherwise, to transfer to pipefitters, sheet metal or any other trade in circumvention of the established and operating personnel procedures applicable to all "transfers" of employees at the shipyard; or

D. Refusing to consult, confer, or negotiate with the Coppersmiths, the pipefitters, the Council or any other affected representative concerning the aforesaid matters as required by the Agreement and the Order.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the agreement and Executive Order 11491, as amended:

A. Post at its facility at Puget Sound Naval Shipyard, Bremerton, Washington, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant

Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by Admiral F. F. Manganaro, RADM, USN, and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Admiral shall take reasonable steps to insure that such notices are not altered, defaced, or covered in whole or in part by other material.

B. Notify Pay Roll Section, or other appropriate section, that, effective immediately, union dues will no longer be deducted from the pay of the following named employees if still employed: Peter F. Brown, Donald A. Palmer, Gerald H. Stocks, Robert L. Prindle, Alexander A. Contreras, Travis L. Boswell, Michael O. Hamren, Roger C. Turner, Elsworth A. Severson, Michael W. Napper, Albert L. Harlan, Dennis J. Hood. Also any other employees, if any, who have transferred from Coppersmiths Local 463 to any other union with the aid of the Activity in circumvention of its established personnel procedures. Such notice shall advise the individuals named and affected that the refusal to withhold dues will remain in effect until such time as each has effected his own transfer, unaided by management, to a union, if he so desires, according to the by-laws of such union and according to the established personnel policies and procedures applicable to all employees, and after execution of a proper request to withhold dues.

C. Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within twenty (20) days from the date specified in the letter transmitting the forms aforesaid as to what steps have been taken to comply herewith.

Dated on the 17th day of August 1977.


BEN H. WALLEY
Administrative Law Judge

Dated: August 17, 1977
San Francisco, California

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

WE WILL NOT suggest, encourage, coerce, admonish or assist any of our employees who are, or who have been, members of Sheet Metal Workers' International Association (Coppersmiths Local 463) to transfer to any other union in circumvention of the established personnel procedures applicable to all employees of this activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees concerning grievances, personnel policies and practices, or other matters affecting working conditions in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

By: _____

Dated:

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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, San Francisco Region, Room 9061, 450 Golden Gate, San Francisco, California, 94102.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE,
CHICAGO DISTRICT OFFICE
A/SLMR No. 1004

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 10, alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by (1) refusing to make available to a union representative a statistical analysis of supervisory evaluations prepared in connection with a promotion action, and (2) in connection with an unrelated promotion action, refusing to make available to a union representative the evaluative material considered during the selection process. In both instances, the material was sought by the Complainant in its capacity as the representative of non-selected employees in grievance proceedings pertaining to the respective promotion actions.

The Assistant Secretary concluded that the record failed to establish, in the first instance, that the statistical analysis was necessary and relevant to the processing of the grievance. He noted that the parties had stipulated that neither the evaluation panel nor the selecting official in any way relied on the statistical analysis in making their selections. To that extent, the Complainant had not shown that the statistical analysis had any demonstrable impact on the selection process which was the subject of the grievance. The particular grievance therein alleged "a failure on the part of the Ranking Panel to properly evaluate the candidates presented to them." Each of the grievant's specific arguments stated that the ranking panel had not properly interpreted his supervisory evaluations. The Assistant Secretary found, however, that the statistical analysis dealt only with the supervisory evaluations themselves and not with the panel's interpretations of the evaluations which led to its rankings. He concluded, therefore, that the Complainant had failed to show that the information contained in the statistical analysis was necessary for it to process the grievance, which was the express reason the statistical analysis was sought. The Assistant Secretary noted, moreover, that the Complainant had in its possession all the data upon which the analysis was based.

Under these circumstances, the Assistant Secretary concluded that the Respondent had no obligation under the Executive Order to provide the Complainant with the statistical analysis it had requested and he ordered that the complaint in this regard be dismissed.

With regard to the second allegation, the Assistant Secretary noted that in Department of the Treasury, Internal Revenue Service, Milwaukee,

Wisconsin, A/SLMR No. 974 (1978), he had found that an employee's right to privacy of his records must be balanced against the conflicting rights in each case. The Assistant Secretary further noted that where, as here, the conflicting rights are broad and involve the paramount public interest of an exclusive representative's right to adequately perform its representational functions, of having the Federal government operate within its merit promotion system equitably, and of encouraging the use of nondisruptive grievance procedures, he had determined that the mere identification of the subject of certain documents is not a violation of privacy so significant as to bar disclosure of the material and that the identified employee(s) would still have the right to have the documents sanitized so as to omit any sensitive or damaging personal material.

Under these circumstances, the Assistant Secretary concluded that the information sought herein, which he found to be necessary and relevant to the performance of the Complainant's representational function, should have been disclosed to the Complainant. Accordingly, he found that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to make available to the Complainant the evaluation material used in connection with the selection for promotion in the second allegation herein. Therefore, he ordered the Respondent to cease and desist from the conduct found violative and to take certain affirmative actions.

-2-

A/SLMR No. 1004

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
CHICAGO DISTRICT OFFICE

Respondent

and

Case No. 50-15459(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU, CHAPTER 10

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator R. C. DeMarco's Order Transferring Case to the Assistant Secretary of Labor in accordance with Section 203.5(b), 203.7(a)(4) and 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits and briefs, the Assistant Secretary finds:

The complaint herein alleges that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by (1) refusing to make available to a union representative a statistical analysis of supervisory evaluations prepared in connection with a promotion action, and (2) in connection with an unrelated promotion action, refusing to make available to a union representative the evaluative material considered during the selection process. In both instances, the material was sought by the Complainant in its capacity as representative of non-selected employees in grievance proceedings pertaining to the promotion actions. The stipulation treats the two alleged unfair labor practices as separate "counts."

Count I

The Respondent refused to produce the statistical analysis requested by the Complainant on the grounds that it had provided the latter with all appropriate information relating to the grievance at issue, and that further, the statistical analysis was an "intra-management" document.

The undisputed facts, as stipulated by the parties, are as follows:

In October 1976, a number of vacancies for GS-12 Revenue Agent positions were announced by the Respondent in Vacancy Announcement 76-119. There were approximately 100 qualified candidates for these positions. Each candidate was evaluated by his or her immediate supervisor and each one also appeared before a ranking panel consisting of three management officials. The ranking panel considered each candidate's promotion appraisal, past experience and training, relevant incentive awards, and such other relevant material as it deemed necessary, and assigned a total score for each applicant. The panel also prepared a written narrative statement reflecting the consensus of panel opinion and judgment of the applicants' ability to perform in the position for which they were being considered as compared with the other applicants. The ranking panel's judgment constituted 40 percent of the total score of an applicant, the other 60 percent being the score given by the supervisor on the promotion appraisal. The total scores determined which candidate would be rated highly qualified or best qualified according to cut-off scores assigned by the ranking panel for that position. As a result of this process, a number of vacancies for the GS-12 Revenue Agent positions were filled.

On December 22, 1976, the Complainant sought, on behalf of non-selected candidates for the GS-12 Revenue Agent position, information related to the selection process. On January 28, 1977, the information sought, including supervisory and ranking panel evaluations of all the candidates, was provided to the Complainant. On February 17, 1977, a non-selected candidate, John Cora, filed a grievance alleging various violations of the parties' negotiated agreement in the selection process. His grievance was taken through all four steps of the negotiated grievance procedure and arbitration was invoked on June 9, 1977.

After it had received the information sought as a result of its original request, the Complainant informally learned that after the ranking panel had completed its duties, the chairman had prepared a statistical analysis of the promotion evaluations submitted by the supervisors of the candidates in connection with Vacancy Announcement 76-119. The promotion evaluations prepared by the supervisors had consisted of ten factors, ranging from "Examination Planning and Scheduling" to "Cooperation." For each of these factors, the employee being evaluated was rated on a scale from "1- Considered to be failing to meet normal requirements of successful operation" to "5- Considered to materially exceed accepted

standards." The evaluation also provided space for a short narrative comment to be made by the supervisor.

The chairman's statistical analysis reflected both the total number and the percentage of the numerical ratings given on all the evaluations received in connection with Vacancy Announcement 76-119. He appended to this statistical analysis a memorandum containing some general comments about the evaluation appraisals. 1/ The analysis was prepared at the request of the selecting official, who requested similar analyses in connection with all GS-12 and GS-13 promotion actions within his division so that he could determine whether the managers in his division were following Internal Revenue Service requirements for the preparation of employee evaluations. A copy of the analysis prepared in this case was sent to the selecting official. The parties stipulated that he did not refer to the analysis in selecting individuals for promotion.

On March 3, 1977, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552, the Complainant requested all quantitative and qualitative analyses of the supervisory appraisals and ranking panel scores prepared in connection with Vacancy Announcement 76-119. This request was denied by the Respondent based on its contention that such information was exempt from disclosure pursuant to the FOIA. On March 18, 1977, the Complainant appealed this determination to the National Office of the Internal Revenue Service. Simultaneously, it requested the information pursuant to Executive Order 11491, as amended, in order to represent Cora in his grievance. This latter request was rejected by the Respondent on May 24, 1977, on the grounds that the Complainant had received all the appropriate information related to Cora's grievance and that the statistical analysis was an "intra-management" document. On May 4, 1977, the Complainant was given the document at issue herein pursuant to its FOIA request. 2/

1/ His comments included the following:

In general the (promotion evaluations) for the Division were well done citing specifics to justify ratings. Generally, the appraisal folders were found to be adequate, however in some instances there was little documentation to support the.... narrative.

The panel's task in evaluating the potential of the agents was at times complicated by a lack of current history records. There are still some folders that contain outdated information (job visits, workload reviews, etc.), or non-authorized documents (fraud referral reports, signout registers). In addition, managers should assure that all evaluative information is in the employee's records prior to submission of the file to Personnel.

2/ From the record it is not clear whether a determination actually was made that the FOIA required release of the document. However, even assuming that production was required under the FOIA, such a conclusion would not be determinative as to whether the document was necessary and relevant for the processing of a grievance under the parties' negotiated grievance procedure.

It has been previously held that agency management must provide an exclusive representative with information it seeks which is necessary and relevant for the performance of its representational functions, and that evaluation materials considered in the course of a promotion action, such as were submitted to the Complainant herein, are necessary and relevant to the effective processing of a grievance which questions the selection process. 3/ The issue here is whether the statistical analysis of the supervisory evaluations, the subject of the instant complaint, also was necessary and relevant to the Complainant's performance of its representational obligations.

In my view, the record fails to establish that the statistical analysis was necessary and relevant to the processing of the grievance herein. Thus, the parties have stipulated that neither the evaluation panel nor the selecting official in any way relied on the statistical analysis in making their selections. To that extent, the Complainant has not shown that the statistical analysis had any demonstrable impact on the selection process which is the subject of the grievance. The Cora grievance alleged a "failure on the part of the Ranking Panel to properly evaluate the candidates presented to them." Each of the grievant's specific arguments stated that the ranking panel had not properly interpreted his supervisory evaluations. However, the statistical analysis, including the chairman's remarks, noted above at footnote 1, dealt only with the supervisory evaluations themselves, and not with the panel's interpretation of the evaluations which led to its rankings. Therefore, in my judgment, the Complainant has failed to show that the information contained in the statistical analysis was necessary for it to effectively process the Cora grievance, which was the express reason the statistical analysis was sought. Moreover, the Complainant had in its possession all the data upon which the analysis was based. 4/

Under all of these circumstances, I conclude that the Respondent had no obligation under the Executive Order to provide the Complainant with the statistical analysis it had requested. Accordingly, I shall order that Count I of the instant complaint be dismissed.

Count II

The Respondent refused to make available to a Union representative the evaluative material reviewed by, used by and/or made available to the ranking panel in the promotion action outlined in the second "count" of the complaint herein. The refusal was on the ground that any released material concerning the selected candidate could be easily identified, where,

3/ Department of Defense, State of New Jersey, 3 FLRC 284, FLRC No. 73A-59 (1975).

4/ The Complainant, although acknowledging that it had the data in its possession, asserted that reconstructing the analysis would have been time consuming. However, it has not been established that the work required to reconstruct the analysis from the available data would have placed an undue burden on the Complainant.

as here, there were only two highly qualified candidates, and thereby would invade the selected candidate's right to the privacy of her records.

The undisputed facts of this matter, as stipulated by the parties, are as follows:

On July 29, 1976, Vacancy Announcement 76-79 was posted for a position as an Audit Accounting Aide, GS-4, in the Respondent's Waukegan, Illinois, facility. There were three applicants. Two were found to be highly qualified, and one of these two candidates, Ms. Bonita Howe, was selected. The Complainant requested the evaluation material considered by the ranking panel in the course of this selection. The request was made in connection with the Complainant's duty to represent the employees in the unit. The Respondent declined to supply the materials, as noted above, on the ground that since there were only two individuals involved, sanitization would not protect the privacy of the selected candidate. Subsequently, a grievance was filed by the Complainant on behalf of Ms. Fredricks pursuant to the parties' negotiated grievance procedure, the grievance was carried to the fourth step, and arbitration was then invoked.

In Department of the Treasury, Internal Revenue Service, Milwaukee, Wisconsin, A/SLMR No. 974 (1978), I found that an employee's right to privacy of his records must be balanced against the conflicting rights in each case. And where, as here, the conflicting rights are broad and involve the paramount public interest of an exclusive representative's right to adequately perform its representational functions, of having the Federal government operate within its merit promotion system equitably, and of encouraging the use of nondisruptive grievance procedures, I have determined that the mere identification of the subject of certain documents is not a violation of privacy so significant as to bar disclosure of the material and that the identified employee(s) would still have the right to have the documents sanitized so as to omit any sensitive or damaging personal material.

Under these circumstances, I conclude that the information sought herein, which I find to be necessary and relevant to the performance of the Complainant's representational function, should have been disclosed to the Complainant. Accordingly, by refusing to make available to the Complainant the evaluation material used in connection with the selection for promotion made pursuant to Vacancy Announcement 76-79, I find that the Respondent violated Section 19(a)(1) and (6) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Chicago District Office, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Refusing to permit the National Treasury Employees Union, Chapter 10, access to such documents and materials as are necessary and relevant to the National Treasury Employees Union's processing of a grievance regarding the selection process for the GS-4 Audit Accounting Aide vacancy for which Vacancy Announcement 76-79 was posted.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

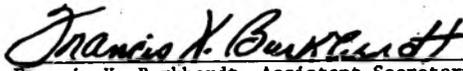
(a) Upon request, permit the National Treasury Employees Union, Chapter 10, access to such documents and materials as are necessary and relevant to the National Treasury Employees Union's processing of a grievance regarding the selection process for the GS-4 Audit Accounting Aide vacancy for which Vacancy Announcement 76-79 was posted.

(b) Post at its facility at the Internal Revenue Service, Chicago District Office, Chicago, Illinois, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director, Internal Revenue Service, Chicago District, Chicago, Illinois, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The District Director shall take steps to ensure that notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that Count I of the complaint in Case No. 50-15459(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
March 9, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

-6-

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to permit the National Treasury Employees Union, Chapter 10, access to such documents and materials as are necessary and relevant to the National Treasury Employees Union's processing of a grievance regarding the selection process for the GS-4 Audit Accounting Aide vacancy for which Vacancy Announcement 76-79 was posted.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, permit the National Treasury Employees Union, Chapter 10, access to such documents and materials as are necessary and relevant to the National Treasury Employees Union's processing of a grievance regarding the selection process for the GS-4 Audit Accounting Aide vacancy for which Vacancy Announcement 76-79 was posted.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Federal Building, Room 1060, 230 South Dearborn Street, Chicago, Illinois 60604.

March 9, 1978

A/SLMR No. 1005

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF SECOND SUPPLEMENTAL DECISION AND ORDER
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE ARMY,
FORT McPHERSON, GEORGIA
A/SLMR No. 1005

On May 28, 1976, the Assistant Secretary issued his Supplemental Decision and Order in A/SLMR No. 655, finding that a Department of Army reorganization did not so thoroughly combine and integrate the American Federation of Government Employees, AFL-CIO, Local 81 (AFGE Local 81) unit, located at Fort Gillem, Georgia, with the Petitioner, the American Federation of Government Employees, AFL-CIO, Local 1759's unit, located at Fort McPherson, Georgia, so as to require a finding that the AFGE Local 81's unit had lost its separate identity. On June 2, 1977, the Federal Labor Relations Council (Council) set aside the Assistant Secretary's Supplemental Decision in the instant case and remanded the case for reconsideration in light of the principles enunciated in its Decision on Appeal (FLRC No. 76A-82).

In light of the principles enunciated by the Council in its Decision on Appeal, the Assistant Secretary found that those employees who had been represented by the AFGE Local 81 at Fort Gillem and who had been administratively transferred to Fort McPherson, have accreted into the AFGE Local 1759's unit, which remains appropriate for the purpose of exclusive recognition.

Accordingly, the Assistant Secretary ordered that the unit represented by the AFGE Local 1759 be clarified consistent with his Second Supplemental Decision and Order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
FORT McPHERSON, GEORGIA

Activity

and

Case No. 40-6126(CU)
A/SLMR No. 586, A/SLMR No. 655
FLRC No. 76A-82

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1759

Petitioner

SECOND SUPPLEMENTAL DECISION AND ORDER

On November 26, 1975, the Assistant Secretary issued his Decision and Remand in the above captioned case in A/SLMR No. 586, finding that the record did not provide an adequate basis upon which to determine the appropriateness of the clarification action sought by the petition filed by the American Federation of Government Employees, AFL-CIO, Local 1759, hereinafter called AFGE Local 1759. 1/ Accordingly, he remanded the case to the appropriate Assistant Regional Director (now called Regional Administrator) for the purpose of securing additional evidence in accordance with his Decision. Thereafter, on May 28, 1976, the Assistant Secretary issued his Supplemental Decision and Order in A/SLMR No. 655, finding, in essence, that a Department of Army reorganization did not so thoroughly combine and integrate the employees formerly represented exclusively by the American Federation of Government Employees, AFL-CIO, Local 81, hereinafter called AFGE Local 81, 2/ located at Fort Gillem, with the AFGE Local 1759's unit, located at Fort McPherson, so as to require a finding that the AFGE Local 81's unit had lost its separate identity.

On June 2, 1977, the Federal Labor Relations Council, hereinafter called Council, issued its Decision on Appeal from the Assistant Secretary's Supplemental Decision (FLRC No. 76A-82). The Council concluded, "that

1/ AFGE Local 1759 sought to clarify its exclusively recognized unit at Fort McPherson, Georgia, so as to include all nonsupervisory and nonprofessional employees who are currently employed by Fort McPherson, but are located physically at Fort Gillem, Georgia, formerly the Atlanta Army Depot.

2/ On July 1975, AFGE Local 81 issued a disclaimer of interest for the unit of employees it had represented at Fort Gillem.

the Assistant Secretary's standard for resolving questions as to the appropriate unit which arise in the context of a claimed accretion is inconsistent with the purposes of the Order, especially those reflected in Section 10(b), and that his application of that standard in the instant case must be set aside." In its Decision, the Council set forth certain principles which it deemed were applicable to the subject case. Among other things, the Council stated that "where a reorganization results in an issue as to whether a previously existing unit continues to be appropriate, or whether the employees in that previously existing unit have accreted into another unit, appropriate unit determinations must equally satisfy each of the 10(b) criteria in recognition of and in a manner fully consistent with purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure." It noted also that a finding of accretion is not dependent upon thorough physical integration of the employees at issue into the existing unit and should not turn solely on whether the previously existing unit has lost its separate identity and the employees in such unit have lost their separate and distinct community of interest.

Upon the entire record in this case, including those facts developed at the initial and reopened hearings, the Assistant Secretary finds:

In accordance with the policy enunciated by the Council, I am constrained to find that the Fort Gillem employees formerly represented by the AFGE Local 81 have accreted into the unit at Fort McPherson represented exclusively by the AFGE Local 1759. Thus, although the employees formerly represented by the AFGE Local 81 remain physically separate, they have the same mission and overall supervision as the employees at Fort McPherson, and all the employees at the two locations are now serviced by a single personnel office located at Fort McPherson. Further, both Fort Gillem and Fort McPherson have one area of consideration for merit promotions and the same competitive area for reductions-in-force. Therefore, I conclude, the employees of Fort McPherson and Fort Gillem now share a community of interest. Moreover, the parties' assert, and I agree, that inclusion of the employees formerly represented by the AFGE Local 81 in the aforementioned unit at Fort McPherson, which will result in a more comprehensive bargaining unit, will promote effective dealings and efficiency of agency operations. Noted particularly in this latter regard is the fact that the employees at Fort McPherson and Fort Gillem are serviced by the same personnel office and that they are in the same area of consideration for promotions and in the same competitive area for reduction-in-force.

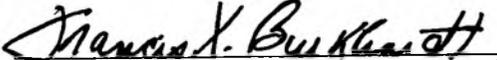
Accordingly, I find that those employees who had been represented by the AFGE Local 81 at Fort Gillem and who have been administratively transferred to Fort McPherson have accreted into the AFGE Local 1789's unit, which I find remains appropriate for the purpose of exclusive recognition. I shall, therefore, order that the unit represented by the AFGE Local 1759 be clarified to include those employees who had been represented by the AFGE Local 81 at Fort Gillem. 3/

3/ See Naval Training Center, Orlando, Florida, A/SLMR No. 988 (1978).

ORDER

IT IS HEREBY ORDERED that the unit for which the American Federation of Government Employees, AFL-CIO, Local 1759 was accorded exclusive recognition on December 9, 1963, at Fort McPherson, Georgia, be, and it hereby is, clarified by including in said unit those employees formerly in the unit for which the American Federation of Government Employees, AFL-CIO, Local 81, was accorded exclusive recognition on December 1, 1964, at the Atlanta Army Depot, Forest Park, Georgia, now called Fort Gillem, Georgia.

Dated, Washington, D.C.
March 9, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

March 9, 1978

A/SLMR No. 1006

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY, EUROPE
AND SEVENTH ARMY; and
ARMY AND AIR FORCE
EXCHANGE SERVICE,
EUROPE
A/SLMR No. 1006

U.S. ARMY, EUROPE AND SEVENTH
ARMY

Respondent

and

Case No. 22-6599 (CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2348, AFL-CIO

Complainant

ARMY AND AIR FORCE EXCHANGE
SERVICE, EUROPE

Respondent

and

Case No. 22-6601 (CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2348, AFL-CIO

Complainant

DECISION AND ORDER

On July 20, 1977, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceedings, dismissing the complaint against Respondent Army and Air Force Exchange Service, Europe, hereinafter called AAFES, finding that the Respondent U.S. Army, Europe and Seventh Army, hereinafter called USAREUR, had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Complainant and both Respondents filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject cases, including the Complainant's and the Respondents' exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations, only to the extent consistent herewith.

This proceeding involved two unfair labor practice complaints filed by the American Federation of Government Employees, Local 2348, AFL-CIO, (AFGE). One complaint alleged, in essence, that the Agency, U.S. Army Europe and Seventh Army (USAREUR) violated Section 19(a)(1) of the Order by its action in issuing regulation 690-84 and making such regulation binding upon the Army and Air Force Exchange Service, Europe (AAFES). The regulation contained, among other things, reduction-in-force (RIF) procedures applicable to U.S. citizens employed by the AAFES which allegedly were contrary to RIF procedures contained in the negotiated agreement between AFGE and AAFES. The second complaint alleged essentially that the AAFES violated Section 19(a)(1) and (6) of the Order by conducting a RIF action affecting employees represented exclusively by the AFGE in violation of the provisions of the negotiated agreement between the AAFES and the AFGE.

The Administrative Law Judge found that USAREUR, in directing and requiring the implementation of Regulation 690-84 by AAFES-Europe, violated Section 19(a)(6) and (1) of the Order as it required AAFES to disregard the RIF procedures established under the negotiated agreement between the AAFES and the AFGE. The Administrative Law Judge also found that the AAFES did not violate Section 19(a)(1) and (6) of the Order as it made an effort to be exempted from the provisions for RIF within Regulation 690-84 and implemented said regulations only on direct command from the USAREUR.

The Assistant Secretary found, contrary to the Administrative Law Judge, that the actions of the USAREUR were not violative of the Order. In this regard he noted that by virtue of a regulation which the AAFES and the AFGE incorporated into their negotiated agreement, the USAREUR had the authority to issue Regulation 690-84 and to require the AAFES to implement its provisions in conducting a RIF action affecting employees exclusively represented by the AFGE and that, therefore, said actions did not result in an improper unilateral modification of the terms and conditions as established in the negotiated agreement between AAFES and the AFGE.

Accordingly, the Assistant Secretary ordered that the complaints be dismissed in their entirety.

The complaint in Case No. 22-6599(CA) alleges essentially that the USAREUR violated Section 19(a)(1) of the Order by its action in issuing and enforcing a regulation binding upon the AAFES containing, among other things, reduction-in-force (RIF) procedures applicable to U.S. citizens employed by the AAFES which were contrary to RIF procedures contained in the negotiated agreement between the AAFES and the American Federation of Government Employees, Local 2348, AFL-CIO, hereinafter called AFGE. The complaint in Case No. 22-6601(CA) alleges essentially that the AAFES violated Section 19(a)(1) and (6) of the Order by conducting a RIF action affecting employees represented exclusively by the AFGE in violation of the provisions of the negotiated agreement between the AAFES and the AFGE. 1/

The essential facts in the case, which are not in dispute, are set forth, in detail, in the attached Administrative Law Judge's Recommended Decision and Order, and I shall repeat them only to the extent necessary.

On October 27, 1971, the AFGE was certified as the exclusive bargaining representative of the regular U.S. citizen civilian employees employed by the AAFES at Munich, Germany. The AAFES (Europe), which is part of the Army and Air Force Exchange Service, a nonappropriated fund instrumentality, employs approximately 200 hourly paid plan (HPP) employees and 300 local national (LN) employees. 2/

On March 25, 1974, the AFGE and the AAFES executed a negotiated agreement which was in effect at all times material herein. Among other things, this agreement contained the following provisions:

Article IV, AUTHORITY, LEGAL AND REGULATORY APPLICATIONS

Section 2. In the administration of all matters covered by this agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in AAFES Personnel Regulations; by published agency policies and regulations in

1/ On July 30, 1976, the Regional Administrator dismissed the 19(a)(5) allegations in both complaints. No request for review of the Regional Administrator's action was filed with the Assistant Secretary.

2/ Throughout the proceedings herein, the parties utilized the term HPP to refer to U.S. citizens employed by the AAFES and the term LN to refer to local national employees, or non-U.S. citizens, employed by the AAFES. The parties also utilized the term LN to refer to positions which are administratively designated as local national positions. To further confuse the matter, the record reveals that approximately 25 to 30 percent of the LN positions are held by U.S. citizens. For the purpose of this decision, however, the term HPP refers to AAFES employees who are U.S. citizens and the term LN refers to employees who are non-citizens.

existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level.

Article XIV, REORGANIZATION AND REDUCTION IN FORCE

Section 2. Notwithstanding the provisions of Article IV, it is agreed that the provisions of AR 60-21/AFR 147-15, on reduction-in-force (RIF) in effect at the time of a reduction-in-force action shall apply. 3/

The USAREUR is a military command under Headquarters, U.S. European Command. As part of its mission, it is responsible for establishing policies and negotiating tariff agreements with trade unions throughout the Federal Republic of Germany covering wages and other conditions of employment for local nationals (German employees). In 1973, representatives of the USAREUR and the Federal Republic of Germany met to discuss RIF procedures involving LN's throughout West Germany. While no written agreement was reached, the representatives arrived at an understanding that, in the event of a RIF, LN's would be given preference over HPP's occupying positions designated, or set aside, for LN's. To implement the understanding reached with the representatives of the Federal Republic of Germany, the USAREUR issued Regulation 690-84 on June 18, 1974. Among other things, the regulation, in Section III, Paragraph 12, provides, in pertinent part: (1) Selection for RIF applies when some but not all LN positions in a competitive area are canceled; (2) incumbents of these positions who are not LN's, including HPP's, will be separated without competitive procedures; and (3) employees in these categories, including HPP's, have no retention credit or displacement rights.

Subsequent to the issuance of Regulation 690-84, there were numerous communications between the AAFES and the USAREUR concerning the implementation of the regulation and its impact on AAFES employees. The AAFES took the position that the implementation of the regulation would violate the retention rights of AAFES HPP employees established under the terms of the negotiated agreement, and that if the AAFES applied the

3/ Prior to June 18, 1974, RIF actions involving unit employees were implemented under Chapter IV, Section I, Paragraphs 4-11, 4-12, 4-13, 4-14, and 4-15 of AR 60-21/AFR 147-15. It was noted that Chapter I, Section IV, Paragraph 1-29 of AR 60-21/AFR 147-15 provides:

" Treaties and overseas command policy. Employees in overseas foreign areas will be subject to the terms and conditions of applicable treaties, agreements, laws, and over sea command policies as well as to this regulation; (see however 5 U.S.C. 8172 and 8173)." (emphasis supplied)

regulation to those employees in a RIF situation, it would result in discrimination and deprivation of the rights of HPP employees without proper basis. The USAREUR, on the other hand, took the position that the policy reflected in Regulation 690-84 had been agreed upon and approved by the Department of the Army and the Civil Service Commission, and that it would not impair retention rights of HPP employees in LN positions in RIF situations. The USAREUR also pointed out that to exempt AAFES employees from a RIF policy applicable to all HPP employees in LN positions would be an act of discrimination, and that headquarters would not consider a request to exempt such personnel from the new RIF policy.

In February 1975, the AAFES was required to initiate a RIF action involving positions designated for LN's. Under the provisions of Regulation 690-84, by which the RIF was implemented, certain LN's were retained in preference to HPP's. On April 3, 1975, the AFGE's local president engaged in discussions with representatives of the AAFES concerning the RIF. At that time, the AFGE was formally notified by the AAFES that the latter had conducted the RIF pursuant to Regulation 690-84, that it was required to do so by virtue of a command policy, and that some HPP's would be displaced by LN's. On April 29, 1975, the AFGE wrote to the AAFES and requested that it renegotiate the matter of retention rights of U.S. citizen employees during a RIF. The AFGE objected to the RIF procedure as set forth under Regulation 690-84, contending that the RIF should be conducted pursuant to the provisions set forth in AR 60-21/AFR 147-15. On June 3, 1975, the AAFES responded that the Commander-in-Chief of the USAREUR had determined which personnel should receive preference during the RIF involving the employees of the AAFES, and that there was no latitude for renegotiating retention rights of those U.S. citizens involved in the RIF.

The AFGE asserts that the action of the AAFES in implementing a RIF affecting employees in the bargaining unit utilizing the provisions of Regulation 690-84, rather than the provisions of AR 60-12/AFR 147-15, as incorporated by reference in the parties' negotiated agreement, constituted a unilateral breach of the provisions of the negotiated agreement in violation of Section 19(a)(1) and (6) of the Order. Further, it contends that the actions of the USAREUR in promulgating Regulation 690-84 and ordering the AAFES to utilize the procedures contained therein in implementing a RIF action affecting bargaining unit employees constituted an unwarranted interference with the bargaining relationship between the AFGE and the AAFES in violation of Section 19(a)(1) of the Order.

In essence, the USAREUR and the AAFES take the position that Regulation 690-84 was an overseas command policy which the USAREUR was authorized to issue and with which the AAFES, as a subordinate command, lawfully complied. In this regard, both Respondents assert that such actions constituted neither a breach of the negotiated agreement nor an

interference with the bargaining relationship and, thus, were not violative of the Order. The Respondents argue that the provisions of Article XIV, Section 2 of the negotiated agreement were never intended by the parties to exempt the provisions of the agreement from ". . . subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, . . ." and that for the AAFES to do so would be contrary to law and Section 12(b) of the Order. Further, they argue that, even assuming that the negotiated agreement could be so interpreted and enforced, the agreement incorporates AR 60-21/AFR 147-15 in its entirety, including Chapter I, Section IV, Paragraph 1-29, which provides that employees in overseas foreign areas are covered by ". . . applicable treaties, agreements, laws, and over sea command policies. . . ."

In his Recommended Decision and Order, the Administrative Law Judge, applying the principles enunciated by the Federal Labor Relations Council in Naval Air Rework Facility, Pensacola, Florida, etc., FLRC No. 76A-37 (1976), found that by its conduct herein the USAREUR violated Section 19(a)(6) and (1) of the Order, but that the AAFES, by engaging in the ministerial act of obeying the directives of the USAREUR, did not violate the Order. In reaching this conclusion, the Administrative Law Judge rejected the arguments and contentions of the Respondents, as set forth above. He reasoned that in negotiating and approving the provisions of Article XIV, Section 2 of the negotiated agreement, the parties intended to exempt the RIF provisions of AR 60-21/AFR 147-15 not only from the provisions of Article IV of the agreement, but also from the provisions of Chapter I, Section IV, Paragraph 1-29 of AR 60-21/AFR 147-15.

In their exceptions, both Respondents essentially reiterated their contentions and arguments made to the Administrative Law Judge. The AFGE excepted to the failure of the Administrative Law Judge to find that the action of both the USAREUR and the AAFES, in promulgating and implementing Regulation 690-84, constituted a violation of Public Law 92-12 and, thus, constituted a violation of the Executive Order.

Contrary to the Administrative Law Judge, I find that, under the particular circumstances set forth above, the actions of the USAREUR, in promulgating and requiring the AAFES to implement the provisions of Regulation 690-84, did not violate Section 19(a)(6) and (1) of the Order. Thus, in Article XIV of the negotiated agreement between the AAFES and the AFGE, the parties specifically incorporated by reference the provisions of AR 60-21/AFR 147-15 with respect to RIF matters, which necessarily included Chapter I, Section IV, Paragraph 1-29 of AR 60-21/AFR 147-15. As noted above, Chapter I, Section IV, Paragraph 1-29 of AR 60-21/AFR 147-15 provides, in part, that, "Employees in overseas foreign areas will be subject to the terms and conditions of applicable treaties, agreements, laws and over sea command policies . . ." Under these circumstances, from a reading of AR 60-21/AFR 147-15 in its entirety, I conclude that employees located in overseas foreign areas, such as those involved in the instant case, were subject to overseas command policies of the USAREUR, an overseas command. Consequently, in

my opinion, the actions of the USAREUR in issuing an overseas command policy - i.e. - Regulation 690-84 - and requiring the implementation of the provisions thereof by the AAFES in the latter's conducting a RIF action affecting employees exclusively represented by the AFGE, did not result in an improper unilateral modification of the terms and conditions established in the negotiated agreement between the AAFES and the AFGE, as such agreement was made expressly subject to overseas command policies. 4/ Accordingly, I shall order that both complaints herein be dismissed in their entirety.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 22-6599(CA) and 22-6601(CA) be, and they hereby are, dismissed.

Dated, Washington, D.C.
March 9, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

4/ Whether or not the promulgation and implementation of Regulation 690-84 was violative of law, as argued by the AFGE, is not an appropriate matter for resolution under the unfair labor practice procedures of the Executive Order.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of

U.S. ARMY, EUROPE AND SEVENTH
ARMY

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2348, AFL-CIO

Complainant

and

ARMY AND AIR FORCE EXCHANGE
SERVICE, EUROPE

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2348, AFL-CIO

Complainant

Case Nos: 22-6599
22-6601

.....
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Deputy Staff Judge Advocate
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For Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Consolidated Hearing on Complaints issued on August 13, 1976 by the Acting Regional Administrator for Labor-Management Services of the U.S. Department of Labor, Philadelphia Region, a hearing was held in these cases 1/ before the undersigned on November 11, 1976 at Munich, Germany.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order). Individual complaints were filed by American Federation of Government Employees, Local 2348, AFL-CIO (herein called Complainant) on January 8, 1976 against U.S. Army, Europe and Seventh Army (herein called Respondent USAREUR) in Case No. 22-6599(CA), and against Army and Air Force Exchange Service, Europe (herein called Respondent AAFES-Europe) in Case No. 22-6601(CA).

The complaint in 22-6599 alleged a violation by USAREUR of 19(a)(1) and (5) of the Order based on its (a) refusing to accord appropriate recognition to Complainant as the exclusive bargaining representative of U.S. civilian employees of AAFES-Europe, and (b) refusing to permit AAFES-Europe to exempt such employees from a reduction-in-force (RIF) policy outlined in USAREUR regulation 690-84, thus causing the implementation of such policy which denied U.S. citizen employees their rights to RIF procedures applicable to U.S. citizen - all in violation of the negotiated agreement between Complainant and AAFES.

The complaint in 22-6601 alleged a violation by AAFES-Europe of 19(a)(1), (5) and (6) of the Order based on a refusal to bargain with Complainant, as the exclusive bargaining representative of AAFES employees re the retention rights of U.S. citizens during a RIF so as to afford

1/ Both cases herein were consolidated on June 1, 1976 by the Regional Administrator.

these employees no less rights for retention than those extended to local nationals. 2/

All parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter the parties filed briefs which have been duly considered.

Upon the entire record in these cases, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

1. Respondent AAFES-Europe, which is part of the Army and Air Force Exchange Service - a nonappropriate fund instrumentality - has its headquarters in Munich, Germany.

2. Respondent AAFES-Europe employs about 200 hourly pay plan (HPP) employees and 300 local national (LN) employees. The HPP employees occupy positions designated as local national (LN) positions. 3/

3. On or about October 27, 1971 Complainant was certified as the collective bargaining representative of AAFES-Europe's regular U.S. citizen civilian employees at Munich, Germany. The represented unit consists of the hourly pay plan employees, and Complainant does not represent the local national, German employees of AAFES-Europe.

4. At all times material herein Complainant and Respondent AAFES-Europe have been and still are parties to a collective bargaining agreement covering the U.S. citizen civilian employees who are employed by said respondent at

2/ On July 30, 1976 the Regional Administrator dismissed the 19(a)(5) allegations in both complaints.

3/ The term "LN" usually refers to local national German employees, or non-U.S. citizens employed by AAFES-Europe. It also refers to positions held by bargaining unit employees which are administratively designated as local national positions. Moreover, some German national citizens also occupy LN positions within AAFES-Europe. Approximately 25-30 percent of the LN positions thereat are held by Americans.

Munich, Germany. 4/ The aforementioned agreement contains, inter alia, the following provisions:

Article IV, AUTHORITY, LEGAL AND REGULATORY APPLICATIONS

"Section 2. In the administration of all matters covered by this agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in AAFES Personnel Regulations; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level."

Article XIV, REORGANIZATION AND REDUCTION IN FORCE

"Section 2. Notwithstanding the provisions of Article IV, it is agreed that the provisions of AR 60-21/AFR 147-15, on reduction-in-force in effect at the time of a reduction-in-force action shall apply."

5. At all times material herein, and prior to June 18, 1974, the reductions in force (RIFs) involving the unit employees herein were implemented under paragraph 4-11, 4-12, 4-13, 4-14, and 4-15 of AR 60-21/AFR 147-15. These paragraphs deal with the RIF procedures caused by the loss of LN positions occupied by U.S. citizen employees, and provision is made therein for such RIFs to be handled on a competitive basis among the HPP employees who are U.S. citizens. 5/ The latter employees, under the procedures

4/ The applicable contract was effective from its date of approval, March 25, 1974, for a two year period.

5/ The contract between the parties did not spell out a procedure for reductions in force.

established in AR 60-21, competed only among themselves when a reduction in force occurred. 6/

A further provision in AR 60-21/AFR 147-15 refers to employees in overseas areas and states as follows:

"1-29. Treaties and overseas command policy. Employees in overseas foreign areas will be subject to the terms and condition of applicable treaties, agreements, laws, and over sea command policies as well as to this regulation; (see however 5 U.S.C. 8172 and 8173."

6. Respondent USAREUR is a military command under Headquarters, U.S. European Command. It is responsible for negotiating tariff agreements, covering wages and conditions of employment for local nationals (German employees), with the German trade unions throughout the Federal Republic of Germany (FRG), and to establish policy in that regard.

7. On August 23, 1953 a NATO status of Forces agreement was executed which provided in Article IX for local civilian labor requirements. It made no provision for a RIF of either German nationals or U.S. employees. Neither did it require that U.S. citizens be bumped non-competitively by German nationals who occupy a position which is abolished.

8. In order to establish a complete policy in respect to labor relations, representative of USAREUR and FRG met in 1973 to discuss a reduction in force procedure involving local nationals. While no written agreement was reached between them, the representatives arrived at an understanding that German nationals would be given preference over U.S. citizen employees occupying local national positions during a reduction in force.

9. As part of its responsibility as an overseas command, and in implementation of the understanding reached with FRG, the USAREUR issued a revised Regulation 690-84 on June 18, 1974. It contained a separate section entitled Section III - RIF PROCEDURE. Paragraph 12 entitled "Selection for RIF",

6/ The abolition of a position held by a German national did not cause a RIF among the U.S. citizen employed by AAFES-Europe. Germans only bumped Germans in a reduction in force.

provides, inter alia, (a) that selection for RIF applies when some LN positions in a competitive are cancelled; (b) incumbents of positions who belong to certain categories, including that of U.S. employee, will be separated for RIF without competitive procedures; (c) employees in said certain categories, including that of U.S. employee, have no retention credit or displacement rights.

10. A letter 7/ dated May 24, 1974 was written by Colonel Joe D. Pettigrew, OSAF, Deputy Commander, to the Commander in Chief of Respondent USAREUR referring to the proposed new RIF procedures. Pettigrew pointed out that implementation of the RIF policy would violate rights of the HHP employees of AAFES; that the U.S. employees would be deprived of retention rights under AR 60-21/AFR 147-15; that if AAFES applied such policy to those employees, it would result in unreasonable discrimination and the taking of regulatory rights without any proper basis.

11. This letter was replied to on July 15, 1974 by a reply 8/ from representative of the Commander in Chief wherein he stated that the policy had been agreed upon and approved by the DA and the Civil Service Commission; that it would not impair retention rights of LN employees in RIF situations; that to exempt AAFES employees from the RIF policy applicable to all LN employees of the U.S. Forces would be an act of discrimination; and headquarters could not consider a request to exempt EES personnel from the new RIF policy.

12. On August 6, 1974, Arthur J. Gregg, Brigadier General USA, Commander wrote a letter 9/ to Brigadier General Vincent De P Gannon, USAEUR, in which AAFES renewed a request that it be relieved from the provisions of Regulation 690-84 applicable in a reduction in force. General Gregg commented therein that AAFES felt any future RIF would cause it to violate AR 60-21/AFR 147-15.

7/ Respondent USAREUR Exhibit 1, Attachment 2.

8/ Respondent USAREUR Exhibit 1, Attachment 3.

9/ Respondent USAREUR Exhibit 1, Incl. 6.

13. General Gannon replied 10/ to the foregoing letter under date of September 5, 1974 wherein he stated that USAREUR did not believe there was a conflict between the two regulations; that the need to RIF U.S. citizens to place local nationals should be a rare occurrence; that the new policy must be continued since it helped to reduce friction with the German government re the increased use of locally-hired U.S. citizens.

14. In early 1975 Respondent AAFES-Europe undertook a RIF which resulted in reducing both U.S. citizen employees and local nationals. The RIF, which was carried out pursuant to 690-84, enabled certain German nationals to bump American citizen employees. Record testimony reveals, and I find, that under 690-84 German national employees of Respondent AAFES-Europe were given preference over and replaced certain Americans occupying local national (LN) positions. The U.S. citizen employees were thus displaced non-competitively in accordance with said regulations.

15. On April 3, 1975 Chester J. Cole, president of Complainant engaged in discussions with management representatives re the RIF undertaken by AAFES-Europe. At that time the union was formally notified by management that it had initiated the reduction in force pursuant to 690-84; that it was required to do so by virtue of a command policy; and that some U.S. citizen employees would be displaced by local national employees.

16. On April 29, 1975 the Complainant wrote Respondent AAFES-Europe and requested it renegotiate the matter of retention rights of U.S. citizen employees during a reduction in force. The union objected to the RIF procedure as set forth under 690-84, and it contended the reductions in force should be conducted pursuant to the provisions set forth in AR 60-21/AFR 147-15.

17. Under date of June 3, 1975 AAFES-Europe replied in writing to the union's request. It stated that the Commander in Chief of USAREUR determined which personnel should receive preference during a RIF in Germany involving the employees of AAFES-Europe. The reply stated, further, there was no latitude for renegotiating the retention rights of U.S. citizen during a reduction in force.

10/ Respondent USAREUR's exhibit 1, Incl. 7.

18. It is provided under Section 106 of Public Law 92-12, 85 Stat. 348, 355; 5 U.S.C. 7151nt. (September 28, 1971) as follows:

"Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense, or by any officer or employee thereof, in the employment of civilian personnel at the facility or installation operated by the Department of Defense in any foreign country because said person is a citizen of the United States or is a dependent member of the Armed Forces of the United States...."

Conclusions 11/

In respect to Respondent AAFES-Europe, the Complainant contends that the implementation of Regulations 690-84 in 1975 constituted a unilateral change in the collective bargaining agreement - all in violation of said respondent's obligation to bargain under Sections 19(a)(1) and (6) of the Order.

In respect to Respondent USAREUR, the Complainant maintains that the issuance by it of such regulation, and causing the unilateral change of the agreement by directing AAFES to follow 690-84, was an unwarranted interference with the bargaining relationship between Complainant and AAFES and violative of Section 19(a)(1).

11/ In its brief respondent USAREUR seeks a dismissal of the complaint on the ground that neither the charge filed on November 14, 1975, nor the complaint filed on January 8, 1976, was timely under 203.2(a)(2) and 203.2(b)(3) of the Rules and Regulations. The motion to dismiss is denied. The Assistant Secretary has held that this procedural deficiency must be raised in a timely manner with the Area Administrator during the investigation of the complaint and prior to issuance of Notice of Hearing. It does not appear that it was so raised herein. See Defense General Supply Center, A/SLMR No. 821; New York Army and Air National Guard, Albany, N.Y., A/SLMR No. 441.

Although the essential facts are not in dispute by the parties, a sharp controversy exists with regard to: (a) the validity of Regulation 690-84 under applicable law; (b) whether said regulation was issued by an "appropriate authority" in accordance with both Section 12(a) of the Order and Article IV, Section 2; of the agreement between the parties; (c) the effect of the terms and provisions of Article XIV of the said contract, as well as Section IV (1-29) of AR 60-12/AFR 147-15, on whether the change in the RIF procedures resulting from Regulation 690-84 constituted a proper and lawful modification of such procedures, (d) whether Respondent USAREUR may properly be charged with a 19(a)(1) violation since it had no bargaining relationship with Complainant.

(a) It is urged herein that 690-84 violates existing law in that it runs counter to Public Law 92-12; 85 Stat. 348, 355. This statute forbids discriminations by the Department of Defense of civilian personnel employed in a foreign country by reason of an individual's status as a citizen of the United States, except as required by treaty. Since the regulation of 1974 explicitly prefers German nationals over U.S. citizen employees, and is allegedly not warranted under the NATO Status of Forces Agreement, it is deemed by Complainant to be unlawful. Further, its implementation by respondents is alleged to be, a fortiori, violative of the Order.

While the regulation may violate the aforesaid statute, I do not consider it my function to pass upon its validity. Administrative agencies do not have jurisdiction to pass upon the constitutionality of congressional enactment. Oestereich v. Selective Service System, et al. 415 U.S., at 368. Moreover, administrative regulations have the force of law and can only be invalidated by a proper court. Paul v. U.S., 371 U.S. 245. The Complainant herein is obliged to challenge the validity of 690-84 at the proper forum - a court of law - rather than seek a determination in that regard during an administrative proceeding. Thus, I render no decision as to whether said regulation violated existing law. Further, I reject Complainant's argument that its implementation constitutes a violation of the Order solely because it is an invalid regulation.

(b) It is argued by Complainant that 690-84 is not, under Section 12(a) of the Order, a regulation of an "appropriate authority" and therefore it could not properly issue as an effective modification of the existing contract

between the parties. In support of this argument the union cites Department of Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SIMR No. 390.

Under Section 12(a) officials and employees, in the administration of contractual terms, are governed by existing or future laws and regulation of appropriate authorities, including policies set forth in the Federal Personnel Manual. The respondent in the Pascagoula case, supra, insisted it was under no obligation to consult with the bargaining agent re the implementation of a higher level instruction. However, the Assistant Secretary held that "appropriate authority" under 12(a) refers to an authority outside the agency rather than a higher echelon within the same agency. Hence respondent in the cited case could not find justification for its unilateral modification of the negotiated agreement based on its implementation of a higher level instruction within the agency. Under this ruling the Respondent AAFES-Europe would find no protection under 12(a) of the Order.

Note, however, is taken of Bureau of Indian Affairs, Indian Affairs Data Center, Albuquerque, New Mexico, A/SIMR No. 341. In that case the parties, in incorporating the language of Section 12(a) of the Order in its contract, specified that in administering contractual matters the employer and union would be governed by existing or future laws, executive orders, and policies set forth in the FPM and regulations of the Department of the Interior, Bureau of Indian Affairs, Indian Affairs Data Center, which maybe applicable. The Bureau of Indian Affairs, with the approval of the Secretary of Interior, announced a policy of extending Indian preference to training and filling vacancies. Notification was sent to the Data Center in Albuquerque, N.M. The Assistant Secretary held there was no obligation by the Data Center to bargain over the policy in view of (a) the language in the negotiated agreement to be bound by future regulation policies of the Department of Interior, Bureau of Indian Affairs, Indian Affairs Data Center, (b) the change in personnel practices was not an act over which the activity had any control.

Unless other considerations prevail, I would conclude that, under the Bureau of Indian Affairs case, supra, the Complainant herein has, in effect, waived the protection afforded by 12(a) of the Order and subjected itself to Regulation 690-84. In the case at bar, the parties agreed under Article IV, Section 2 of their contract to be bound

by regulations of appropriate authorities, including policies set forth in AAFES personnel regulations. The record supports the conclusion that, as a command policy applicable to the unit employees herein, Regulation 690-84 was deemed to be an AAFES Personnel Regulation. Accordingly, under Article IV, Section 2 of the contract between Complainant and AAFES-Europe, the union might not ordinarily challenge the implementation of 690-84 since it agreed to be bound by future AAFES regulations.

(c) Complainant, however, adverts to the language in Article XIV of the contract herein which specifically states that, notwithstanding Article IV, the provisions of AR 60-21/AFR 147-15 on reduction in force in effect at the time of a reduction in force action shall apply. The latter regulation sets forth detailed provisions, under 4-12 thru 4-15, which specify the "RIF procedures" to be followed in the event of a reduction in force. Thus it would appear the parties intended that, although subsequent personnel regulations would be binding upon the employees as those of an appropriate authority, they desired the RIF provisions in AR 60-21/AFR 147-15, to apply in the event of a reduction in force. The logical conclusion to be drawn from the language in Article IV is that the specified RIF procedures in the said AR 60-21 were to survive and control when employees became separated from their employment. The effect of Article XIV is to bar a waiver by Complainant of 12(a) and not render 690-84 a regulation by an appropriate authority.

In an attempt to negate this conclusion, Respondent AAFES-Europe lays stress on Section 1-29 of AR 60-21/AFR 147-15 which bespeaks of employees in oversea foreign area. This section declares that such employees will be subject to the "terms and conditions of applicable treaties, agreements, laws and oversea command policies as well as to this regulation". It is argued by this respondent that USAREUR is an oversea command and that the retention rights provision and RIF procedures of regulation 690-84 were a policy of said command. Hence, it is urged that, pursuant to Section 1-29 of AR 60-21, the policy which favored German nationals over U.S. citizen employees in a reduction in force - as expressed in Regulation 690-84 is controlling herein.

The aforesaid argument is predicated on the premise that all future command policies will displace or supersede the provisions of AR 60-21 with respect to oversea employees. I do not, however, construe the language in 1-29 thereof as having that effect. The said regulation, AR 60-21/AFR 147-15,

contains certain numerous provisions dealing with employment as well as programs for employees. While the parties may have desired to declare that such provisions would yield to subsequent policies, I agree with Complainant that an exception was carved out in respect to a reduction in force. Where such an event occurs, the parties apparently preferred to utilize the specific procedures spelled out in AR 60-21, and I do not conclude that any exception was made in respect to oversea employees. The language contained in 1-29 does not, in my opinion, constitute a limitation upon the procedures to be followed in a reduction in force as spelled out in AR 60-21 and agreed to in Article XIV of the contract.

In the case at bar Respondent AAFES-Europe was bound, under its agreement with Complainant, to observe the RIF procedures spelled out in AR 60-21/175-15. Under these circumstances this respondent was not at liberty to ignore their procedures absent a bilateral modification of the agreement. The implementation of 690-84 without meeting and conferring with Complainant was therefore a unilateral modification of the 1974 agreement herein in respect to the RIF procedures. Contrary to the recognized provisions in force and effect, it preferred to German nationals over American citizens during a separation from employment. Such a unilateral modification, which I have concluded draws no support from either the contract or AR 60-21/175-15, is violative of the Order.

The factual situation herein is similar to that which prevailed in Colorado Air National Guard, et. al, A/SLMR No. 758. The negotiated agreement therein provided that in conducting a RIF the procedures would be "in accordance with DMA Reg. 2-3 pending revision. A supplemental agreement will be negotiated." No revision of that regulation was made nor did the parties execute a supplemental agreement. A RIF was conducted by the activity which, instead of following DMA Reg. 2-3 re reduction in force adhered to the procedures set forth in National Guard Bureau's Technical Personnel Pamphlet 910 (TFF-910). ^{12/} This conduct by the activity was held to be a unilateral change in the terms of the agreement and a breach of an obligation to negotiate - all in violation of 19(a)(1) and (6). See also Small Business Administration, Richmond, Virginia, District Office,

^{12/} The National Guard Bureau was not deemed an appropriate authority under 12(a) of the Order since it was not an authority outside the agency.

A/SLMR No. 674. Moreover, unless AAFES-Europe is exculpated from responsibility for its actions by virtue of its merely following directions without choice, as hereinafter discussed, the unilateral change would be a violation of 19(a)(6) and (1) of the Order.

(d) A serious issue is presented as to the responsibility of Respondent USAREUR for the unilateral modification by AAFES-Europe at the direction of USAREUR of the reduction in force procedures. Further, in view of the fact that the implementation of 690-84 was at the direction and command of USAREUR, a corollary issue is posed as to whether Respondent AAFES-Europe may be found to have violated the Order.

Prior hereto the Assistant Secretary has determined that conduct by an activity resulting, through the direction of the agency, in a unilateral modification of terms and conditions of employment warranted finding that the activity violated 19(a)(1) and (6) of the Order whereas the agency was in violation of only 19(a)(1) thereof. This was based on the premise that the agency had no collective bargaining relationship with the union. See Naval Air Rework Facility et. al, A/SLMR No. 608 and cases cited above. Upon appeal of the Naval Air Rework case, supra, the Federal Labor Relations Council ^{13/} enunciated its views with respect to a distinction between alleged 19(a)(1) and (6) violations when conduct is attributed to agency management at a higher level within the agency than the level of exclusive recognition. The Council concluded that when acts and conduct constitute a refusal to bargain as required by the Order, such acts may properly be found violative of 19(a)(6) regardless of the organizational level of the member of agency management who committed the violative conduct. Recognizing that the obligation, under Section 11(a), to meet and confer is applicable only where there is a bargaining relationship. The Council declared this does not mean that certain acts and conduct of a higher level may not be a predicate for finding 19(a)(6) when such conduct violates that Section. Thus, where agency management initiates unlawful conduct - as in directing the activity in Naval Air Rework, supra, to terminate differential pay to employees awarded by as arbitrator - the obligation to negotiate is breached by the acts and conduct of agency management and may properly provide a basis for a 19(a)(6) violation.

^{13/} FLRC No. 76A-37, May 4, 1977.

Applying the holding and rationale as expressed by the Council in FLRC No. 76A-37, I am constrained to find that the acts and conduct of USAREUR in directing and requiring the implementation of 690-84 by AAFES-Europe violated Section 19(a)(6) and (1) of the Order. 14/ This respondent initiated the unlawful conduct and was directly responsible for the disregard and modification of the RIF procedures set forth in AR 60-21/175-15. The granting of preference to local nationals over U.S. citizen employees during the 1975 RIF resulted directly from USAREUR's command. Although the latter had no bargaining relationship with Complainant this factor does not militate against a finding of an unfair labor practice involving a unilateral change in the terms and conditions of employment. Determinative herein is the language of the Council in the Naval Air Rework case as follows:

"Where he (Assistant Secretary) finds that an act or conduct constitutes an unfair labor practice and that the individuals who committed the act use agency management, there is no basis in the order to draw artificial distinctions between organizational levels of such agency management so as to relieve them of the responsibility for their acts which would otherwise be violative of the Order."

Accordingly, and in conformance with the rationale expressed by the Council in the cited case, I conclude the obligation to negotiate herein was breached by reason of USAREUR's unlawful conduct.

14/ While I am aware that no allegation of 19(a)(6) was made against Respondent USAREUR, the Council has concluded that acts of agency management at a higher level of an agency's organization may provide the basis for finding a violation of any part of Section 19(a). Moreover, no 19(a)(6) allegation was present in the Complaint in Naval Air Rework, supra, but the Council nevertheless found the agency to have violated this section of the Order. To this extent the Council has obliterated any distinction between the levels where, at least, the activity was charged with a 19(a)(6) violation. Further, although the Department of Defense is, in truth, the agency, I find the status of the USAREUR command equitable therewith and part of agency management.

In respect to the responsibility of an activity which has complied with directions from agency management, the Council in Naval Air Rework, supra, concluded that a violation would not lie against such activity solely on the basis of its ministerial actions in implementing such directions. The apparent theory behind such conclusion is that where the activity has no choice but to follow directives from agency management at a higher level, the "agency management" at a lower organizational level where the recognition unit exists should not be penalized for compliance therewith. In the cited case the Council found no violation by the facility (activity) in terminating the differential pay of employees at the instance of the Navy Department.

Upon review of the facts herein, I am persuaded that, based upon the Council's decision in the Naval Air Rework case, Respondent AAFES-Europe should not be found to have violated 19(a)(6) or (1) of the Order. The record establishes that this respondent protested in a series of letters to USAREUR that the implementation of Regulation 690-84 was discriminatory against U.S. citizen employees and in contravention of the RIF procedures agreed upon and set forth in AR 60-21/147-15. It requested that this activity, to which Regulation 690-24 applied specifically, be excepted from its provisions re RIF that conflicted with the established procedures. However, USAREUR replied that it disagreed with AAFES-Europe's determinations, and did not, in any event, anticipate many U.S. citizen employees being displaced by local nationals. The command refused to exempt the activity herein from the application of 690-84, and directed the implementation of the changed RIF procedures. Thus, Respondent AAFES-Europe had no choice in the matter. In implementing the new regulation and preferring local national employees over U.S. citizen employees, it was, in my opinion, engaged in a ministerial act no less than that pursued by the activity in Naval Air Rework, supra. Accordingly, I conclude that Respondent AAFES-Europe has not, under the recent decision of the Council in the cited case, violated Sections 19(a)(6) and (1) of the Order.

Remedy

A further issue is presented as to the proper remedy herein. Any order providing for reinstatement of U.S. citizen employees to positions held by them prior to the RIF, as well as an award of back pay lost, is opposed by respondents. In support of such opposition it is contended

that the Council has held in Department of the Interior, Bureau of Reclamation, Yuma Projects Office Arizona, FLRC No. 74A-52, such relief is prohibited under Section 19 (d) of the Order. The cited case involved a unilateral change of competitive procedures governing a reduction in force. It was held by the Council that since there was a RIF appeals procedure, the employees affected by the reduction in force could properly raise the issue of whether it was carried out in compliance with CSC regulations. Moreover, this was the exclusive procedure to raise that issue and the appropriate remedies including restoration of employees to previous positions with back pay. Respondent AAFES-Europe maintains that AR 60-21/AFR 147-15 contains an appeals procedure which therefore, under 19(d), requires a denial of such remedies to any affected American employees herein.

An examination of said regulation, which sets forth the RIF procedures, convinces me that no such appeals procedure exists as is envisaged by 19(d). While it is true that 60-21 provides for a right of appeal in 3-35, this refers to appeals after a determination of a grievance by a hearing examiner. Under 3-39 of the regulation, which specifies matters that are not grievable, the issues raised in this proceeding are not subject to the grievance procedure. Rather are they, as stated in 3-29(20), matters that may be submitted to the Commander of AAFES in a request for review under 3-28 of the regulation.

The request for review procedure under 60-21/AFR 147-15 is not, in my opinion, an established appeals procedure which conforms with CSC regulations. No provision is made for any hearing or appellate consideration except by the same individual, i.e. the Commander, who was responsible for the implementation of the newly adopted RIF procedures under 690-84. I do not view such review, under 3-38 of 60-21/AFR 147-15, to be an appeal procedure which would render 19(d) operative and thus bar relief for U.S. employees who were affected by the reduction in force.

Moreover, the Assistant Secretary has, in respect to 19(d), drawn a distinction between an issue involving whether a regulation was properly applied and one concerned as to which regulation governed a reduction in force. He concluded that if the issue before him dealt with which regulation should be applicable in a RIF, the Yuma case strictures were not binding. Thus, assuming arguendo, these were a proper appeals procedure herein, since the remedial order was limited to directing that the appropriate regulation be followed in a RIF, Section 19(d) would not act as a bar thereto.

Accordingly, I shall recommend a remedy consistent with the scope of violations found to have occurred. In addition to requiring corrective action re the directive that 690-84 be implemented without being mutually agreed to by the parties, I shall recommend that U.S. citizen employees adversely affected by the improper application of such regulations be reinstated and made whole for any less of monies occasioned thereby. See Colorado Air National Guard, et. al, supra.

RECOMMENDATION

Having found that Respondent AAFES-Europe was engaged in a ministerial act, and followed the directive issued by Respondent USAREUR, in implementing the RIF provisions of Regulation 690-84 unilaterally during the term of the agreement between the parties, I shall recommend to the Assistant Secretary that the complaint in Case No. 22-6601 be dismissed in its entirety.

Having found that Respondent USAREUR, in directing and ordering the implementation by AAFES-Europe, of the RIF provisions of 690-84 unilaterally during the term of the agreement between the parties, which granted preference to U.S. citizen employees over local national employees in a reduction in force, I shall recommend to the Assistant Secretary that he adopt the following order designed to effectuate the policies of the Order.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor Management Relations hereby orders that the United States Army Europe and Seventh Army shall:

1. Cease and desist from:

- (a) Ordering or directing that the Army and Air Force Exchange Service Europe unilaterally implement the RIF provisions of Regulation 690-84 which grant preference to local national employees over U.S. citizen employees in any reduction in force at the headquarters, McGraw Kaserne, Munich, Germany during the term of the negotiated agreement between the Army and Air Force Exchange Service, Europe and American Federation of Government Employees, Local

2348, AFL-CIO unless such implementation is mutually agreed to by the said parties in a supplemental agreement to the negotiated agreement.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Rescind in writing its order and directive to the Army and Air Force Exchange Service, Europe that it unilaterally implement the RIF provisions of Regulation 690-84 which grant preference to local national over U.S. citizen employees in any reduction in force at the headquarters, McGraw Kaserne, Munich, Germany, during the term of the negotiated agreement between the Army and Air Force Exchange Service, Europe and American Federation of Government Employees, Local 2348, AFL-CIO unless such implementation is mutually agreed to by the parties in a supplemental agreement to the negotiated agreement.

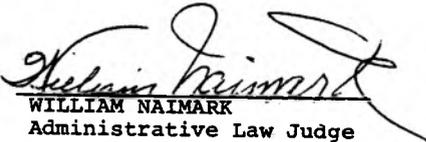
(b) Order and direct the Army and Air Force Exchange Service, Europe to abide by the RIF provisions contained in AR 60-21/AFR 147-15 in any reduction in force, and reconsider in accordance with such regulation all reduction in force actions taken since July 18, 1974 at headquarters, McGraw Kaserne, Munich, Germany during the term of the agreement between the Army and Air Force Exchange Service, Europe and American Federation of Government Employees, Local 2348, AFL-CIO.

(c) Order and direct that Army and Air Force Exchange Service, Europe to reinstate any U.S. citizen employees who was adversely affected by the improper application of Regulation 690-84 in any reduction in force since July 18, 1974 at headquarters, McGraw Kaserne, Munich, Germany, and make him whole for any loss of monies occasioned by such improper reduction in force consistent with the RIF provisions and procedures set forth in AR 60-21/AFR 147-15.

(d) Post at the headquarters of Army and Air Force Exchange Service, Europe, McGraw Kaserne, Munich, Germany, copies of the attached notice marked "Appendix" on form to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commander in chief, or his representative, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous

places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander in chief, or his representative, shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(e) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply therewith.


WILLIAM NAIMARK
Administrative Law Judge

Dated: 20 JUL 1977
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT order or direct that the Army and Air Force Exchange Service, Europe, unilaterally implement the RIF provisions of Regulation 690-84, which grant preference to local national employees over U.S. citizen employees in any reduction in force at the headquarters, McGraw Kaserne, Munich, Germany during the term of the negotiated agreement between the Army and Air Force Exchange Service, Europe and American Federation of Government Employees,

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended,

WE WILL rescind our order and directive to the Army and Air Force Exchange Service, Europe, that it unilaterally implement the RIF provisions of Regulation 690-84 which grant preference to local national employees over U.S. citizen employees in any reduction in force at the headquarters, McGraw Kaserne, Munich, Germany during the term of the negotiated agreement between the Army and Air Force Exchange Service, Europe and the American Federation of Government Employees, Local 2348, AFL-CIO unless such implementation is mutually agreed to by the parties in a supplemental agreement to the negotiated agreement.

WE WILL order and direct the Army and Air Force Exchange Service, Europe, to abide by the RIF provision contained in AR 60-21/AFR 147-15 in any reduction in force, and to reconsider in accordance with such regulation all reduction in force actions taken since July 18, 1974 at headquarters, McGraw Kaserne, Munich, Germany during the term of the

agreement between the Army and Air Force Exchange Service, Europe, and American Federation of Government Employees, Local 2348, AFL-CIO.

WE WILL order and direct the Army and Air Force Exchange Service, Europe to reinstate any U.S. citizen employee who was adversely affected by the improper application of Regulation 690-84 in any reduction in force since July 18, 1974 at headquarters, McGraw Kaserne, Munich, Germany, and to make him whole for any loss of monies occasioned by such improper reduction in force consistent with the RIF provision and procedures set forth in AR 60-21/AFR 147-15.

Agency or Activity

Dated _____ By _____
Signature

March 14, 1978

A/SLMR No. 1007

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
GREENSBORO DISTRICT OFFICE
A/SLMR No. 1007

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
GREENSBORO DISTRICT OFFICE

Respondent

and

Case No. 40-7829(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 50

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and National Treasury Employees Union, Chapter 50 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to bargain over the procedures used to cure a staffing imbalance, which involved the transfer of unit employees, and on the impact and implementation of this decision on adversely affected employees. The Complainant alleged an additional violation of Section 19(a)(1) and (6) based upon the Respondent's refusal to furnish it with information concerning the staffing imbalance. The Respondent contended that it was under no obligation to bargain inasmuch as the transfers were voluntary and there was no resulting adverse impact; that the parties' negotiated agreement provided procedures for solving staffing imbalances; and that it had no obligation to furnish the requested information.

On December 6, 1977, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Administrative Law Judge found that the Respondent was obligated to bargain on the procedures used and the impact of the transfer on adversely affected employees and that its failure to do so constituted a violation of Section 19(a)(1) and (6) of the Order. Similarly, the Administrative Law Judge found that there existed an obligation to furnish the information requested and that, while this information was, for the most part, supplied, it was not given to the Complainant until after the transfers had occurred. Finally, the Administrative Law Judge determined that the parties' negotiated agreement did not constitute a waiver of any bargaining obligation involved herein.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Greensboro District Office, shall:

1. Cease and desist from:

(a) Instituting a reassignment or transfer of employees represented exclusively by the National Treasury Employees Union, Chapter 50, or any other exclusive representative of its employees, without affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such reassignment or transfer, and on the impact the reassignment or transfer will have on adversely affected employees in the exclusively recognized unit.

(b) Refusing or failing to furnish, upon request by the National Treasury Employees Union, Chapter 50, or any other exclusive representative of its employees, any information bearing upon reassignment, transfer or any other condition of employment which is relevant and necessary to enable the National Treasury Employees Union, Chapter 50, or any other exclusive representative, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

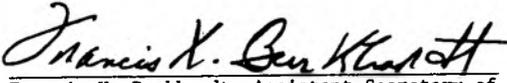
(a) Upon request by the National Treasury Employees Union, Chapter 50, or any other exclusive representative of its employees, meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing a reassignment or transfer, and on the impact such reassignment or transfer will have on adversely affected employees in the exclusively recognized unit.

(b) Upon request, make available to the National Treasury Employees Union, Chapter 50, or any other exclusive representative of its employees, any information bearing upon reassignment, transfer or any other condition of employment which is relevant and necessary to enable the National Treasury Employees Union, Chapter 50, or any other exclusive representative, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(c) Post at its facility at the Internal Revenue Service, Greensboro District Office, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
March 14, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a reassignment or transfer of employees represented exclusively by the National Treasury Employees Union, Chapter 50, or any other exclusive representative of our employees, without affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such reassignment or transfer and on the impact the reassignment or transfer will have on adversely affected employees in the exclusively recognized unit.

WE WILL NOT refuse or fail to furnish, upon request by the National Treasury Employees Union, Chapter 50, or any other exclusive representative of our employees, any information bearing upon reassignment, transfer or any other condition of employment which is relevant and necessary to enable the National Treasury Employees Union, Chapter 50, or any other exclusive representative, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Executive Order.

WE WILL, upon request by the National Treasury Employees Union, Chapter 50, or any other exclusive representative of our employees, meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing a reassignment or transfer, and on the impact such reassignment or transfer will have on all adversely affected employees in the exclusively recognized unit.

WE WILL, upon request, make available to the National Treasury Employees Union, Chapter 50, or any other exclusive representative of our employees, all information bearing upon reassignment, transfer or any other condition of employment which is relevant and necessary to enable the National Treasury Employees Union, Chapter 50, or any other exclusive representative, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

Agency or Activity

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



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 In the Matter of
 DEPARTMENT OF THE TREASURY,
 INTERNAL REVENUE SERVICE
 GREENSBORO AREA OFFICE
 Respondent
 and
 NATIONAL TREASURY EMPLOYEES
 UNION AND NATIONAL TREASURY
 EMPLOYEES UNION CHAPTER 50
 Complainant

Case No. 40-7829(CA)

HENRY MASON, ESQ.
 Internal Revenue Service
 Regional Counsel's Office,
 P.O. Box 1074
 Atlanta, Georgia 30301
 For the Respondent

MICHAEL T. BRANDOW, NAT'L REPRESENTATIVE
 National Treasury Employees Union
 1730 K Street, N.W. Suite 1101
 Washington, D.C. 20006
 For the Complainant

Before: WILLIAM NAIMARK
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on complaint issued on April 13, 1977 by the Regional Administrator for Labor-Management Service Administration, U.S. Department of Labor, Atlanta Region, a hearing was held before the undersigned on May 26, 1977 at Greensboro, North Carolina.

The proceeding was initiated under Executive Order 11491, as amended (herein called the Order). It was based on a complaint filed on January 21, 1977 by National Treasury Employees Union and National Treasury Employees Union Chapter 50 (herein called Complainants) against Department of the Treasury, Internal Revenue Service, Greensboro Area Office (herein called Respondent). It was alleged in said complaint that Respondent violated Sections 19(a)(1) and (6) of the Order by (a) refusing to negotiate, on or about September 8, 1976, with Complainant NTEU Chapter 50 over the impact and implementation of a procedure in curing the imbalance of Revenue officers' staffing throughout the North Carolina District; (b) refusing to furnish information as requested by said Complainant on August 9, 1976 regarding the staffing imbalance of Revenue officers throughout the North Carolina District.

Respondent filed a response to the Complaint herein on February 16, 1977. It denied the commission of any unfair labor practice and contended therein that (a) no obligation to bargain over the impact existed since the parties had agreed upon the procedures which were embodied in their negotiated agreement, (b) since no duty to bargain existed, there was no concomitant obligation to furnish the information requested. In respect to the request for information by Complainant, it was also contended that the latter had made no effort to obtain such data on its own behalf, and that the union had an effective means of communicating with employees to secure at least part of such information sought from Respondent.

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered. 1/

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

1/ In its brief Complainant moved to correct the transcript as follows: Joint Exhibit No. 1 should be recorded as August 4, 1976 rather than August 20, 1976; on page 33, line 22, strike the word "beginning" and insert the word "treating". The motion is granted to the extent requested.

Findings of Fact

1. At all times material herein National Treasury Employees Union (NTEU), Chapter 50, has been, and still is, the exclusive bargaining representative of Respondent's professional and non-professional employees.

2. At all times since May 3, 1974 the Complainants herein and Respondent have been parties to a collective bargaining agreement covering the aforesaid unit of employees. The said agreement, which is multi-district by its terms, applies to all such unit employees who are employed at different Districts throughout the United States. Respondent's District Office at Greensboro includes offices located at various cities in North Carolina. About 125-135 Revenue officers are attached to the Greensboro District office.

3. The collective bargaining agreement contains several provisions concerning reassignments or transfers.

(a) In Article 7 thereof, entitled "Promotions/ other Competitive Actions", a procedure is established for the filling of vacant positions by promotion, reassignment or transfer to ensure that placement are done on an equitable and fair basis. This article sets forth details re publishing vacancy announcements, submission of applications therefor by employees, and the manner in which best qualified candidates shall be submitted. However, by its terms - Section 2B(7) - said Article 7 excepts from its coverage the filling of a position by lateral reassignment prior to a determination that the vacancy will be filled by competitive action.

(b) Under Article 14 of the agreement the Respondent agreed to provide certain facilities and services to the union. Pursuant thereto Respondent provided the union bargaining agent with a meeting place, made available 1/3 of each bulletin board at the various posts of duty for the use of the union, allowed the distribution of union literature on the premises at specified times, and furnished the union a list of employees semi-annually with monthly revisions of new and separated employees.

(c) The agreement also contains a provision regarding transfers. Under Article 28, entitled "TRANSFERS and ASSIGNMENTS" it is provided as follows:

"Section 1.

Transfer and reassignments will not be used in lieu of discipline. When an involuntary transfer or reassignment is necessary due to a staffing imbalance, the employee at the affected post of duty with the least IRS length of service who meets the position requirements will be transferred.

Section 2.

A. The Employer agrees that where an employee has been transferred due to abolition of his position, he will be given preference, if that position is reestablished within one year and he applies for the position within fifteen (15) days after written notification to him of its reestablishment.

B. It is in the interest of the Government to return an employee who applies to his former position at Government expense whenever possible.

C. If there are two or more applicants for the reestablished position, the applicant with the greater IRS length of service who meets the job requirements will have preference.

Section 3.

The employer agrees to give affected employees fifteen (15) days and when possible thirty (30) days written notification of reassignments to a different post of duty."

4. On August 3, 1976 ^{2/} Edward Phelps, Chief of Respondent's Collection Division, called Rachel Allred, President of NTEU Chapter 50, to attend a meeting on that date. The meeting was attended by both of those individuals as well as by Jerry Keith, Chief of Personnel and David Cohen, union steward.

^{2/} Unless otherwise specified, all dates hereinafter mentioned are in 1976.

At said meeting the union officials were told by management that the Collection Division in North Carolina had an imbalance of Revenue officers which Respondent was taking steps to cure; that there were 16 extra Revenue officers in North Carolina; and that management intended to visit the various posts of duty to encourage officers to voluntarily transfer to the Jacksonville, Florida District. The union president asked if employees could go elsewhere than Florida, but the employer informed her there was no other choice. Moreover, management stated that a letter would go out the next day to employees re this matter. No discussion ensued regarding a retention register or other procedures, but Allred did remark that employees should be allowed to transfer to a location other than Florida.

5. A memo dated August 4 was distributed by Respondent to all Revenue officers of the Greensboro District informing them of the fact that a staffing imbalance existed. A copy was also furnished the union representative. The memo recited the fact that there were 16 extra Revenue officers in the Greensboro District, and that officers would be reassigned from the Greensboro and Nashville, Tennessee Districts to the Florida District; that reassignment would be effected on a voluntary basis, but if an insufficient number of transfers resulted therefrom, the reassignments would be involuntarily made. The memo contained four questions and guideline answers which were furnished for the the employees' information. They were as follows: 3/

Q. How will individuals to be involuntarily transferred be identified?

A. The employee at the affected Post of Duty with the least Internal Revenue Service length of service who meets the position requirements will be transferred.

Q. Will the Service pay relocation expenses?

A. The Service will pay relocation expenses in this instance whether the transfer is voluntary or involuntary.

3/ These question and answers constitute, in effect, a recitation of Article 28 (Sections 1 and 2) of the collective bargaining agreement between the parties.

Q. If involuntary transfer, what are the possibilities of returning to my former Post of Duty?

A. An employee transferred due to abolition of his position will be given preference if that position is reestablished within one year and he/she applies for the position within 15 days after written notification is received by him/her of its reestablishment. It is in the interest of the Government to return an employee who applies to his/her former position at Government expense whenever possible.

The memo also provided a questionnaire for the employee to indicate whether or not he/she wished to voluntarily relocate in the Florida District. The employee was directed to submit the completed questionnaire to the Group manager by August 20.

6. By letter dated August 9, NTEU Chapter 50 advised Respondent that it desired to negotiate over the impact and implementation of procedures to be followed in curing the imbalance of Revenue officers, and that it would submit its proposals shortly. The union also requested management to "furnish all official information concerning this problem" to the NTEU representative.

7. On August 10 both Phelps and Keith advised union official Allred that, in respect to her letter of August 9, the matter of curing the Revenue officer imbalance - as to either the decision itself or the impact and procedures - was not negotiable.

8. By letter dated August 20, District Director Robert A. LeBaube advised Allred that the subject matter of staffing imbalance was covered by the multi-district agreement, and that he saw no need to negotiate concerning same.

9. On August 23 Allred replied to LeBaube's letter and reiterated its opinion that the matter was negotiable. Moreover, she stated that the union would submit its proposals shortly. Further, Allred renewed a request for information re the problems and facts relied upon by management in its decision. Specifically, the union asked for data as to the competitive levels affected, location and number of employees involved, the proposed effective date, and the underlying reasons for the actions.

10. On August 24, the union submitted its written proposals pertaining to the Revenue officer staffing imbalance. These were twofold: (a) the employer identify all vacant positions in the Greensboro District and fill them pursuant to Article 7 of the multi-district contract prior to making a determination to reassign employees to the Florida District as per Article 28, Section 1 of the contract, (b) no employee with a compelling reason for not inter-district transferring will be transferred. He/she will be assigned in this district with his/her consent to a position for which he/she is qualified which will last three months.

11. LeBaube replied to the aforesaid union letters on September 8. He restated that the multi-district agreement sets forth procedures for transfers and assignments due to staffing imbalance; that it allows the transfer of employees between posts of duty to resolve the imbalance; and that Respondent is in the process of filling all vacant positions in the Revenue officer category pursuant to Article 7 of the agreement. The letter further recited the fact that no action had been initiated re involuntary transfers. Moreover, LeBaube repeated management's refusal to negotiate the matter as requested by the union, but stated it would discuss any unresolved concerns of the union.

12. By letter dated October 5 addressed to Respondent, NTEU Chapter 50 repeated its request that management furnish it with the Revenue officers to be transferred to the Jacksonville, Florida District.

13. On November 19, Respondent furnished the union herein with a list 4/ of the Revenue officers, together with their posts of duty, who had expressed an interest in transferring to the Florida District.

14. As a result of voluntary transfers to the Jacksonville, Florida District no involuntary transfers were made to that office from Greensboro. Further, in order to fill the vacant positions at Florida, promotions were made and vacancies filled in accordance with Article 7 of the agreement. As a result thereof, no inter-district transfers were made and none was contemplated.

4/ Joint Exhibit 10. This Exhibit is not a legible copy of the names and addresses of such Revenue officers. Accordingly, I make no finding as to the exact number of such employees who expressed a desire to make the transfer.

15. Respondent indicated in a letter to the union, dated November 23, that involuntary transfers or reassignments on an intra-district basis, by virtue of a staffing imbalance, at various posts of duty will be made in accordance with Article 28 of the negotiated agreement. Since Respondent concluded that the procedures are specified in said Article 28, it informed the bargaining agent that it would not negotiate such transfers or reassignments.

Conclusions

Both parties agree that, in respect to the decision by Respondent to transfer Revenue officers from the Greensboro District to the Jacksonville, Florida District, no obligation exists under Sections 11(b) and 12 (b) of the Order to bargain with Complainant. However, contrary to Respondent, it is asserted by Complainant that an obligation existed to meet and confer as to the procedures to be followed, as well as the impact of the reassignment on those employees adversely affected. Further, Respondent contends it was under no obligation to furnish information requested by the union representative since (a) it had no obligation to bargain or negotiate at all; (b) Complainant had access to, and other means of obtaining, such information.

(1) It is urged by Respondent that since the transfer from the Greensboro District of Revenue officers were voluntary, no impact or implementation existed over which it was required to bargain. I do not agree. The obligation to negotiate concerning the effects of its actions does not, in my opinion, turn on whether the reassignments to Florida were compulsory or at the behest of the employees. In either instance the transfer could result in problems attendant upon a relocation, i.e., the expenses involved or resettlement difficulties - all of which affected the particular officers who transferred away from the Greensboro area. The fact that such employees voluntarily chose to relocate does not obliterate an impact upon them. The entire plan to reassign officers was initiated by Respondent and involved factors which clearly affected conditions of employment. In such a posture, Respondent was obliged to meet and confer with Complainant over the procedures and impact of the proposed reassignment. See Federal Railroad Administration, A/SLMR No. 418.

Moreover, the voluntary transfer of the employees herein has an impact upon those remaining in the Greensboro District. The competitive status of those who continued at that district, as well as their condition of employment in light of the reduced unit, are legitimate concerns of the

bargaining agent. Accordingly, Respondent is obliged to meet and confer with the union herein as to the impact of its decision upon the officers who remained and did not transfer to the Florida District. See Department of the Army, U.S. Electronics Command, Fort Monmouth, New Jersey, FLRC No. 76A-101.

Respondent argues further that under Article 28 of the negotiated agreement the parties have agreed to the procedures to be invoked in the event reassignments are made. Thus, it insists that, under applicable law, there is no obligation to negotiate concerning matters, i.e., procedures, which have been embodied in the contractual arrangement. While an employer may be relieved from a duty to bargain in such circumstances, I do not agree that this principle of law applies in the instant case. Article 28 provides for transferring employees with the least tenure in the event of an involuntary transfer due to a staffing imbalance. No reference is made to voluntary transfers, nor are procedures delineated with respect thereto. Moreover, I do not read that provision as foreclosing any discussion concerning the subject of reassigning employees, but merely reciting which employees would be selected first in the event of an involuntary transfer. It was neither comprehensive as to the procedures to be followed, nor did it constitute a waiver by the union to compel bargaining, to the extent consonant with the law and regulations, as to the impact of its decision upon employees adversely affected. Cf. NASA Space Center, Kennedy Space Center, A/SLMR No. 223.

In the case at bar the Complainant has repeatedly requested that Respondent meet and confer as to the procedures to be followed in the reassignment of Revenue officers as well as the impact and implementation of the decision itself. 5/ Management continual refusal is, in light of the foregoing, a violation of its duty to bargain and violative of Sections 19(a)(1) and (6) of the Order. See Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, A/SLMR No. 486; Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic, New Jersey, A/SLMR No. 329.

5/. Respondent's argument that the union was, in reality, seeking to negotiate over the decision to reassign employees is rejected. Record facts reveal that Complainant recognized the right of management to reassign Revenue officers and was concerned about the procedures to be followed and the impact of the reassignment upon employees adversely affected.

(2) In conjunction with its request that the employer bargain re the impact and implementation of its decision to cure the imbalance of Revenue officers at Greensboro, Complainant sought information from Respondent on several occasions. On August 23, in particular, it requested data as to the competitive levels affected, the location and number of employees involved, the proposed effective date, and the reason for the actions. This information was, for the most part, furnished in November after the charge was filed against Respondent on September 23, and following a demand pursuant to the Freedom of Information Act.

It has been held by the Assistant Secretary, in conformance with the decisional law in the private sector, that a union is entitled to relevant information necessary for it to pursue its duties as the bargaining representative. Where the data is required to afford the representative an opportunity to make intelligent decisions in order to bargain with management, a refusal to supply it will be violative of 19(a)(6). Department of the Navy, Dallas Naval Air Station, Dallas, Texas, A/SLMR No. 510. Respondent takes the position that the information desired by Complainant was not necessary to enable the union to carry out its representational functions; that the procedures were spelled out in the agreement, and no negotiations were required under the circumstances.

In view of the fact that Respondent was, in my opinion, required to meet and confer with Complainant re the impact and implementation of its decision to cure the staffing imbalance, I am constrained to conclude a concomitant obligation existed to furnish the data sought by the union herein. Details concerning the competitive levels, the location and number of employees involved, and the date contemplated for the reassignment were all relevant to an intelligent discussion of the reassignment and its effect upon employees. Any proposals made by Complainant would necessarily be made in light of the information requested by it. While the data was furnished to Complainant ultimately, it was not submitted until after the reassignments were made and the charge filed. It was only supplied pursuant to a request under the Freedom of Information Act. Accordingly, I do not view such submission by Respondent as indicative of a good faith effort to comply with its obligation under the Order. 6/ Cf. U.S. Department of Justice, Immigration and

6/ Respondent also maintains that Complainant had access to the information from other sources. Apart from the fact that I am not convinced the union could have obtained the data on its own, I do not believe that access thereto elsewhere relieves an employer from its obligation to furnish same to the bargaining agent.

Naturalization Service, A/SLMR No. 682. The refusal by Respondent to furnish the information sought by Complainant, prior to the reassignments and the filing of the charge herein, was violative of 19(a)(6) of the Order.

Further, the failure of Respondent to meet and confer with Complainant re the procedures and impact of the reassignments, as heretofore discussed, as well as the refusal to furnish the information requested, had a restraining influence upon the unit employees and a coercive effect upon their rights assured by the Order - all in violation of Section 19(a)(1) of the Order. Department of the Navy, Dallas Naval Air Station, Dallas, Texas, supra; Federal Railroad Administration, supra.

Recommendation

Having found that Respondent has engaged in certain conduct which is violative of Sections 19(a)(1) and (6) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purpose of Executive Order 11491, as amended.

Recommended Order 7/

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Greensboro, North Carolina District Office shall:

1. Cease and desist from:

(a) Instituting a reassignment or transfer to different district offices of employees represented exclusively by National Treasury Employees Union, Chapter 50, or any other exclusive representative, without notifying the National Treasury Employees Union, Chapter 50, or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management

7/ Inasmuch as Respondent was not obliged to meet and confer re its decision to transfer Revenue officers and cure the staffing imbalance, I do not recommend a return to the status quo aute. It has been held by the Assistant Secretary that it would not effectuate the purposes of the Order to require such a remedy where the employer's failure was limited to a refusal to bargain over impact and implementation Department of the Treasury, Internal Revenue Service, Indianapolis Indiana, A/SLMR No. 909.

will observe in implementing such reassignment or transfer, and on the impact the reassignment or transfer will have on the employees adversely affected by such action.

(b) Refusing or failing to furnish, upon request by National Treasury Employees Union, Chapter 50, any information bearing upon reassignment or transfer of employees from the Greensboro, North Carolina District to any other district office, or any other condition of employment, which is necessary to enable National Treasury Employees Union, Chapter 50 to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Notify the National Treasury Employees Union, Chapter 50, or any other exclusive representative, of any intended reassignment or transfer to different district offices of employees represented exclusively by National Treasury Employees Union, Chapter 50, or any other exclusive representative, and, upon request meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such reassignment or transfer and on the impact the reassignment or transfer will have on the employees adversely affected by such actions.

(b) Post at its facility at the Internal Revenue Service, Greensboro District office, Greensboro, North Carolina, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the District Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply herewith.


WILLIAM NAIMARK
Administrative Law Judge

Dated: 6 DEC 1977
Washington, D.C.

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO

A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a reassignment or transfer to different district offices of employees represented exclusively by National Treasury Employees Union, Chapter 50, or any other exclusive representative, without notifying the National Treasury Employees Union, Chapter 50, or any other exclusive representative, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such reassignment or transfer and on the impact the reassignment or transfer will have on the employees adversely affected by such action.

WE WILL NOT refuse or fail to furnish, upon request by National Treasury Employees Union, Chapter 50, any information bearing upon reassignment or transfer of employees from the Greensboro, North Carolina District to any other district office, or any other condition of employment, which is necessary to enable National Treasury Employees Union, Chapter 50 to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Executive Order.

WE WILL notify National Treasury Employees Union, Chapter 50 or any other exclusive representative, of any intended reassignment or transfer of employees from the Greensboro, North Carolina District to any other district, and, upon request, meet and confer in good faith to the extent consonant with law and regulations, on the procedures which management

March 17, 1978

will observe in implementing such reassignment or transfer, and on the impact the reassignment or transfer will have on the employees adversely affected by such action.

WE WILL, upon request, furnish to National Treasury Employees Union, Chapter 50 all information bearing upon a reassignment or transfer of employees from the Greensboro, North Carolina District to any other district office, or any other condition of employment, which is necessary to enable National Treasury Employees Union, Chapter 50, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ALABAMA STATE MILITARY DEPARTMENT
A/SLMR No. 1008

This case involved a representation petition filed by the Association of Civilian Technicians (ACT) seeking a unit of all General Schedule and Wage Board technicians employed by the Alabama Army National Guard assigned to the southern half of the State. The petitioned for unit is coextensive with the unit for which the National Federation of Federal Employees, Local 1730 (NFFE Local 1730) is the incumbent exclusive representative. The Activity contended that the existing unit was not appropriate inasmuch as it had not led to effective dealings and efficiency of agency operations and that only a statewide unit of Army National Guard technicians would be appropriate for the purpose of exclusive recognition. The parties were also in dispute as to the eligibility of certain job classifications.

The record revealed that on the same date that NFFE Local 1730 was certified as the exclusive representative for a unit of National Guard technicians assigned to the southern portion of the State, the National Federation of Federal Employees, Local 1706 (NFFE Local 1706) was certified in an identical unit for the northern half of the State. These two Locals entered into a multi-unit agreement with the Activity in 1971. Thereafter, in 1973, the parties negotiated a second multi-unit agreement which never became effective. In 1976, NFFE Local 1706, and another NFFE local representing a statewide unit of Alabama Air National Guard technicians signed a multi-unit agreement with the Activity. While NFFE Local 1730 had been a party to these negotiations, its membership failed to ratify the proposed agreement. Thus, at the time the ACT filed the subject petition, there was no negotiated agreement covering the employees in the petitioned for unit.

The Assistant Secretary noted that since the evidence establishes that a history of collective bargaining exists and there is no evidence that the scope and character of the existing unit have changed by virtue of events subsequent to its initial certification, such unit continues to constitute an appropriate unit for the purpose of exclusive recognition.

With regard to the eligibility of certain job classifications, namely the positions of Examiner and Flight Instructor (Aircraft), the Assistant Secretary found that there existed insufficient evidence to warrant the exclusion of employees in these classifications on the basis that they exercise supervisory authority within the meaning of Section 2(c) of the Order or that they function as management officials.

Based on his findings, the Assistant Secretary directed an election in the unit found appropriate.

Agency or Activity

Dated _____ By _____
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor Management Services Administration, United States Department of Labor, whose address is: Room 300 - 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ALABAMA STATE MILITARY DEPARTMENT

Activity

and

Case No. 40-8008(RO)

ASSOCIATION OF CIVILIAN TECHNICIANS

Petitioner

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1730

Intervenor

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1706

Party-in-Interest

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Robert F. Woodland, Jr. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject case, including the brief filed by the National Federation of Federal Employees, 1/ the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The Petitioner, Association of Civilian Technicians, hereinafter called ACT, seeks an election in a unit consisting of all General Schedule and Wage Board technicians employed by the Alabama Army National Guard assigned to the southern half of the State, excluding professional

1/ The Activity submitted an untimely brief which has not been considered.

employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined by the Order. 2/ The petitioned for unit is coextensive with the unit for which the National Federation of Federal Employees, Local 1730, hereinafter called NFFE Local 1730, is the incumbent exclusive representative. The Activity contends that the existing unit is not appropriate inasmuch as it has not led to effective dealings and efficiency of agency operations and that only a statewide unit of Army National Guard technicians would be appropriate for the purpose of exclusive recognition. The parties also are in dispute as to the eligibility of certain job classifications.

The record reveals that on June 4, 1970, NFFE Local 1730 was certified as the exclusive representative in the petitioned for unit. On the same date, the National Federation of Federal Employees, Local 1706, hereinafter called NFFE Local 1706, was certified as the exclusive representative in an identical unit for the northern half of the State of Alabama. Both locals entered into a multi-unit negotiated agreement with the Activity in 1971. Thereafter, in 1973, the parties negotiated a second multi-unit agreement which was not approved by higher agency authority and which never became effective. 3/ At the time the ACT filed its petition herein, there was no negotiated agreement covering the employees in the petitioned for unit.

The Alabama Army National Guard is comprised of five major commands which also were in existence at the time the above noted bargaining units were certified. Two of the major commands are headquartered in the southern half of the State, although there are subordinate units of these commands located in the northern half. Similarly, with respect to the three major commands headquartered in the north, certain subordinate elements are located in the southern half of the State. For the most part, there is local supervision of the National Guard technicians. The Adjutant General of the Alabama National Guard is empowered by law to employ and manage the technicians within his jurisdiction. The Technician Personnel Manual issued by the State's Technician Personnel Office further prescribes that the Adjutant General has the authority to promote, reassign, detail, demote, separate and compensate technicians, and that this authority will not be redelegated. However, the record reveals that, in reality, the Technician Personnel Office is responsible for administering this authority uniformly with respect to all National Guard technicians within the State. Additionally, the record reveals that the military commanders and subordinate levels of supervision, as well as management

2/ The southern half of the State is defined as the counties of Sumter, Greene, Hale, Bibb, Chilton, Coosa, Tallapoosa, Chambers, and all counties south of these.

3/ In 1976, NFFE Local 1706 and NFFE Local 1445, which previously had been certified as the exclusive representative in a statewide unit of Alabama Air National Guard technicians, entered into a multi-unit negotiated agreement with the Activity. Although NFFE Local 1730 had been a party to these negotiations, its membership failed to ratify the proposed agreement and, therefore, its unit was not covered by the agreement.

officials, have the authority to recommend personnel actions. Labor relations matters are generally handled at the local level with the Technician Personnel Office providing assistance when necessary.

The evidence establishes that a history of collective bargaining exists in the petitioned for unit. Further, there is no evidence that the scope and character of the existing unit have changed by virtue of events subsequent to its initial certification. In this latter regard, the record reveals that the organizational structure of the Activity and the lines of authority have remained essentially as they existed when the petitioned for unit was initially certified, and that labor relations matters continue, for the most part, to be handled at the local level. Additionally, the evidence establishes that the incumbent exclusive representative, NFFE Local 1730, has actively engaged in the collective bargaining process as demonstrated by its past negotiated agreement with the Activity. Under these circumstances, I find that the petitioned for unit continues to constitute an appropriate unit for the purpose of exclusive recognition within the meaning of Section 10(b) of the Order.

Eligibility Issues

The parties are in dispute as to the eligibility of employees classified as Examiners and Flight Instructors (Aircraft). 4/

Examiners

The Activity contends that employees in this classification should be excluded from any unit found appropriate as either management officials, supervisory employees, or both. The record reveals that Examiners conduct examinations, inspections and inventories of Army and Air National Guard property and fiscal accounts and perform internal reviews of the United States Property and Fiscal Office (USPFO) functions. In this regard, Examiners review and appraise the adequacy and effectiveness of policies, systems, procedures, records and reports relating to the overall operation of the Activity, conduct physical inventories of Federal property issued by the USPFO, and prepare reports based upon these examinations. Recommendations contained in the reports which result from such examinations are channeled through a Supervisory Accounting Technician to other supervisory levels. The record reveals that Examiners do not exercise supervisory authority over other employees, adjust grievances, or make recommendations with regard to hiring, firing, promotion, approval of leave, or the granting of awards.

Based on these circumstances, I find that there is no basis for the exclusion of Examiners from the petitioned for unit. In this regard, there is no evidence to indicate that Examiners are vested with the authority to make or effectively influence the making of policy with

4/ In addition, the parties entered into several stipulations concerning the eligibility of certain other job classifications. However, as there was no evidence adduced to support these stipulations, I shall not pass upon the unit eligibility of these classifications.

respect to personnel, procedures, or programs, which would justify their exclusion on the basis of being management officials. 5/ Nor is there evidence that they exercise supervisory authority within the meaning of Section 2(c) of the Order. Accordingly, I find that employees classified as Examiners should be included in the unit found appropriate.

Flight Instructors (Aircraft)

Employees in the subject classification, in addition to their regular flight and test flight duties, are responsible for implementing a flight training and testing program. In the latter capacity, their duties involve evaluating aviators and determining whether or not they should remain on flight status. However, there is no evidence that in the performance of such duties the Flight Instructors' evaluations determine the promotion, demotion or dismissal of the aviators whom they evaluate. The record reveals that Flight Instructors may act as the Facility/Activity Commander in the latter's absence. However, in this regard, the evidence indicates that this occurs on an infrequent basis, and then only for short periods of time. Further, while acting in such capacity, Flight Instructors have not exercised the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to responsibly direct them, adjust their grievances, or to effectively recommend such action.

Under these circumstances, I find insufficient evidence to warrant the exclusion of employees classified as Flight Instructors (Aircraft) from the petitioned for unit either as management officials or supervisors. Thus, while the employees in the subject classification evaluate other aviators and determine their fitness to remain on flight status, there is no evidence to indicate that such evaluation determines the continued employment status of such aviators. 6/ Further, the evidence establishes that although employees in the subject classification may act as the Facility/Activity Commander, such instances are sporadic, of short duration, and while so acting, such employees have not exercised supervisory authority within the meaning of Section 2(c) of the Order. Accordingly, I find that employees classified as Flight Instructors (Aircraft) should be included in the unit found appropriate.

Based on all of the foregoing circumstances, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All General Schedule and Wage Board technicians employed by the Alabama Army National Guard assigned to the southern half of the State, which includes the counties of Sumter,

5/ See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, 2 A/SLMR 83, A/SLMR No. 135 (1972).

6/ Compare Federal Aviation Administration, Department of Transportation, 1 A/SLMR 594, A/SLMR No. 122 (1971), and Federal Aviation Administration, Department of Transportation, 2 A/SLMR 340, A/SLMR No. 173 (1972).

March 21, 1978

Greene, Hale, Bibb, Chilton, Coosa, Tallapoosa, Chambers, and all counties south of these, excluding all professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, military advisors, guards and supervisors as defined in the Order. 7/

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DIRECTION OF ELECTION

An election by secret ballot shall be conducted, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the Association of Civilian Technicians; by the National Federation of Federal Employees, Local 1730; or by neither.

Dated, Washington, D.C.
March 17, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 32
A/SLMR No. 1009

This case involved a complaint filed by Karen Boyd against Local 32, American Federation of Government Employees, alleging violations of 29 CFR 204.2, Bill of Rights of members of labor organizations.

The Administrative Law Judge concluded that the union had violated 29 CFR 204.2 by thwarting members' duly petitioned requests to have an investigative committee set up to consider charges of certain misconduct on the part of union officers, by branding legitimately petitioned meetings illegal, by refusing to recognize actions taken by members at a special membership meeting to set up an investigative committee, and by threatening to expel members if they persisted in their efforts concerning the investigative committee. The Administrative Law Judge recommended that the union be ordered to cease and desist from committing the above actions and from not holding elections or permitting meetings duly petitioned by local union members from being held in accordance with the local's constitution and bylaws.

The Assistant Secretary noted that the complaint alleged three separate violations of 29 CFR 204.2. The first allegation was that the Respondent labor organization had violated Section 204.2 by the failure to conduct an annual election of delegates to the National Capital Area Department of the American Federation of Government Employees (AFGE) in April 1976, as required by the local's constitution and bylaws. The Assistant Secretary ordered that this portion of the complaint be dismissed because the matter was moot due to the conduct of an election of delegates in June 1977 under the provisions of the newly amended constitution and bylaws of Local 32 and because this allegation was a matter that should have been brought under Section 204.29, Election of Officers, rather than under Section 204.2.

7/ Although the petitioned for unit did not specifically exclude military advisors and guards, and as the parties made no argument to the contrary, I find that the unit determined to be appropriate herein should continue to exclude employees classified as military advisors and guards, thereby conforming to the unit recognized in the Certification of Representative issued to NFFE Local 1730 in 1970.

The second allegation was that the Respondent labor organization had violated Section 204.2 by denying members the right to establish a committee of investigation and to have that committee report its recommendations to the membership. The Assistant Secretary concluded that the refusal of the local president to recognize motions properly made at membership meetings and to accept the report from the investigative committee established at a special meeting violated members' rights under Sections 204.2(a)(1) and (2) to participate in meetings and to express their views upon any business properly before the meetings. The Assistant Secretary specifically noted that it was unnecessary to reach the question of whether the Bill of Rights grants members the right to call special meetings.

The third allegation was that members were threatened with expulsion from membership for their activities in connection with the investigative committee in violation of Section 204.2. The Assistant Secretary held that members' right of free speech guaranteed by Section 204.2(a)(2) was violated by the threats contained in the Executive Council report which indicated that continued "unauthorized" activity in connection with attempts to bring charges against certain local officers could be the basis for expulsion.

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A/SLMR No. 1009

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 32

Respondent

and

Case No. 22-7567(18)

KAREN BOYD

Complainant

DECISION AND ORDER

On November 9, 1977, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent labor organization had violated Section 204.2(a)(2) of the Regulations implementing Section 18 of Executive Order 11491, as amended. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Administrative Law Judge concluded that the Respondent labor organization had violated 29 CFR 204.2(a)(2) by thwarting members' duly petitioned requests to have an investigative committee set up to consider charges of certain misconduct on the part of union officers, by branding legitimately petitioned meetings illegal, by refusing to recognize actions taken by members at a special membership meeting to set up an investigative committee, and by threatening to expel members if they persisted in their efforts concerning the investigative committee. The Administrative Law Judge recommended that the Respondent labor organization be ordered to cease and desist from committing the above actions and from not holding elections or permitting meetings duly petitioned by local union members from being held in accordance with the local's constitution and bylaws.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, I adopt the findings, conclusions, and recommendations of the Administrative Law Judge, to the extent consistent herewith.

This case involved three alleged violations of 29 CFR 204.2^{1/}, Bill of Rights of members of labor organizations. The first allegation in the complaint was that the Respondent labor organization had violated Section 204.2 by the failure to conduct an annual election of delegates to the National Capital Area Department of the American Federation of Government Employees (AFGE) in April 1976, as required by the local's constitution and bylaws. The record indicates that the local's constitution and bylaws were violated by the failure to conduct an annual election of delegates. However, this matter has become moot due to the conduct of an election of delegates in June 1977 under the provisions of the newly amended constitution of Local 32.

1/29 CFR 204.2 provides in part:

- a)(1) Equal rights. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organizations' constitution and bylaws.
- a)(2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

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Furthermore, it should be noted that the allegation that the local's constitution and bylaws were violated by the failure to hold a timely election is a matter that should properly have been brought under Section 204.29, Election of Officers, rather than under Section 204.2. The requirement that a union conduct its officer elections in accordance with the provisions of its constitution and bylaws is contained in Title IV of the Labor-Management Reporting and Disclosure Act of 1959, as Amended, which was incorporated by reference in Section 204.29 of the Regulations implementing Section 18 of the Order. The United States Supreme Court has established in Calhoon v. Harvey, 379 U.S. 134 (1964), that allegations of violations of Title IV may not be the basis for a complaint under the Bill of Rights. Accordingly, for the above reasons, I shall order that this part of the complaint be dismissed.

The second allegation was that the Respondent had violated Section 204.2 by denying members the right to establish a committee of investigation and to have that committee report its recommendations to the local membership. The evidence indicates that the local president refused to permit a motion to set up an investigative committee to be brought before the August 5, 1976, special membership meeting which had been called for the purpose of establishing such a committee. The local officers and Executive Council refused to recognize the legality of the August 11 special meeting at which an investigative committee was established. At the August 23 and September 27 regular membership meetings, the president refused to permit a report from the investigative committee to be presented to the members and refused to recognize a properly made motion to establish another investigative committee.

Sections 204.2(a) (1) and (2) provide, in part, that members have equal rights to participate in the deliberations and voting upon the business of membership meetings and the right to express their views at membership meetings upon any business properly before the meetings, subject to the organization's established and reasonable rules pertaining to the conduct of meetings. The evidence indicates that the motions to establish an investigative committee were properly made and therefore should have been permitted.

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AFGE National Representative Harry F. Rager represented the Respondent at the hearing on this complaint and his February 16, 1977, report to AFGE 14th District National Vice-President Major H. Travis was presented as the official position of AFGE. In his report he indicated that the August 11 special meeting was chaired by the 3rd Vice-President, and at the hearing he stated that "The Council was in error if they disapproved this meeting." (p. 26). Therefore, since representative for the Respondent has recognized the validity of such a special meeting, the investigative committee selected at this meeting would appear to have been properly chosen under the provisions of the local and national constitutions and entitled to report to the membership at a subsequent meeting.^{2/}

The preponderance of the evidence indicates that the actions of the presiding officer in refusing to accept properly made motions to establish an investigative committee at the August 5, August 23, and September 27 meetings and in refusing to accept a report from the investigative committee at the August 23 and September 27 meetings, were more than mere procedural errors. I find that these actions constitute a violation of members' rights under Sections 204.2(a) (1) and (2) to participate in meetings and to express their views upon any business properly before the meetings.

The third allegation was that members were threatened with expulsion from membership for their activities in connection with the investigative committee. The report of the Executive Council which was read at the August 23 membership meeting indicated that continued "unauthorized" activity connected with the attempts to bring charges against certain local officers could be the basis for expulsion. While no overt action was taken to discipline any member, the threat contained in the Executive Council report constituted interference with the members' right of free speech

^{2/} It is unnecessary to reach the question of whether the Bill of Rights grants members the right to call special meetings. See Yanity v. Benware, 376 F.2d 197 (C.A.2 1967).

guaranteed by Section 204.2(a)(2). See Allen v. Local 92, Iron Workers, 47 LRRM 2214 (N.D. Ala. 1960).

ORDER

Pursuant to 29 CFR 204.91 implementing the Standard of Conduct provisions of Section 18 of the Order, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that AFGE Local 32, AFL-CIO, Civil Service Commission, 1900 E Street, N. W., Washington, D. C., shall:

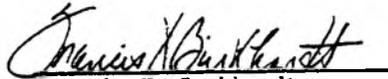
1. Cease and desist from:
 - (a) Refusing to permit members to participate in the meetings of the Local and to express their views upon business properly before the meetings including the consideration of charges against officers of the local, subject to the local's established and reasonable rules pertaining to the conduct of such meetings.
 - (b) Threatening members with expulsion from membership for exercising their rights of free speech, including their right to participate in establishing an investigative committee.
 - (c) In any like or related manner interfering with, restraining, coercing or threatening its members with expulsion by reason of exercising their rights assured by Executive Order 11491, as amended.
2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:
 - (a) Post on the bulletin boards provided for AFGE Local 32 union members at U.S. Civil Service Commission facilities located in Washington, D. C., and particularly at 1900 E Street, Northwest, copies of the attached notice marked

"Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall be signed by the AFGE Local Union President and shall be posted and maintained by her for sixty (60) consecutive days thereafter in conspicuous places, including all places where notice to members of the Union are customarily posted. The President shall take steps to insure that such notices are not removed, altered, defaced, or covered by any other material.

- (b) Pursuant to Section 204.92 of the Regulations, notify the Assistant Secretary in writing within thirty (30) days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the portion of the complaint alleging a violation of Section 204.2 by the failure of the Respondent labor organization to conduct an annual election of delegates to the National Capital Area Department of AFGE in April 1976, as required by the local's constitution and bylaws, be, and it hereby is, dismissed.

Dated, Washington, D. C.
March 21, 1978


Francis X. Burkhardt
Assistant Secretary of Labor for
Labor-Management Relations

APPENDIX

NOTICE TO ALL AFGE LOCAL 32 MEMBERS

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our members that:

WE WILL NOT refuse to permit members to participate in the meetings of the Local and to express their views upon business properly before the meetings, subject to the Local's established and reasonable rules pertaining to the conduct of such meetings.

WE WILL NOT threaten to expel from membership, penalize, or otherwise discriminate against, any members of AFGE Local 32, AFL-CIO, for exercising their Bill of Rights or other privileges assured by Executive Order 11491, as amended and implemented by regulations.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our members in the exercise of their rights assured by Executive Order 11491, as amended, or intimidate them from filing charges or complaints against officers of the union and bringing such matter before the membership for consideration and disposition in accordance with the governing constitution and bylaws.

Local Union 32, AFGE
U.S. Civil Service Commission
Washington, D. C.

Dated _____ by _____
President, Local 32, AFGE

This notice must remain posted for sixty (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 its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of :
 :
Ms. Karen Boyd :
 :
Complainant :
and :
 :
American Federation of : Case No. 22-7567(18)
Government Employees, Local 32, :
AFL-CIO :
Respondent :
.....

Karen A. Boyd, Pro Se
1260 21st Street, Northwest
Washington, D.C. 20036
For the Complainant

Henry F. Reddick
6200 Wilson Boulevard
Apt. No. 308
Falls Church, Virginia 22044

Harry F. Rager, National Representative
American Federation of Government Employees
AFL-CIO
8020 New Hampshire Avenue
Langley Park, Maryland 20783
For the Respondent

Before: RHEA M. BURROW
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a Standards of Conduct proceeding in which a formal hearing of record was held on July 6, 1977, 1/

1/ A hearing on May 17, 1977, was scheduled but recessed at the preconference stage for the purpose of exploring the positions of the parties by reason of additional information offered and resolution of their differences if possible, without formal litigation. When later advised that no resolution was possible, hearing was scheduled and held.

pursuant to Executive Order 11491, as amended (hereafter referred to as the Order). In a complaint dated October 18, 1976, the Complainant alleged in substance that her rights under Section 18 of the Executive Order had been violated by the undemocratic behavior and abuse of parliamentary procedure by Martha Frazier, Beatrice Osbia and Jerry Calhoun of AFGE Local 32 wherein they thwarted four attempts on August 5, August 11, August 23, and September 27, 1976, of members of Local 32 to establish a Committee of Investigation, a right provided under Article XIV, Section 3 of the AFGE Constitution 2/; it was also alleged that there was a threat of expulsion from membership in the union for pursuit of the investigation requested by 21 members of the union as evidenced by minutes of the Executive Council meeting on August 20, 1976, and read at the union meeting on August 23, 1976 3/; it was further alleged that the internal channels for establishing the democratic process to investigate the allegations signed by 21 members on July 19, 1976, do not function because of the undemocratic behavior of the above named members.

2/ Article XIV, Section 3 relating to Offenses, Trials, Penalties and Appeals provides: "Charges may be proffered by the National President, the Executive Council, the National Vice President having jurisdiction over the local of which the accused is a member, or by a committee of investigation of the local. Any member may bring charged by first filing them with the local of which the accused is a member and the charges shall be investigated by a committee of investigation of the local. If the committee of investigation finds provable cause, and cannot settle the matter informally, it shall cause charges to be served upon the accused by registered or certified mail, at his last known address, and the local of which the accused is a member shall also be served at its office or address of its highest ranking officer and shall contain an allegation of facts describing the nature of the offences charged."

3/ Section 18 of the Order provides in part as follows: "Section 18. Standards of Conduct for labor organizations (a) An agency shall accord recognition only to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles. Except as provided in paragraph (b) of this section, an organization is not required to prove that it has the required freedom when it is subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for -
(Continued on next page)

The implementing Regulation 29 CFR §204.2 of Section 18 of the Order referred to as "Bill of Rights of Members of Labor Organizations" provides in part:

"(a)(1) Equal rights. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

"(a)(2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meeting of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings. Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contract obligations..."

Upon the basis of the entire record, including my observation of the witnesses and their demeanor and briefs submitted by or on behalf of the respective parties, I make the following recitation of facts, findings, conclusions and recommendations.

Background Information

There was an election of officers for AFGE Local 32 4/ held in April 1975 at which time Henry Reddick was named

3/ (continued)

"(1) the maintenance of democratic procedures and practices, including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participation in the affairs of the organization, to fair and equal treatment under the governing rules of the organization and to fair process in disciplinary proceedings..."

4/ American Federation of Government Employees, Local 32, AFL-CIO.

as President; Martha Frazier, 1st Vice President; 5/ Inez Conley, 2nd Vice President 6/ and Jerry Calhoun, 3rd Vice President. Othella Poole was elected Chief Shop Steward and Delegates elected to the National Capital Area Department were: Henry Reddick, Rosalie Gordon, Martha Frazier and Beatrice Osbia. Members of the Advisory Committee were Rosalie Gordon, Past President; Beatrice Osbia and Jack Brennan.

At a March 1976 membership meeting of AFGE Local Union 32, Complainant along with a member of other union stewards expressed the opinion that under Section 4(b) of the Local Constitution NCAD delegates should be elected annually in April rather than every two years; when the issue was not resolved at the March meeting they were told to write the National President. 7/ The stewards also protested to no avail the announcement made at the March 1976 meeting that delegates to the National Convention will be elected on April 30, at the same time that delegates to the 14th District Caucus are elected. This was stated to be unfair under Section 4(c) of the Local Constitution bylaws which provided that: "Delegates and alternates to the National Convention shall be elected at least 30 days prior to each convention of AFGE." President Webber in a letter dated May 5, 1976 to Major H. Travis, AFGE National Vice President stated it appears that the April 30, 1976 election of delegates and alternates to the National AFGE Convention would not be unreasonable in view of the one year membership qualification for candidacy; he also expressed opinion that delegates and alternates to the NCAD should be elected annually under the constitution and bylaws as amended and that unless the Local

5/ Martha Frazier, 1st Vice President became President upon the resignation of Henry Reddick.

6/ Louis Ray was sworn in as 3rd Vice President in June 1976. The vacancy was created by the resignation of Henry Reddick.

7/ Section 4(b) of the bylaws to the Local Constitution states: "Delegates and alternates to the District of Columbia Department shall be elected annually at the regular meeting for the month of April (unless some other date has been fixed at a previous meeting."

had fixed another date elections should be conducted annually during the regular April membership meeting. He further stated: "Accordingly, if after an investigation you find no other such data was fixed, I suggest that you advise the Local to conduct an election of delegates and alternates to the NCAD as soon as possible." 8/ President Webber also stated that the constitution and Bylaws of Local 32 had many deficiencies and major revision was suggested. 9/

AFGE National President Webber died shortly thereafter and was succeeded by Dennis Garrison; Kenneth Blaylock was later named as President.

At a meeting on May 29, 1976, Local 32, AFGE voted to endorse Russell Binion as National Vice President and to instruct the delegates to work actively in his behalf and to cast all 299 votes for him. According to the report of action unchallenged at the hearing, delegate Beatrice Osbia was Major Travis' Campaign Manager and stated she would not be able to actively work to the election of Russell Binion but would relinquish her position as Major Travis' Campaign Manager. However she subsequently published a Notice that she would continue to serve as Chairperson of Major Travis' Campaign Committee through the end of the 14th District Caucus on May 28, 1976. She was also at the time running herself for election to the Woman's Advisory Committee of the National Office.

At the June 1976 meeting of Local 32 the question of representation of NCAD was brought up. The position of the Executive Committee had not been ascertained or clarified since President Webber had advised two months earlier that an election of delegates should have been held in April and NCAD should be notified of Local 32's position and representation. It was also stated by President Frazier, that, unless business of importance arises, there will be no further meetings until September.

8/ Complainant Exhibit No. 8.

9/ Copies of President Webber's letter of May 5, 1976 to Major Travis were sent to Martha Frazier, Karen Boyd and N. R. Kershaw. The latter was not identified during the hearing.

On July 19, 1976, 21 members of AFGE Local 32 petitioned Martha Frazier, President, Rosalie Gordon and Beatrice Osbia, Committee Advisory Members for a special meeting to be held on August 5, 1976 for the purpose of presenting charges against the President and the named Advisory Committee members and calling attention of the membership to the violations which have occurred to our local constitution and to the National Constitution of AFGE. 10/ A summary as to what happened at the August meetings is indicated in a letter to Major Travis dated October 26, 1976. 11/

It was stated that "...petitions for two special meetings were submitted by more than enough local members to constitute a quorum. The first meeting was chaired by Ms. Frazier. At that meeting, Ms. Frazier refused to accept a motion to set up an Investigation Committee to review the charges against Ms. Osbia, Ms. Gordon and herself. In view of this, a second meeting was petitioned for August 11. Ms. Frazier was on leave and Louis Ray, 3rd Vice President, chaired the meeting. It was decided at that time that there was sufficient evidence to warrant establishment of an Investigation Committee and a motion to this effect was passed.

"At the August monthly membership meeting we were told that the Executive Committee decided that the Investigation Committee set up at the second Special Meeting was 'ad hoc' and illegal; its findings, if any, unacceptable. A point of order was made followed by a motion asking the President to hand over the chair because she was personally involved in the charges to be investigated. The motion passed 11 to 5 but was ignored by the President despite numerous protests by the membership...."

Findings

1. The Complainant, Karen Boyd is and was at all times material herein, a member of AFGE Local 32, AFL-CIO union, the exclusive representative for all non-professional Wage Grade and General Schedule employees and all professional General Schedule employees in the U.S. Civil Service Commission Central Office located in the Washington, D.C., metropolitan area.

10/ For specific alleged violations see Complainant Exhibit No. 4.

11/ Complainant Exhibit No. 15.

2. Section 4(b) of the bylaws to the AFGE Local Constitution provided that: "Delegates and alternates to the District of Columbia Department shall be elected annually at the regular meeting for the month of April..." There had been no other date fixed by the Local to alter the mandatory requirements and there is no claim it is in conflict with the National Constitution or bylaws. There was no annual election of delegates or alternates by AFGE Local 32 in 1976 or April 1977.

3. The President and officials in AFGE had notice from Complainant and others at the March 1976 membership meeting that an election of delegates and alternates to the District of Columbia Department (NCAD) should be held in April 1976 in accordance with its local constitution and bylaws.

4. No action was taken by AFGE, Local 32 officials and the matter was addressed by the Complainant to the AFGE National President who concluded that such election should be held annually and a copy of such notice was furnished to the AFGE Local 32 Union President in May 1976.

5. In July 1976 Complainant along with 20 other union members petitioned AFGE President of Local 32 to call a meeting on August 5, 1976 for the purpose of presenting charges against her and certain named advisory committee members and calling attention to the membership to local and National Constitutional Violations. 12/ At the August 5, 1976 meeting President Frazier refused to entertain any motions regarding the charges. 13/

12/ Section 1(a) of the bylaws to the Local Constitution provides - "A regular meeting of this lodge shall be held as far as practicable on the fourth Monday of every month. However, at any meeting the date of a future meeting or meetings may be changed, or such meetings may be dispensed with by a two-thirds (2/3) vote of the members present. Special meetings may be called by the Executive Council. A special meeting shall be called by the President upon petition of at least ten (10) members of the lodge. General notice to all members shall be given three (3) days in advance of any special meeting."

13/ Transcript p. 117 (testimony of Mary Workman, whom I find to be a credible and reliable witness) in this proceeding.

6. At a subsequent duly petitioned meeting on August 11, 1976 by Complainant and a quorum of other AFGE Local 32 members the meeting was held as scheduled and chaired by Vice-President Louis Ray, the President, the other higher Vice Presidents being absent. At the meeting an investigative committee was authorized and members elected were Mary Workman, Larry Smith and Earline McNeal.

7. At two later meetings one in August and the other in September 1976, the earlier being the regular August membership meeting the investigative committee was thwarted by Respondent from presenting its charges or making a report of its investigation to the membership. A council report read at the regular monthly August meeting reflected that the council had met and branded the investigative committee elected at the August 11 meeting as "ad hoc" and not permitted if not authorized by the council; that the August 11, 1976, meeting was illegal; and, any further unauthorized activities surrounding internal problems could be the basis for expulsion of such members.

8. The council is not an avenue for request, or approval for a duly petitioned membership business meeting by 10 or more members of the local union.

9. The respective meetings in August and September 1976 by Complainant and others were duly petitioned by more than 10 members and it was mandatory under the bylaws for the President to call and hold such meetings. The council had no right to interfere or preclude the investigative committee from making its report or proceeding with its charges in an orderly fashion based on business transacted at a duly petitioned meeting.

10. The business affairs of Respondent Local 32 were conducted in a loosely coordinated manner with little regard to rights of members under the adopted constitution and bylaws.

11. The Respondents disregarded the mandate of the bylaws to the local constitution by not holding an annual election for NCAD delegates in April 1976 and by denying members the right to establish a committee of investigation and to have that committee report its findings and recommendations as to why its officials refused to follow the constitution and bylaws of Local 32.

12. The threat of expulsion from the union for attempting to set up an investigative committee to investigate charges that its officers were not holding elections as required and abusing and failing to recognize the rights of union members at membership meetings was a violation of union members rights under the Bill of Rights provisions of 29 CFR Section 204.2.

13. AFGE Local 32 adopted a new constitution and bylaws in June or July 1977, that is currently before the National AFGE, AFL-CIO for ratification. The terms of NACD delegates are one year.

Discussion and Evaluation

Under Section 18(d) of the Order the Assistant Secretary has been directed to prescribe regulations effectuating the Standards of Conduct of Labor Organizations and Management. Pursuant to the Order Bill of Rights regulations of members of labor organizations (29 CFR §204.2) have been promulgated to assure particularly that all union members have equal rights and freedom of speech and assembly. These rights within the organization include ... "the right to nominate candidates, to vote in elections or referendums of the labor organizations, to attend membership meetings and to participate in the deliberations and voting of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws." It is also provided that "Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings..."

At the time Complainant made inquiry of union officers at its March 1976 membership meeting as to election of delegates to the NCAD, the bylaws to the local constitution provided that such delegates were to be elected annually at the April general meeting. The provision was clear and unambiguous and needed no interpretation by the National organization. Even so, President Webber informed the President of Local 32 as to the requirements in May 1976, leaving no reasonable basis for Respondents to conclude that such delegates were elected for other than a one year term despite failure of the Local to conduct annual elections in 1971 and 1973. He also suggested an election be held as soon as possible.

At four either duly petitioned or regular membership meetings in August and September 1976, local union officers arbitrarily by refusing to entertain or consider meetings by Complainant and others successfully thwarted them from establishing a committee of investigation and have it report its findings to the membership; further a council report read by Beatrice Osbia at the August meeting threatened Complainant and others with expulsion from the union if they persisted in their investigative efforts of bringing charges against local officers.

The Complainant sought redress within the Local organization and at the National level but was not ever provided an answer to her complaints and inquiries until the beginning of the hearing on May 17, 1977. I recessed that hearing for the purpose of having the parties consider the answer submitted on behalf of the Local by Major Travis as a satisfactory offer of settlement.

No agreement was reached and a full hearing was subsequently held. I conclude that there was a reasonable basis for the complaint in this case without any satisfactory offer of settlement.

The Standards of Conduct Labor-Management Relations decisions under Section 18 of the Order and applicable Regulations promulgated thereunder provide little precedent for determining the issues herein involved. However, the Labor-Management Reporting and Disclosure Act of 1959, as amended, (29 U.S.C.A. §411) contains the identical provisions as those in 29 CFR §204.2(a)(b) and courts have passed on many decisions under Section 411. Generally, it has been held that by becoming a member of a union, the worker in effect, makes contract to be governed by the Constitution and bylaws and rules of the organization. (Smith v. General Truck Drivers, Warehouseman and Helpers Union Local 467 of San Bernardino and Riverside Counties, D.C. Cal. 1960, 181 F. Supp. 14). In the same case it was held that courts will not interfere with internal affairs of unions except in rare cases of fraud or illegality. In a later case it was held that the Bill of Rights provisions under Section 411 guarantee basic rights relating to internal affairs of the union. (Lucas v. Kenny, D.C. Ill. 1963, 220 F. Supp. 188). In enacting this Section (411), Congress sought to protect union members in their relationship to union by adopting measures to insure provision of democratic processes in conduct of union affairs and procedural due process to members subjected to discipline. (Tincher v. Piasecki, C.A. Ind. 1975, 520 F. 2d. 912. This chapter protects

the union members right to discuss union affairs, and whether a particular action constitutes "discipline" within the meaning of this chapter is to be determined by its practical effect. Morrissey v. National Maritime Union, D.C. N.Y. 1975, 397 F. Supp. 659. A court should not hesitate to find a union in violation of statutory requirements if the union utilizes a vaguely worded prohibition of action contrary to the best interests of the union in order to chill a union member's freedom of speech through constant disciplinary action. Ritz v. O'Donnell, D.C. D.C. 1976, 413 F. Supp. 1365. In actions against unions under this chapter, determination whether a union member has exhausted intra-union remedies must be made on state of facts in each particular case. Woods v. Local Union No. 613 of International Brotherhood of Electrical Workers, D.C. Ga. 1975, 404 F. Supp. 110.

The decisions do not clearly delineate the line of demarcation as to what constitutes a standards of conduct violation under the "Bill of Rights" provisions of 29 CFR §204.2. It is evident that as of May 1976, officers of AFGE Local 32 had been made aware by the AFGE National President that their NCAD delegates under the local constitution and bylaws were to be elected annually at their April monthly meeting and that an election should be held immediately.

One of the chief purposes of the Bill of Rights regulations is to protect union members against possible overreaching by union officials; other purposes include the stopping of objectionable conduct by those in positions of trust and to protect democratic processes within union organizations and to permit local affairs to be governed by local members under democratic processes. As to the four duly petitioned and regular meetings held in August and September 1976, the conduct and actions by local union officers were obvious attempts to thwart and suppress the democratic process of members seeking by legitimate means to bring proper business matters before the membership for consideration. Such action coupled with the threat of expulsion from membership of Complainant and others approved by the council was not in the best interests of the union and had a chilling effect on Complainant and others participating in the effort to have legitimate charges brought before the membership. The actions and threat of expulsion from membership transcended the bounds of permissible conduct and constituted a violation of the standards of conduct provisions of 29 CFR 204.2(a)(2).

It must be noted that not only was an election of NCAD delegates not held in accordance with the constitution and bylaws in 1976, but none was held at the regular time provided for holding elections in April 1977.

The adoption of a new constitution and bylaws in June or July 1977 with election of new officers has most probably rendered moot the basis upon which the complaint herein was based. However, when given the opportunity of considering the position of Major Travis, Executive Vice-President of the National Union who filed the answer on behalf of the Union, such were not accepted by local union officials and it was insisted there had been no violation. Such is contra to Major Travis' findings and recommendations and the evidence in the case. The Respondents at the hearing did not refute the allegations in the complaint or otherwise explain or present reasons for denying the Complainant and others a forum to consider their legal requests made in accordance with the constitution and bylaws, they were required to administer. Hence, the Complainant and others were denied their procedural due process rights.

While dismissal of the complaint was seriously considered on the basis of the issues having become moot after the new constitution and bylaws were adopted and new officers and delegates elected, the type of conduct here involved is susceptible to recurrence and there was blatant denial of any violation having been committed, even after Major Travis submitted his report. Under the circumstances a remedy to apprise the membership that there was a violation of the Standards of Conduct provision under 29 CFR §204.2(a)(2) and of their rights is deemed advisable.

By reason of the foregoing, I conclude that the Respondents violated 29 CFR §204.2(a)(2) implementing Section 18 of Executive Order 11491 when they refused and thwarted Complainant's duly petitioned requests to have an investigative committee set up to consider charges of certain misconduct on the part of union officers, branded legitimately petitioned meetings illegal, refused to recognize action taken by members at the August 12, 1976 meeting, and threatened Complainant and others with expulsion from membership if they persisted in their efforts.

Recommendation

Having found that the Respondent AFGE Local 32, AFL-CIO engaged in conduct which violated the Standards of Conduct provisions of Section 204.2(a)(2) implementing Section 18 of the Order, I recommend that the Assistant Secretary adopt the following Order designed to effectuate the policies of Executive Order 11491, as amended.

RECOMMENDED ORDER

Pursuant to 29 CFR 204.91 implementing the Standard of Conduct provisions of Section 18 of the Order, the Assistant Secretary of Labor for Labor Management Relations hereby orders that AFGE Local 32, AFL-CIO Civil Service Commission, 1900 E Street, N.W., Washington, D.C., shall

(1) Cease and desist from

(a) Not holding elections or permitting meetings duly petitioned by local union members from being held in accordance with the local constitution and bylaws;

(b) Attempting to thwart efforts by members of Local 32 to present to the membership legitimate investigative charges for consideration;

(c) Branding as ad hoc and illegal actions taken at a meeting and specifically petitioned for in accordance with the constitution and bylaws;

(d) Threatening members with expulsion from membership for having participated in efforts to set up an investigative committee and a meeting petitioned in accordance with the constitution and bylaws;

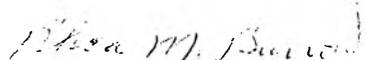
(e) In any like or related manner interfering with, restraining, coercing or threatening its members with expulsion by reason of exercising their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes of Executive Order 11491, as amended:

(a) Post on the bulletin boards provided for AFGE Local 32 union members at U.S. Civil Service Commission facilities located in Washington, D.C. and particularly at 1900 E Street, Northwest, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall be signed by the President of the AFGE

Local Union President and shall be posted and maintained by him for sixty (60) consecutive days thereafter in conspicuous places including all places where notice to members of the Union are customarily posted. The President shall take reasonable steps to insure that such notices are not removed, altered, defaced, or covered by any other material.

(b) Pursuant to Section 204.92 of the Regulations, notify the Assistant Secretary in writing within thirty (30) days from the date of this Order as to what steps have been taken to comply herewith.


RHEA M. BURROW
Administrative Law Judge

Dated: November 9, 1977
Washington, D.C.

Appendix

RMB:dmb

APPENDIX

NOTICE TO ALL AFGE LOCAL
32, AFL-CIO MEMBERS

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to hold special meetings legally petitioned in accordance with Local 32, AFGE, AFL-CIO's constitution and bylaws and will accept and carry out the mandate of the membership transacted at such meetings in accordance with the constitution and bylaws.

WE WILL NOT expel or threaten to expel from membership, penalize, or otherwise discriminate against any member of AFGE Local 32, AFL-CIO, for exercising their bill of rights or other privileges assured by Executive Order 11491, as amended and implemented by regulations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our members in the exercise of their rights assured by Executive Order 11491, as amended, or intimidate them through private council or other action from filing charges or complaints against officers of the union and bringing such matter before the membership for consideration and disposition in accordance with the governing constitution and bylaws.

Local Union 32, AFGE-CIO
U.S. Civil Service Commission
Washington, D.C.

Dated _____ by _____
President, Local 32, AFGE-CIO

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

March 21, 1978

If employees have any questions concerning this Notice or compliance with its provisions, they may be communicated directly with the Regional Administrator, United States Department of Labor, whose address is Labor-Management Services Administration, Regional Office, 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL AVIATION ADMINISTRATION,
OAKLAND AIRWAY FACILITIES SECTOR,
OAKLAND, CALIFORNIA
A/SLMR No. 1010

This case involved a petition filed by the Professional Airways Systems Specialists (PASS) seeking an election in a unit of all unrepresented nonprofessional employees of the Airway Facilities Sector, Oakland, California. The Activity contended that the unit sought is inappropriate under Section 10(b) of the Order as the employees involved do not share a community of interest separate and distinct from other Federal Aviation Agency employees and that such unit would lead to fragmentation and would not promote effective dealings and efficiency of agency operations. It also contended, as did the Intervenor, National Association of Government Employees (NAGE), that the petitioned for unit should be included in the existing nationwide unit represented by the NAGE or remain unrepresented.

In 1971, as a result of a national Airway Facilities reorganization, the Oakland Airway Facilities Sector and the San Jose Sector were merged into what became known as the Oakland Sector. This reorganization combined some 55 employees exclusively represented by the National Association of Broadcast Employees and Technicians (NABET), employees represented by the NAGE at the San Jose Moffet Sector Field Office, and a number of unrepresented employees. In 1976, all of the employees at the Oakland Sector, except those for which the NABET was the exclusive representative and for which unit there was an agreement bar, were included in NAGE's nationwide unit as a result of the election ordered in Federal Aviation Administration and Federal Aviation Administration, Eastern Region, 5 A/SLMR 776, A/SLMR No. 600 (1975). After the PASS filed its petition in the instant proceeding, the NABET disclaimed interest in further representing the employees in the unit.

The Assistant Secretary found that the claimed unit was appropriate for the purpose of exclusive recognition. In this regard, he noted that the petitioned for unit was, in effect, a residual unit of all unrepresented nonprofessional employees of the Activity who share a clear and identifiable community of interest, and that such employees share a common mission, common overall supervision, generally similar job classifications and duties, and enjoy uniform personnel policies and practices and labor relations policies. He also found that such unit would promote effective dealings and efficiency of agency operations and would prevent further fragmentation of units at the Activity. In this regard, he noted that

the claimed residual unit of all unrepresented employees had a prior bargaining history, and that such unit would lessen the potential for further fragmentation of units and would promote effective dealings as the unit would be consistent with the established bargaining experience of the parties. The Assistant Secretary noted also that to hold, as contended by the Activity and the NAGE, that the claimed employees should be unrepresented or added to the NAGE'S nationwide unit without an election, would, in effect, deny such employees who had been exclusively represented previously in a viable unit, the opportunity to freely elect a new exclusive representative in the identical unit.

In addition, the Assistant Secretary ordered that the claimed employees be included within the NAGE's nationwide unit should they select that labor organization as their exclusive representative in the election he directed.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

A/SLMR No.1010

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
OAKLAND AIRWAY FACILITIES SECTOR,
OAKLAND, CALIFORNIA

Activity

and

Case No. 70-5721(RO)

PROFESSIONAL AIRWAYS SYSTEMS
SPECIALISTS

Petitioner

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer George R. Sakanari. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs submitted by the Activity and the Professional Airways Systems Specialists, hereinafter called PASS, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. In its amended petition, the PASS seeks an election in a unit of all unrepresented nonprofessional employees of the Airway Facilities Sector, Oakland, California. 1/ The Activity contends that the unit

1/ The unit description in the original PASS petition appeared to include Activity employees already exclusively represented by the National Association of Government Employees, hereinafter called NAGE.

sought is inappropriate under Section 10(b) of the Order as the employees involved do not share a community of interest separate and distinct from other Agency employees and that such unit would lead to fragmentation and would not promote effective dealings and efficiency of agency operations. Further, it contends that the employees in the petitioned for unit should be included in the existing nationwide unit represented by the NAGE or remain unrepresented. The NAGE takes the position that the sought unit is inappropriate and that such employees should be included in its nationwide unit.

The mission of the Federal Aviation Administration (FAA) is to provide a safe and expeditious flow of aircraft in the national airspace system. The Western Region of the FAA is headed by a Regional Director. Under his jurisdiction is the Western Region's Airway Facilities Division, which is composed of four branches: the Program and Planning Branch, the Maintenance Engineering Branch, the Maintenance Operations Branch, and the Establishment Engineering Branch. The Division also contains 15 sectors, of which the Activity is one, each headed by a Sector Manager who is responsible to the Division Chief. The mission of the Activity, and all airway facilities sectors, is to maintain and operate all national airspace system facilities within the sector, assuring that performance is within established tolerances of accuracy and meets operational requirements of availability and reliability; to maintain environmental support facilities and equipment; and to effectively manage available resources.

On May 10, 1971, the National Association of Broadcast Employees and Technicians, hereinafter called NABET, was certified as the exclusive representative of a unit consisting of all employees of the Airway Facilities Sector, Oakland International Airport, Oakland, California, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, Technicians-in-Depth, Training Relief Technicians, and supervisors and guards as defined in Executive Order 11491. Previously, in 1966, NAGE Local R12-22 was granted exclusive recognition for some 10 maintenance technician employees at the Airway Facilities' San Jose Moffett Sector Field Office. At that time and until late 1971, the San Jose Sector was an adjacent but separate Sector from the Oakland Sector.

In late 1971, as part of a national Airway Facilities reorganization, the Oakland Airway Facilities Sector and the San Jose Sector were merged into what is now the Oakland Sector. It appears from the record that, as a result of this reorganization, the Oakland Sector included some 55 employees exclusively represented by the NABET, the employees represented by the NAGE at the San Jose Moffett Sector Field Office, and a number of unrepresented employees.

The history of bargaining within the Airway Facilities Division of the FAA reveals that there are sectorwide units, in some instances less than sectorwide units, and regionwide units. On December 18, 1975, the Assistant Secretary issued a Decision and Direction of Elections in Federal Aviation Administration and Federal Aviation Administration, Eastern Region, 5 A/SLMR 776, A/SLMR No. 600 (1975), finding that either a regionwide, a nationwide, or a sectorwide unit of Airway Facilities Division employees may be appropriate for the purpose of exclusive recognition under the Order. It appears from the record that as a result of the election ordered in A/SLMR No. 600 all of the Oakland Sector employees, except those in the NABET's exclusively recognized unit, were included in the NAGE's nationwide unit. ^{2/} With respect to the petitioned for unit herein, the record reveals that the PASS filed its petition on April 4, 1977, for the employees in the NABET's exclusively recognized unit and that, on April 19, 1977, the NABET disclaimed any interest in further representing the employees in its unit.

The record reveals that the claimed unit of employees formerly represented by the NABET is composed of approximately 40 of the some 94 employees of the Oakland Sector. The majority of employees in the claimed unit are classified as Electronic Technicians, GS-0856 series. Such employees are responsible for the operation of equipment such as radar, nav aids, data processing, and communication systems so that the safety of air travel will not be compromised. The qualifications for such employees are established on a nationwide basis by the FAA, and all employees engaged in such functions must be certified based on these standardized qualifications. Further, the technical handbooks utilized by such employees have been developed nationally to provide uniformity in the maintenance of equipment nationally.

The record reflects that, consistent with the FAA policy of delegating authority with respect to personnel and labor relations matters to the lowest possible level, the authority for such matters has been delegated to the Regional Director, subject to FAA guidelines. The area of consideration for promotions involving technicians may be confined to an individual sector, but may be regionwide or nationwide in scope.

^{2/} At the time of the filing of the petitions which resulted in the Decision and Direction of Elections in A/SLMR No. 600, the employees in the claimed unit herein were included in the NABET's exclusively recognized unit which was subject to an agreement bar. Therefore, the employees in the petitioned for unit were expressly excluded from the units found appropriate therein.

With regard to the Activity's bargaining history within the Oakland Sector, the record reveals that the Activity negotiated an agreement with the NABET for the employees in the claimed unit with an effective date of August 1972. The NABET agreement has been automatically renewed since 1972 and was in effect up until April 19, 1977, when, as noted above, the NABET disclaimed interest in representing the covered employees. There is no evidence that since the effective date of the NABET agreement that there has been a significant alteration in the agency's operations or any change in the mission or functions of the employees in the unit sought which would effect the previously established appropriateness of such unit. 3/

Based on all the foregoing circumstances, I find the claimed unit of all unrepresented employees of the Activity is appropriate for the purpose of exclusive recognition. 4/ Thus, the petitioned for unit is, in effect, a residual unit of all unrepresented nonprofessional employees of the Activity who share a clear and identifiable community of interest. Further, all of the unrepresented employees of the Activity share a common mission, common overall supervision, generally similar job classifications and duties, and enjoy uniform personnel policies and practices and labor relations policies. I find also that such unit will promote effective dealings and efficiency of agency operations and will prevent further fragmentation of units at the Activity. Thus, where, as here, the petitioned for employees constitute a residual unit of all unrepresented employees and, indeed, such employees have a prior bargaining history, in my view, such a unit will lessen the potential for further fragmentation of units and will promote effective dealings as it is consistent with the established bargaining experience of the parties. 5/ Further, to hold, as contended by the Activity and the NAGE, that the claimed employees should be unrepresented, or added to the NAGE's nationwide unit

3/ As indicated above, the abortion of the negotiated agreement between the Activity and the NABET was not attributable to any change in the scope of the bargaining unit, effective dealings, or efficiency of agency operations. Rather, the NABET disclaimed interest in further representing the unit.

4/ Cf. Department of Transportation, Federal Aviation Administration, O'Hare Airway Facility Sector, Chicago, Illinois, A/SLMR No. 927 (1977).

5/ As noted above, there has been a long bargaining history in the petitioned for unit and no evidence that such unit has failed to promote effective dealings and efficiency of agency operations.

without an election, would, in effect, deny such employees who have been exclusively represented previously in a viable unit, the opportunity to freely elect a new exclusive representative in the identical unit. 6/

Accordingly, I find that the following residual unit, previously represented by the NABET, is appropriate for the purpose of exclusive recognition under Section 10(b) of Executive Order 11491, as amended:

All employees of the Airway Facilities Sector, Oakland, California, excluding all professional employees, employees in current exclusively recognized units, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in Executive Order 11491, as amended.

In view of the NAGE's clear intention to have the unit found appropriate included within its existing nationwide unit, I find that the employees in such unit should be afforded the opportunity to choose whether or not they wish to become part of the existing nationwide unit represented by the NAGE. Accordingly, if a majority of the employees in the unit found appropriate votes for the NAGE, they will be taken to have indicated their desire to be included in the existing nationwide unit represented by that labor organization and the appropriate Area Administrator will issue a certification to that effect. If, on the other hand, a majority of the employees votes for the PASS, they will be taken to have indicated their desire to be included in the separate residual unit found appropriate and the appropriate Area Administrator will issue a certification to that effect.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as soon as possible but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or who were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

6/ In any event, as indicated below, should the claimed employees select the NAGE as their exclusive representative in the unit found appropriate, such unit will be added to the NAGE's nationwide unit.

Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the Professional Airways Systems Specialists, the National Association of Government Employees, or no labor organization.

March 22, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Because the unit found appropriate is substantially different than that originally petitioned for, I direct that the Activity, as soon as possible, shall post copies of a Notice of Unit Determination, which shall be furnished by the appropriate Area Administrator, in places where notices are normally posted affecting the employees in the unit found appropriate. Such notice shall conform in all respects to the requirements of Section 202.4(b) and (c) of the Assistant Secretary's Regulations. Further, any labor organization which seeks to intervene in this matter must do so in accordance with the requirements of Section 202.5 of the Assistant Secretary's Regulations. Any timely intervention will be granted solely for the purpose of appearing on the ballot.

Dated, Washington, D.C.
March 21, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF THE
AIR FORCE, 15th AIR BASE WING,
HICKAM AIR FORCE BASE, HAWAII
A/SLMR No. 1011

This case involved an unfair labor practice complaint filed by the Service Employees International Union, Local 556, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to bargain in good faith and by unilaterally altering the wording of a provision of an Article in a proposed negotiated agreement after a final accord was purportedly reached on such provision.

Subsequent to the time that representatives of the Complainant and the Respondent signed Article 18 of the proposed negotiated agreement, the Complainant notified the Respondent of an alleged discrepancy between the provisions of the signed Article and the notes the Complainant had taken at a prior negotiating session. Thereafter, the Respondent offered to negotiate on the alleged discrepancy. However, the Complainant insisted that the Article be changed to reflect the position indicated by its notes and no satisfactory agreement or resolution of differences was reached.

The Administrative Law Judge found no evidence in the record which would warrant reformation or modification of the Article in dispute. He noted also that the Respondent had offered to and, in fact, did meet and confer with the Complainant on the alleged discrepancy but that it was the Complainant which was inflexible. Accordingly, he found that the Respondent did not violate Section 19(a)(1) and (6) of the Order.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF THE AIR FORCE, 15th AIR BASE WING, HICKAM AIR FORCE BASE, HAWAII

Respondent

and

Case No. 73-933(CA)

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 556, AFL-CIO

Complainant

DECISION AND ORDER

On January 5, 1978, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 73-933(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C. March 22, 1978

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ In reaching his decision herein, the Administrative Law Judge utilized, among other things, as authority an analysis set forth in the U.S. Civil Service Commission's Office of Labor-Management Relations Information Guide (OLMR Info-Guide No. 75-28). It should be noted that the OLMR Info-Guides are issued by the U.S. Civil Service Commission pursuant to its responsibility under Section 25(a) of the Order to provide policy guidance to agencies. As such, they do not constitute appropriate authority for decisions by the third-parties, including Administrative Law Judges, under the Executive Order.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W. Washington, D.C. 20036



In the Matter of

United States Department of the Air Force, 15th Air Base Wing Hickam Air Force Base, Hawaii Respondent

and

Service Employees International Union, Local 556, AFL-CIO Complainant

Case No. 73-933(CA)

Captain Dan M. Scheuermann, Esquire 15th Air Base Wing/VA Hickam Air Force Base, Hawaii APO San Francisco, California 96553 For the Respondent

Eric A. Seitz, Esquire 3049-B Kalihi Street Honolulu, Hawaii 96819 For the Complainant

Before: RHEA M. BURROW Administrative Law Judge

RECOMMENDED DECISION

This is an unfair labor practice proceeding in which a formal hearing of record was held on July 20, 1977, in Honolulu, Hawaii pursuant to Executive Order 11491, as amended (hereinafter referred to as the Order). The Respondent was charged with violating Sections 19(a) (1) and (6) of the Order by failing to bargain in good faith and unilaterally altering the wording of a provision of a collective bargaining agreement after a final accord was

purportedly reached upon such provision. 1/ Upon the basis of the entire record, 2/ including the evidence adduced, timely brief, my observation of the witnesses and judgment of their credibility, I make the following findings, conclusions and recommendations.

Findings of Fact

1. Complainant, Services Employees International Union, Local 556 AFL-CIO, is and was at all times material herein, the authorized collective bargaining representative to the unit consisting of all nonsupervisory employees, including off duty military personnel, of the Billeting Non Appropriated Fund Activity, 15th Air Force Base Wing, Hickam Air Force Base, Hawaii.

2. From about early November 1976, through February 1977, the parties were engaged from time to time in negotiating a collective bargaining agreement.

1/ The specific complaint is set forth as follows: "The above named activity has engaged in conduct violative of Sections 19(a)(1) and (6) in that Mr. Robert J. Rosen, Chief negotiator for the activity has failed to bargain in good faith. During negotiations on December 17, 1976, agreement was reached by the parties on the content of Article 18, Section 3. On January 5, 1977, Article 18 was signed off by the parties. Upon final proof reading of the negotiated agreement by the Union negotiators, it was found that the content of Article 18, Section 3 as it was signed off, did not conform to the agreement reached on December 17, 1976. Mr. Rosen refuses to abide by the agreement reached on December 17 and denies the existence of such agreement. Mr. Rosen also refused to disclose the Activity's notes on negotiations when the parties met on February 14, 1977 to attempt to informally resolve the complaint.

2/ The 15th Air Force Base Wing letter of March 16, 1977, with attachments, addressed to Mr. Dale Bennett, Area Administrator of the Honolulu Office of the LMSA and the Department of Labor request of March 4, 1977 are pursuant to a stipulation of the parties dated August 10, 1977 made a part of the Assistant Secretary's Exhibits.

3. One of the items under consideration and occasionally discussed by the parties, concerned Article 18 of a proposed agreement relating to "Disciplinary Actions," Section 3 of Article 18 pertained to "...situations where the disciplinary actions consists of a written reprimand..." After various proposals and counterproposals or changes the parties finally on January 5, 1977 signed Article 18 of the proposed agreement including Section 3, thereof which read

"Section 3. In situations where the disciplinary action consists of a written reprimand, the reprimand will be issued within 10 workdays of the preliminary discussion unless the union representative is notified of circumstances which would make its issuance impractical. The letter of reprimand will specify the infraction of regulations or the improper conduct, or the action which prompted it and where possible, state the time and place of occurrence. The letter will inform the employee that he may grieve the reprimand at Step 2 under the negotiated procedure." 3/

4. The Complainant Union maintains that "preliminary discussions" contained in Article 18, Section 3, were not mentioned in the negotiating session with the Activity on December 17, 1976, or on January 5, 1977, when Complainant signed Article 18, Section 3, containing the sentence: "In situations where the disciplinary action consists of a written reprimand, the reprimand will be issued within 10 workdays of the preliminary discussion unless the union representative is notified of circumstances which makes its issuance impractical."

Katy Mikasa, business agent for Complainant and one of its negotiators testified that the matter of preliminary discussions was raised with reference to more severe disciplinary actions such as suspensions and removals but not in

3/ Management's counterproposal dated December 17, 1976, read: "In situations where the disciplinary action consists of a written reprimand, the reprimand will be issued in a timely manner. The letter of Reprimand will specify the infraction of regulations or the improper conduct, or the action which prompted it and where possible, state the time and place of occurrence. The letter will inform the employee that he may grieve the reprimand at Step 2 of the negotiated agreement."

connection with written reprimands. Gregory Elliott, Vice President of Local 556, testified that the matter of preliminary discussion was raised only in connection with severe disciplinary actions and not in connection with letters of reprimand. Robert Rosen, Respondent's Labor Relations Specialist, testified from notes he took at the December 17, 1976 meeting with Complainant and stated that the term preliminary discussion was mentioned with regard to Article 18, Section 3. His note in shorthand was stated to read:

"Must have discussion and then add in Section 3 the previous provision I read about ten work days."

While the testimony between the parties is conflicting, I find that the notes taken by Robert Rosen contemporaneous with the December 17, 1976 meeting more accurately reflect the elements of discussion at that meeting. This is especially so, since preparation and negotiated changes fell within his realm to present at the ensuing meeting for consideration and/or adoption.

5. Despite previous proposals and counterproposals regarding Article 18, Section 3, this section was signed without comment or protest by both Complainant and Respondent representatives on January 5, 1977.

6. The methods and procedures utilized in formalizing Article 18, Section 3, presented to the Union for consideration on January 5, 1977, was not different from those of other sections of the proposed agreement reached by the parties.

7. The alleged discrepancy by Complainant relating to the term preliminary discussion contained in Article 18, Section 3 and signed by the parties on January 5, 1977, was initially called to Respondent Rosen's attention on January 24, 1977.

8. Even after Article 18, Section 3 was signed, the Respondent offered to negotiate after the alleged discrepancy was called to its attention but no satisfactory agreement or resolution of differences in position was reached.

Discussion and Conclusions

Section 19 of Executive Order 11491 relates to Unfair Labor Practices and provides in part, as follows:

(a) Agency management shall not -

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

The same obligation as is imposed upon Agency management in Section 19(a)(6) is also imposed on a labor organization by Section 19(b)(6).

The documentary and oral evidence clearly establishes that there had been several prior discussions relating to Article 18, Section 3, before the parties signed and signified their approval of its provisions on January 5, 1977. The parties who acknowledged, signed and negotiated Article 18 of the proposed Agreement on January 5, 1977, were the same as those who had participated in the previous discussions and were thus intimately aware of previous differences between the Union and Management Activity. Under such circumstances it was their duty and responsibility to carefully read and consider the language contained in the provisions of Article 18 before signifying their approval.

U.S. Civil Service Commission's Office of Labor Management Relations Information Guide (OLMR Info. Guide No. 7528 dated July 8, 1975) states:

Where agreement has been reached on the substantive provisions of the contract, the refusal to consider changes or additions to such agreements at this point does not constitute bad faith bargaining in violation of Section 19(a)(6). Obviously, the negotiations must have some form of finality; reconsideration of previously resolved matters, absent mutual assent, does not permit such finality.

More important than the provision of the cited guideline, the Assistant Secretary for Labor Management Relations in Community Service Administration, A/SLMR No. 749 stated with reference to the disputed version which appeared in a draft copy of Amendment 11, initialed at an earlier date by the parties that:

"While I agree with the Administrative Law Judge that where the language of an agreement clearly does not reflect what the parties agreed to it may be reformed, I do not view the evidence herein as clearly establishing that the language appearing in the final printed version of Amendment 11 did not reflect the parties agreement. Thus, reformation of an agreement is a remedy accorded by courts of equity to parties only where the agreement fails through fraud or mutual mistake to express the real agreement or intention of the parties. In this regard, two rules have been firmly established in equity to avoid needless disputes: First, that the burden is on the complaining party to prove the mutual mistake, or the mistake of one party and the deceit, fraud, or other inequitable conduct of the other upon which he relies for a modification or avoidance of the agreement; and, second, that in view of the written record of the terms of the agreement, a preponderance of the evidence is insufficient, and nothing less than evidence that is plain and convincing beyond reasonable controversy will constitute such proof as will warrant a modification or reformation of a written agreement." 4/

The evidence in the instant case establishes that Complainant's agents Mikasa and Elliott were experienced in negotiating contracts; they were present at the several drafting sessions when Article 18, Section 3, was discussed and on January 5, 1977 when it was signed by them. Further, by Complainant's own testimony it was disclosed that because of the nature of the billeting services, it is often more than a month before an incident, particularly with reference to lost articles is discovered. To insist on language Complainants now claim was agreed to, would make the Section ambiguous and perhaps unenforceable. In view of the past position of management in the drafting sessions, I do not find that Complainant has shown there was mutual mistake, or other mistake of one party coupled with deceit, fraud, or other inequitable conduct of the other upon which it relied as a basis for a modification, change, or avoidance

4/ Citing Williston on Contracts, Revised Edition, Sections 632, 633, 1552 and 1597.

of the agreement. Further, in view of the written record of the terms of Article 18, Section 3, the evidence is not so plain and convincing beyond reasonable controversy as would constitute proof sufficient to warrant modification or reformation of the terms of Article 18, Section 3. 5/ Further, when Respondent offered to confer, consult and negotiate with respect to Article 18, Section 3, when the alleged discrepancy was called to its attention almost three weeks after the Section had been signed by the parties, Complainants' position was inflexible, it insisted that Section 3 be changed or adopted to reflect the position indicated by its notes rather than the signed version of January 5, 1977. If there was any refusal to consult, confer or negotiate in good faith regarding Article 18, Section 3, in this proceeding, the record does not establish it was on the part of the Respondent.

From the foregoing, I conclude that:

- (1) the Respondent did not refuse to consult, confer, or negotiate with a labor organization as required by this Order;
- (2) the Respondent did not interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order.
- (3) The Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of Section 19(a)(1) and (6) of the Order.

RECOMMENDATION

Upon the basis of the above findings, conclusions, and the entire record, I recommend to the Assistant Secretary that the complaint in Case No. 73-933(CA), be dismissed in its entirety.

Rhea M. Burrow

 RHEA M. BURROW
 Administrative Law Judge

Dated: January 5, 1978
 Washington, D.C.

5/ At no time during the proceeding did the Respondent claim that the proposal in Article 18, Section 3 was other than a bargainable issue within the unit.

RMB:dmb

March 22, 1978

A/SLMR No. 1012

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
OFFICE OF CIVILIAN PERSONNEL
A/SLMR No. 1012

DEPARTMENT OF THE NAVY,
OFFICE OF CIVILIAN PERSONNEL

Respondent

and

Case No. 22-07332(CA)

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator Hilary M. Sheply's order transferring case to the Assistant Secretary of Labor in accordance with Section 203.5(b), 203.7(a)(4) and 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits and briefs, the Assistant Secretary finds:

The complaint herein alleges that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, when its agent, the Naval Air Systems Command, hereinafter called NASC, directed the realignment of its field activities at Lakehurst, New Jersey, without prior national consultation with the National Federation of Federal Employees, hereinafter called NFFE or Complainant.

The undisputed facts, as stipulated by the parties, are as follows:

The NFFE was granted national consultation rights by the Department of the Navy, a primary national subdivision of the Department of Defense, on May 25, 1971, in accordance with Section 9(a) of the Order and implementing instructions of the Federal Labor Relations Council, hereinafter called the Council. Administration of the Respondent's national consultation rights program has been delegated to the Office of Civilian Personnel, the Respondent in the subject case.

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees (NFFE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when its agent, the Naval Air Systems Command (NASC), directed the realignment of its field activities at Lakehurst, New Jersey, without prior national consultation with the NFFE, which held national consultation rights with the Department of the Navy.

Based on the stipulation of facts, accompanying exhibits, and briefs filed by the parties, the Assistant Secretary held that the Respondent's failure to notify the NFFE of the proposed substantive change in personnel policy violated Section 19(a)(1) and (6) of the Order as it deprived the NFFE of its right under Section 9(b) to comment on the proposed change. He concluded further that the Respondent violated Section 19(a)(1) and (6) of the Order by not affording the Complainant the opportunity to consult on the impact and implementing procedures of the change. In reaching the conclusion that the Respondent improperly failed to give notice to the Complainant, the Assistant Secretary found that the proposed change involved a substantive personnel policy within the meaning of the Regulations of the Federal Labor Relations Council.

Accordingly, the Assistant Secretary ordered the Respondent to cease and desist from the conduct found violative and to take certain affirmative actions.

In an Office of the Assistant Secretary of Defense News Release dated March 17, 1976, the Secretary of the Navy proposed management actions designed to improve overall fleet readiness through reductions in overhead and support costs. Among the proposed actions was a study for possible termination of air operations and consolidation of the remaining support functions at the Naval Air Engineering Center, Lakehurst, New Jersey, in Fiscal Year 1977. Approximately 13 military and 59 civilian jobs were to be affected. Thereafter, in a memorandum to the Chief of Naval Material, 1/ dated April 5, 1976, the Chief of Naval Operations, hereinafter called CNO, who is directly responsible to the Secretary of the Navy, nominated the Naval Air Station, Lakehurst, New Jersey, along with two other Naval activities, as "candidate realignment proposals." In this connection, the CNO referenced as the basis for his nominations the news release of the Secretary of the Navy, and reduced ceilings on support personnel required by the Department of Defense.

In a memorandum dated May 25, 1976, the Chief of the NASC directed the consolidation of the three commands at Lakehurst--the Naval Air Test Facility, the Naval Air Station, and the Naval Air Engineering Center--in order to effectuate the personnel reduction required by the April 5 memorandum from the CNO. 2/ The consolidation of support services was directed to be effectuated on October 1, 1976, the beginning of the Fiscal Year, and was to involve the reduction of 59 civilian positions as stated in the Secretary of the Navy's news release of March 17, 1976.

Findings and Conclusions

The central issue herein is whether the action taken at Lakehurst involved a substantive change in a personnel policy about which the Respondent was obligated to consult within the meaning of Section 9(b) of the Executive Order. 3/ The Respondent's position is that even assuming arguendo that the

- 1/ The Respondent's motion to correct the name of the "Naval" Material Command from "Navy" Material Command as it appears in the stipulation of facts is hereby granted.
- 2/ The NASC is a subordinate command of the Department of the Navy assigned to the Naval Material Command which, in turn, is directly responsible to the CNO.
- 3/ In its brief, the Respondent argued, among other things, that the instant complaint should be dismissed because it specified the actions of the NASC, rather than the Department of Defense (the Agency), or the Department of the Navy (the primary national subdivision), as being violative of the Order. In my view, the complaint herein is adequate as it names the Department of the Navy, Office of Civilian Personnel, as the Respondent and the Secretary of the Navy as the person to contact, and as the Complainant's clear thrust in specifying the NASC memorandum in its complaint was to point out an act of an agent of the primary national subdivision involved. It is noted, in this regard, that the Complainant was not given notice of the Secretary of the Navy's news release, nor was there any evidence that it knew of the CNO's implementing memorandum, except by reference in the NASC memorandum. Moreover, the Respondent's statement in its brief that the May 25 memorandum "...was a communication implementing instructions from higher authority..." was considered to be an indication that it too viewed the NASC Chief's action as that of an agent of the CNO.

action taken at Lakehurst was directed by a primary national subdivision, such action was not a proposed substantive change in a personnel policy within the meaning of Section 9(b) of the Executive Order and Section 2412.1 of the Council's Rules and Regulations. 4/ The Respondent argues that the consolidation of facilities at Lakehurst was not a substantive personnel policy within the meaning of the Council's definition because it was a one-time change at a single facility that was required by the Agency's mission and its organizational needs. I disagree.

The specified action set forth by the May 25, 1976, NASC memorandum was the Complainant's first notice of an agency-wide proposal for consolidation of its support facilities as outlined in the Secretary of the Navy's news release which was being carried out at three widely dispersed Naval facilities through the CNO's memorandum. 5/ Consistent with Section 2412.1 of the Council's Rules and Regulations, such an agency-wide consolidation proposal clearly would create and define the conditions relating to employee and labor organization rights, such as competitive areas for reduction in force and unit definitions. Moreover, the proposal sets a definite course of action which was to be followed by subordinate echelons as exemplified in the NASC's implementing memorandum, and it was formulated within the discretionary authority of the Secretary of the Navy as the method by which he proposed to achieve the lowered ceilings required by the Department of Defense.

The Council's Rules and Regulations also require that the proposed change be substantive in nature, i.e., a "change in the established rights of employees or labor organizations or the conditions relating to such rights." In the instant case, the proposal by the Secretary of the Navy to consolidate support activities agency-wide necessarily will result in the displacement of employees. Thus, here, as in Secretary of the Navy, Department of the Navy, Pentagon, A/SLMR No. 924 (1977), I view such a displacement as a fundamental substantive change in personnel policy. Under these circumstances, I find that the Respondent's failure to notify the NFFE of a proposed substantive change in a substantive personnel policy violated

4/ Section 2412.1 reads, in part:

Substantive personnel policy means a standard or rule which (a) creates and defines rights of employees or labor organizations, including conditions relating to such rights; (b) sets a definite course or method of action to guide and determine procedures and decisions of subordinate organizational units on a personnel or labor relations matter; and (c) is formulated within the discretionary authority of the issuing organization and is not merely a restatement of a course or method of action prescribed by higher authority.

Substantive change in personnel policy means a change in the established rights of employees or labor organizations or the conditions relating to such rights.

5/ The other facilities are the Navy Publications and Printing Service Offices in Washington, D. C., and the Naval Electronics Laboratory Center/Naval Under-seas Center, San Diego, California.

Section 19(a)(1) and (6) of the Order, as it deprived the Complainant of its right under Section 9(b) to comment on the proposed change. 6/

As I stated in Secretary of the Navy, Department of the Navy, Pentagon, cited above, Section 9(b) confers upon an agency an additional obligation, i.e., the obligation to consult with labor organizations holding national consultation rights over proposed substantive changes in personnel policy. However, this obligation is expressly limited by Section 9(b) to consulting over matters which would be negotiable and not reserved to management under the Order. In this regard, I agree with the Respondent that its decision dealing with the consolidation of support services and the resulting displacement of employees involves matters that are reserved to management under Section 11(b) and 12(b) of the Order, and no obligation exists to consult over the decision itself. However, I find that the Respondent was obligated to afford the Complainant prior notice of its proposed substantive change in a substantive personnel policy so as to afford the latter a reasonable opportunity to consult in person and present its views in writing regarding the impact and implementation of the proposed substantive change. 7/ Accordingly, I conclude that its failure to notify the Complainant and afford it the opportunity to consult on the impact and implementation of the proposed substantive change violated Section 19(a)(1) and (6) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Navy, Office of Civilian Personnel, shall:

1. Cease and desist from:

(a) Failing and refusing to notify the National Federation of Federal Employees, pursuant to its national consultation rights under the Order, of a proposed substantive change in personnel policy that affects employees it represents, and provide it with an opportunity to comment on such proposed substantive change.

(b) Failing to provide an opportunity for the National Federation of Federal Employees to consult in person and to present its views in writing on a proposed substantive change in personnel policy.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

6/ Secretary of the Navy, Department of the Navy, Pentagon, cited above.

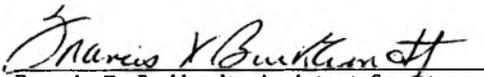
7/ See Tidwater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, FLRC No. 71A-56 (1973).

(a) Upon request of the National Federation of Federal Employees, pursuant to its national consultation rights under the Order, consult with that organization, to the extent consonant with law and regulations, concerning the procedures used to implement the Agency's new consolidation of support services policy and the impact of the change in policy on the adversely affected employees.

(b) Post at units of all affected Department of the Navy facilities and installations where the Complainant is the exclusive representative copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Director of the Office of Civilian Personnel and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer of each facility or installation shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of the order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
March 22, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

April 11, 1978

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT fail or refuse to notify the National Federation of Federal Employees, pursuant to its national consultation rights under the Order, of a proposed substantive change in personnel policy that affects employees it represents, and provide it with an opportunity to comment on such proposed substantive change.

WE WILL NOT fail to provide an opportunity for the National Federation of Federal Employees to consult in person and present its views in writing on a proposed substantive change in personnel policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employees in the exercise of their rights assured by the Executive Order.

WE WILL, upon request of the National Federation of Federal Employees, pursuant to its national consultation rights under the Order, consult with that organization, to the extent consonant with law and regulations, concerning the procedures used in implementing the new consolidation of support services policy, and the impact of the change in policy on adversely affected employees.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Rm. 14120, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

THE SMITHSONIAN INSTITUTION
A/SLMR No. 1013

This case involved a petition filed by the American Federation of Government Employees, AFL-CIO, Local 2463 (AFGE) seeking an election in a residual nationwide unit of all currently unrepresented nonprofessional General Schedule (GS) and Wage Grade (WG) employees of the Agency. The AFGE took the position that the petitioned for unit is inherently appropriate because it includes all unrepresented GS and WG nonprofessional employees of the Agency, nationwide. The Agency asserted, among other things, that the AFGE should have first consolidated its existing units at the Smithsonian before filing the petition herein.

The Assistant Secretary found that all the unrepresented GS and WG employees of the Agency, nationwide, constituted an appropriate unit for the purpose of exclusive recognition under the Order. In reaching this conclusion, he noted that employees in the claimed residual unit are engaged in a common mission, and are subject to similar personnel policies and practices established by Civil Service laws and by the Agency. Thus, the Assistant Secretary concluded that the petitioned for employees share a clear and identifiable community of interest. Moreover, he found that the claimed residual unit could reasonably be expected to promote effective dealings and efficiency of agency operations. With respect to the Agency's contention that the AFGE should have first consolidated its existing units at the Smithsonian before filing the petition herein, the Assistant Secretary noted that the determination of the appropriateness of the petitioned for unit in the instant case is a separate and independent determination from any determination of appropriateness under the unit consolidation procedures. He noted also that petitions for consolidation may be filed by agencies as well as labor organizations should the agency involved believe this appropriate in a particular situation.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

THE SMITHSONIAN INSTITUTION

Agency

and

Case No. 22-07524 (RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2463

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Daniel Francis Sutton. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a joint statement filed by the parties after the hearing, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Agency.
2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 2463, hereinafter called AFGE Local 2463, seeks essentially an election in a residual nationwide unit of all currently unrepresented nonprofessional General Schedule (GS) and Wage Grade (WG) employees of the Smithsonian Institution. 1/ In this regard, it takes the position that the petitioned for unit is inherently appropriate because it includes all unrepresented GS and WG nonprofessional employees of the Agency nationwide. On the other hand, the Agency asserts that AFGE Local 2463 should have first consolidated its existing units at the Smithsonian Institution before filing the petition herein, and that the unit sought is inappropriate inasmuch as it does not bear a resemblance to the Agency's organizational structure.

The mission of the Smithsonian Institution is to foster the increase and diffusion of knowledge. Created by an Act of Congress in 1846, the Agency is currently a leading research center and museum complex which

1/ At the hearing, AFGE Local 2463 amended its petition seeking to represent "all currently unrepresented, appropriated fund, nonsupervisory, non-professional, General Schedule and Wage Grade employees of the Smithsonian Institution, nationwide."

conducts scientific and scholarly research, administers national collections, and performs other educational public service functions. The chief executive officer of the Agency is the Secretary of the Smithsonian who is responsible for administering the day-to-day affairs of the Institution. Under him organizationally are the Under Secretary, Assistant Secretaries for Science, History and Art, Public Service, Museum Programs, and certain Administrative Officers, such as the General Counsel, Treasurer, Auditor, Director of Support Activities, Coordinator of Membership and Development, as well as over 60 bureaus and activities. In addition, the Agency has a number of boards and commissions.

The record discloses that the petitioned for unit consists of approximately 1,400 GS and WG employees located throughout the Agency within the United States. At present, AFGE Local 2463 represents exclusively some 1,073 GS and WG employees of the Agency. In this connection, the record shows that, within the United States, AFGE Local 2463 is the exclusive representative of units of the nonprofessional GS and WG employees in: the National Zoological Park, excepting park police, 2/ the Craft Services Division (formerly the Mechanical Services Division), the Photographic Services Division, the Protective Services Division, the Office of Exhibits Programs, and certain employees of the Office of Plant Services. All of AFGE Local 2463's units are covered by negotiated agreements with the Agency.

The Agency's GS and WG employees, including those employees in the petitioned for unit, are in the Civil Service, are subject to the rules and regulations of the Civil Service Commission, and have identical benefit, health and retirement plans, the same annual and sick leave accrual system and pay schedules. Further, they are covered by similar personnel policies and practices established by the Secretary of the Smithsonian and coordinated by the Agency's Personnel Office. In this latter regard, they share the same overall merit, equal opportunity and labor relations programs of the Agency and have similar occupational codes and classifications. The record reveals that the Personnel Office at the Agency provides advice, guidance and technical assistance in labor-management relations matters and that negotiated agreements are reviewed and given final approval by the Secretary of the Smithsonian Institution, or the Acting Secretary.

Based on all of the foregoing circumstances, I find that the petitioned for nationwide residual unit is appropriate for the purpose of exclusive recognition under the Order. Thus, the evidence demonstrates that employees in the claimed residual unit are engaged in a common mission, and are subject to similar personnel policies and practices established by Civil Service laws and by the Agency. Under these circumstances, I find that the employees in the petitioned for unit share a clear and identifiable community of interest.

2/ AFGE Local 185 has represented park police at the National Zoological Park since 1963.

Moreover, in my view, the petitioned for residual unit can reasonably be expected to promote effective dealings and efficiency of agency operations. Thus, in addition to the existence of uniform agency personnel policies and practices, it was noted that the Agency's Personnel Office gives advice and guidance in labor-management relations matters and that negotiated agreements are reviewed and approved by the Secretary of the Smithsonian. With respect to the Agency's contention that the unit is inappropriate because it does not bear a resemblance to the Agency's organizational structure, the record reflects that a number of the existing exclusively recognized units consist of divisions or offices whose employees are located physically at a number of different facilities of the Agency and that this has not hindered the Agency in the negotiation or administration of negotiated agreements. Therefore, the petitioned for unit of all the remaining unrepresented GS and WC employees will, in fact, prevent further fragmentation and will also, in my view, promote effective dealings and efficiency of agency operations. 3/

Accordingly, I shall order an election in the following unit which I find appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All the unrepresented General Schedule and Wage Grade employees of the Smithsonian Institution, nationwide, excluding management officials, professional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Order.

DIRECTION OF ELECTION

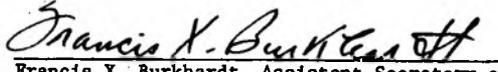
An election by secret ballot shall be conducted among employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those who are employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on

3/ Regarding the Agency's contention that AFGE Local 2463 should seek to consolidate its existing units before petitioning for the remainder of the unrepresented nonprofessional GS and WC employees herein, it should be noted that the determination of the appropriateness of the petitioned for unit herein is a separate and independent determination from any determination of appropriateness under the unit consolidation procedures. Moreover, it is noted that petitions for consolidation of units (UC) may be filed by agencies as well as labor organizations should the agency involved believe this appropriate in a particular situation.

furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 2463.

Dated, Washington, D. C.

April 11, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

April 11, 1978

A/SLMR No. 1014

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
ATLANTA DISTRICT OFFICE,
ATLANTA, GEORGIA
A/SLMR No. 1014

INTERNAL REVENUE SERVICE,
ATLANTA DISTRICT OFFICE,
ATLANTA, GEORGIA

Respondent

and

Case No. 40-7435(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NATIONAL TREASURY
EMPLOYEES UNION, CHAPTER 26

Complainant

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and National Treasury Employees Union, Chapter 26 (Complainant) alleging the Respondent violated Section 19(a)(1) and (6) of the Order by denying the Complainant the right to be represented at a formal discussion within the meaning of Section 10(e) of the Order.

The Administrative Law Judge concluded the Respondent had not violated Section 19(a)(1) and (6) of the Order. In his view, the meeting involved herein between management and unit employees was not a formal discussion within the meaning of Section 10(e) of the Order.

Contrary to the Administrative Law Judge, the Assistant Secretary found that the Respondent violated Section 19(a)(1) and (6) of the Order. The Assistant Secretary concluded the meeting in question was a formal discussion within the meaning of Section 10(e) of the Order because part of the meeting concerned the discussion of three memoranda relating to personnel policies and practices and working conditions of employees in the unit. In reaching this conclusion, the Assistant Secretary did not view the scope of Section 10(e) of the Order so narrowly as to encompass only discussions concerning changes or proposed changes in personnel policies and practices or other matters affecting the general working conditions of employees in the unit. Rather, in his view, Section 10(e) requires the exclusive representative be afforded the opportunity to be represented at discussions between management and unit employees when the subject matter being discussed concerns personnel policies and practices and working conditions of bargaining unit employees. Thus, in the Assistant Secretary's opinion, the exclusive representative has a legitimate interest in representing the unit employees' interests regarding the terms and conditions of employment, including matters in an existing negotiated agreement. He noted that the exclusion of the exclusive representative from such discussions would result in bypassing the exclusive representative regarding the very matters for which it was chosen by the unit employees to act as their spokesman.

Accordingly, the Assistant Secretary ordered the Respondent to cease and desist from the conduct found violative of the Order and take certain affirmative actions.

DECISION AND ORDER

On October 31, 1977, Administrative Law Judge David W. Pelkey issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Report and Recommendation.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Report and Recommendation and the entire record in the subject case, including the exceptions and supporting brief filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation, only to the extent consistent herewith.

The complaint herein alleges, in essence, that the Respondent violated Section 19(a)(1) and (6) of the Order when it failed to notify and afford the Complainant an opportunity to attend a meeting conducted by management with employees concerning personnel policies and practices affecting working conditions of employees in the unit. The Administrative Law Judge concluded that the Respondent had not violated Section

19(a)(1) and (6) of the Order as, in his view, the meeting in question, held on November 13, 1975, was not a formal discussion within the meaning of Section 10(e) of the Order. 1/

The essential facts of the case, which are not in dispute, are set forth, in detail, in the Administrative Law Judge's Report and Recommendation, and I shall repeat them only to the extent necessary.

The record reveals that a detachment of the Respondent's employees are assigned to, and perform their duties in, Columbia, South Carolina. These employees are under the direct supervision of the Group Manager-Employee Plans, hereinafter called the Group Manager, who is stationed at the Respondent's office in Atlanta, Georgia. Periodically, the Group Manager visits the detachment and conducts meetings with the employees there. On or about September 22, 1975, the Complainant and the Respondent executed a "Memorandum of Agreement" which provided, in part, that bargaining unit employees who perform their duties at a geographic location separated from the rest of the bargaining unit may be represented for certain purposes by a representative of the Complainant who is not normally associated with that bargaining unit.

On or about November 13, 1975, the Group Manager met with the employees in Columbia, South Carolina. Neither she, nor any other official of the Respondent, notified the Complainant about, or afforded the Complainant the opportunity to attend, the meeting. Although the subject matter of the meeting was not divulged to either the employees or the Complainant prior to the meeting, one of the employees requested that a representative of Complainant attend the meeting. The Group Manager, however, refused to allow the Complainant's representative to attend the meeting stating, in essence, that no changes in personnel policies and practices or other matters affecting working conditions were to be discussed. Thereafter, during the meeting with the employees, the Group Manager, among other things, distributed copies of three memoranda from the Respondent addressed to all employees. These memoranda were variously entitled, "Restoration of Annual Leave," "Open Season for Health Benefits - November 15 through December 31, 1975," and "Employee's Responsibilities in Timekeeping." She also discussed the subject matter of each of these memoranda with the employees during the meeting.

The Respondent contends, among other things, that the November 13 meeting was not a formal discussion within the meaning of Section 10(e) of the Order since the purpose of the meeting was not to announce or

1/ Section 10(e) states, in pertinent part: "When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. . . . The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning . . . personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

make any changes in personnel policies and practices, or other matters affecting general working conditions of employees in the unit. On the other hand, the Complainant asserts, among other things, that formal discussions under Section 10(e) of the Order are not restricted only to those meetings where changes are proposed in personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

Contrary to the Administrative Law Judge, I find that, under the particular circumstances herein, the November 13 meeting was a formal discussion within the meaning of Section 10(e) of the Order. Thus, as indicated above, part of the meeting's agenda concerned three memoranda relating to annual leave, employee health benefits, and employee time-keeping responsibilities, clearly matters involving personnel policies and practices and working conditions of employees in the bargaining unit. In this regard, the record clearly reflects that the subject matter of the three memoranda was discussed at the meeting.

While formal discussions under Section 10(e), in many instances, have involved discussions between management and unit employees concerning proposed changes in existing personnel policies and practices and other matters affecting general working conditions of unit employees, 2/ I do not view the scope of Section 10(e) so narrowly as to encompass only discussions concerning changes or proposed changes in such matters. Rather, I view Section 10(e) as requiring that an exclusive representative be afforded the opportunity to be represented at discussions between management and unit employees where, as here, the subject matter being discussed concerns personnel policies and practices and working conditions of the employees in the bargaining unit. In such circumstances, the exclusive representative has, in my opinion, a legitimate interest in representing the interests of the unit employees with regard to their terms and conditions of employment, including matters in an existing negotiated agreement. The exclusion of the exclusive representative from such discussions, in effect, would result in the bypassing of the exclusive representative with regard to the very matters for which it was chosen by the unit employees to act as their spokesman.

Under these circumstances, because the November 13 meeting involved a discussion between management and unit employees concerning personnel policies and practices and matters affecting the employees' working conditions, I find that such a meeting constituted a formal discussion within the meaning of Section 10(e) of the Order. Accordingly, the Respondent's failure to notify and afford the Complainant the opportunity to be represented at the November 13 meeting constituted a violation of Section 19(a)(1) and (6) of the Order.

2/ Cf. e.g. Rocky Mountain Arsenal, Denver, Colorado, A/SIMR No. 933 (1977), and Federal Aviation Administration, Springfield Tower, Springfield, Missouri, A/SIMR No. 843 (1977).

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Atlanta District Office, Atlanta, Georgia, shall:

1. Cease and desist from:

(a) Conducting formal discussions between management and unit employees, or their representatives, concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit, without notifying and affording the National Treasury Employees Union, Chapter 26, the exclusive representative of its employees, or any other exclusive representative of its employees, the opportunity to be represented at such discussions.

(b) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Order by failing to notify and afford the National Treasury Employees Union, Chapter 26, or any other exclusive representative of its employees, the opportunity to be represented at formal discussions between management and employees, or employee representatives, concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

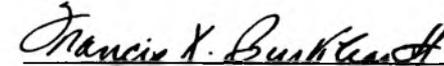
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Executive Order:

(a) Notify the National Treasury Employees Union, Chapter 26 of, and afford it the opportunity to be represented at, formal discussions between management and unit employees, or their representatives, concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(b) Post at its facilities at the Internal Revenue Service District Offices, located in Atlanta, Georgia, and Columbia, South Carolina, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director, Internal Revenue Service, Atlanta, Georgia, and they shall be posted for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
April 11, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and unit employees, or their representatives, concerning personnel policies and practices or other matters affecting general working conditions of employees in the unit, without notifying and affording the National Treasury Employees Union, Chapter 26, the exclusive representative of our employees, or any other exclusive representative of our employees, the opportunity to be represented at such discussions.

WE WILL NOT interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Order by failing to notify and afford the National Treasury Employees Union, Chapter 26, or any other exclusive representative of our employees, the opportunity to be represented at formal discussions between management and employees, or employee representatives, concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify the National Treasury Employees Union, Chapter 26 of, and afford it the opportunity to be represented at, formal discussions between management and unit employees or their representatives, concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 the employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
: In the Matter of: :
: :
: INTERNAL REVENUE SERVICE AND :
: IRS ATLANTA DISTRICT OFFICE :
: Respondents :
: :
: and :
: :
: NATIONAL TREASURY EMPLOYEES :
: UNION (NTEU CHAPTER 26) :
: Complainant :
:
:

Case No. 40-7435 (CA)

"The violations concern the failure of Internal Revenue Service to inform NTEU that a formal meeting was being held concerning personnel policies, practices and matter affecting working conditions. Additionally, the IRS violated 19(a)(6) of the Executive Order by refusing to consult, confer or negotiate with NTEU prior to the distribution of a memorandum entitled 'Employee's Responsibility in Timekeeping' at a group meeting conducted in Columbia, South Carolina on November 7, 1975."

The date should have read November 13, 1975.

Upon review of a Regional Administrator's dismissal of the complaint, the Assistant Secretary of Labor issued an April 11, 1977, determination. In pertinent part, the Assistant Secretary stated:

"Accordingly, your request for review, seeking reversal of the Regional Administrator's dismissal of the complaint with respect to the 'Timekeeping' memo, is denied. The remaining allegation of the complaint [i.e., with regard to whether the November 13, 1975, meeting was a formal discussion within the meaning of Section 10(e) of the Order] is hereby remanded to the Regional Administrator, who is directed to reinstate that portion of the complaint, and, absent settlement, to issue a notice of hearing."

Such a notice issued on April 29, 1977, and I conducted a hearing thereunder in Columbia, South Carolina, on June 14, 1977. The hearing was conducted in accordance with the provisions of 5 United States Code 554.

The last sentence of Section 10(e) of the Order reads:

"The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

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For the Complainant

Before: DAVID W. PELKEY
Administrative Law Judge

Report and Recommendation

Background

Complainant filed a complaint on June 22, 1976, in which it alleged that Respondents had engaged in activities in violation of Subsections 19(a)(1) and (6) of Executive Order 11491, as amended (Order). In part, the complaint stated:

At the hearing, the parties submitted the following issue for resolution:

Whether a November 13, 1975, meeting that a group manager held, with some of the employees she supervised, constituted a formal discussion within the meaning of Section 10(e) of the Order.

Complainant submitted that the meeting was a formal discussion because personnel policies and practices, and other matters affecting general working conditions, were discussed at the meeting. Respondents submitted that the meeting was not a formal discussion because no changes in personnel policies and practices, and other matters affecting general working conditions, were discussed at the meeting.

Such issue will be discussed and disposed of in connection with my consideration of the pertinent facts I find to be established as a result of my examination and evaluation of the entire record developed herein. The facts found to be established follow.

Findings of Fact

1) At all times pertinent hereto, a Multi-District Agreement (MDA) governed relationships between Internal Revenue Service (I.R.S.) representing 56 district offices and National Treasury Employees Union (NTEU) representing chapters holding exclusive recognition in those district offices. I.R.S. Atlanta District Office (ADO) was one such office. Chapter 26 was one such chapter. Chapter 55, of the Columbia, South Carolina, District Office (CDO) was another such chapter.

2) Some employees assigned to an Employees Plan/Exempt Organizations (EP/EO) Group in ADO performed their duties at an I.R.S. facility in Columbia, South Carolina. In this connection ADO was identified as the "key" district (the district charged with administrative responsibility attending an I.R.S. function). In this connection, CDO was identified as the "satellite" district (the district at which some key district employees accomplished administrative responsibilities attending an I.R.S. function).

3) The EP/EO key district employees who performed their duties at the satellite district were under direct supervision of a Group Manager (manager) located at ADO. During the period pertinent hereto, the manager visited and met with EP/EO employees at the satellite district periodically.

4) A September 22, 1975, Memorandum of Agreement executed by Director, Personnel Division, I.R.S., and National President, NTEU, provided, in part and with respect to processing grievances at Step 1, that key district employees at the satellite district could be represented by a satellite district union steward.

5) Prior to November 13, 1975, an ADO EP/EO employee (Hook) invited a CDO union official (Golden) to attend a meeting that the manager had scheduled for that date with EP/EO employees at the satellite district. At the time he extended the invitation, Hook was unaware of the subject(s) on the agenda for the meeting.

6) Neither the manager nor any representative of Respondents notified Complainant of the scheduled November 13 meeting.

7) Golden presented himself as Complainant's representative for attendance at the meeting. He was denied permission to attend by the manager.

8) At the June 14, 1977, hearing, Golden testified that the manager told him that he was being denied admission because she did not intend to discuss personnel policies and practices or other matters affecting working conditions. At the hearing, the manager testified that she told Golden that he was being denied admission because no changes in personnel policies and practices or other matters affecting working conditions were to be discussed.

9) Complainant was given no opportunity to be represented at the November 13, 1975, meeting.

10) The November meeting was attended by the manager, the five specialists who performed duties at the satellite district and the group clerk located at that district.

11) As of November 18, 1975, the manager submitted a report to her Division Chief that enumerated 41 items that were "discussed" at the meeting. The report was typed by a secretary at the key district from notes made by the manager and the satellite district clerk during the meeting.

12) One item related to the Regional Commissioner's October 23, 1975, memorandum to all region employees, the subject of which was "Restoration of Annual Leave." Substantively, the memorandum referenced relief afforded to

employees, faced with leave forfeiture under certain conditions, by Public Law 93-181. It encouraged planned scheduling of leave to avoid forfeiture and set forth guidelines to be followed to effect permissible restoration of forfeited leave.

13) At the meeting, the manager gave each attendee a copy of the memorandum, paraphrased some of its contents, "highlighted" some conditions under which lost leave could be restored, and solicited proposed leave schedules for the remainder of the year. Among the participants, there was conversation "[a]s conversation goes at an informal meeting" but there were no questions relating to the memorandum posed by the specialists or the clerk and there was no assertion of a problem attending forfeited leave.

14) Another item related to the Health Benefits Coordinator's November 6, 1975, memorandum to all employees, the subject of which was "Open Season for Health Benefits - November 15 through December 31, 1975." Substantively, the memorandum advised employees of options open to them under health benefits plans during the specified period.

15) At the meeting, the manager gave each attendee a copy of the memorandum, invited their attentions to its contents, and suggested individual pursuit of questions relating to health benefits. No questions relating to the memorandum were posed by the specialists.

16) A third item related to an Administration Division Chief's November 7, 1975, memorandum to all employees, the subject of which was "Employee's Responsibilities in Timekeeping." Substantively, it referenced pay problems attributable to unfamiliarity with timekeeping procedures; it reminded employees of their responsibilities for leave approval, timecard accuracy, and errors in leave and earnings statements. It recommended that the timekeeper be consulted relative such matters.

17) At the meeting, the manager gave each attendee a copy of the memorandum; noted its contents; received comments from two attendees relative to time card errors; and tendered an unaccepted offer to assist one such attendee with his problem.

18) Other items "discussed" at the meeting have been treated by the parties hereto as technical matters not significantly concerning grievance, personnel policies and practices, or other matters affecting general working conditions.

Discussion

The unfair labor practice complaint is bottomed on the proposition that the November 13, 1975, meeting that the manager had with her group at the satellite district was a "formal meeting" that was "held concerning personnel policies, practices and matters affecting working conditions."

Relative to the "formal meeting" aspect of the proposition, I determine that the record contains a preponderance of and substantial evidence to support a finding that the meeting was "formal" in nature and form. I so find.

The meeting, identified as "Post of Duty Visit-Group Meeting," was one of a series of meetings that the manager conducted periodically with her group at the satellite district. A written record was made of matters that were covered at the meeting. The manager supplied her Division Chief with a written report on the meeting.

Relative to the aspect of the proposition that is concerned with the purpose of the meeting, I determine that the record contains a preponderance of and substantial evidence to support a finding that the meeting was not "held concerning personnel policies, practices and matters affecting working conditions." I so find.

Initially, I note that the record contains no probative evidence that, prior to the time thereof, the meeting was represented as one that would be concerned with any of the referenced subjects. Rather, Complainant's witnesses testified that, prior to the meeting, they had no knowledge of what was to be on the agenda. Witness Golden stated that, prior to the meeting, the manager represented that she did not intend to discuss such subjects. Witness Hook testified that, prior to the meeting, the manager told Golden that "technical matters" were to be subjects thereof. For Respondents, the manager testified that, prior to the meeting, she told Golden that changes in the referenced subjects would not be discussed at the meeting.

Secondly, I note the parties' submission that, of the more than 40 items on the agenda for the meeting, only the documents relating to A) restoration of annual leave, B) health benefits and C) timekeeping responsibilities concern grievances, personnel policies and practices and/or other matters affecting general working conditions. In connection therewith. I find no decisionally persuasive evidence of

record to establish the fact that the meeting was scheduled for the significant purpose of discussion of the contents of those documents.

On brief and with reference to the documents relating to annual leave and timekeeping responsibilities, Complainant submits "that portions of the meeting...involved leave administration." In support thereof, Complainant notes that the annual leave memorandum involved a policy attending forfeiture of earned annual leave; notes that the policy constituted a matter that had an impact on all employees at the meeting; notes that the memorandum was distributed at the meeting; notes that, in connection with the distribution, the manager requested submission of leave requests; notes that the manager then had in her possession a document that was mentioned in the memorandum; and notes that there were matters relating to the memorandum that the manager could have discussed but did not discuss.

Further in support thereof, Complainant notes that the timekeeping memorandum effected recognition of leave and pay problems; notes the unique situation attending the physical separation of the satellite district group from the manager; notes Hook's testimony relative to a discussion of the memorandum's contents and his leave problems; and notes matters that the manager could have discussed but did not discuss.

Thereafter, Complainant concludes that "it is apparent that the meeting...was a 'formal meeting' within the purview of Section 10(e) of the Order."

I find that the submissions, notations and conclusions are not decisionally persuasive that the meeting was formal, that its significant purpose was discussion of the documents or that the documents were discussed.

I have heretofore dealt with the "formal meeting" aspect of the proposition on which the complaint is based. My examination and evaluation of the decisional persuasiveness of the evidence involving the annual leave and timekeeping responsibilities memoranda result in my determination that the record does not establish that the meeting was "held concerning personnel policies, practices and matters affecting working conditions."

I find that a preponderance of the credited evidence establishes that the meeting was held for the substantive purpose of discussion of technical problems by the manager and her group. I find that, in connection with accomplishment of that purpose, the manager elected to effect, and did effect, distribution to her group of three memoranda directed to all employees by the Regional Commissioner, the Health Benefits Coordinator and the Administration Division Chief. I find that, in connection with such distribution, there was no decisionally significant discussion of the contents of the memoranda.

My findings involve recognition and evaluation of each witness' testimony relative to statements made, questions asked, replies made, comments offered, and ideas exchanged relative to the memoranda at the meeting. Further, they involve recognition and evaluation of the fact that the written notes and report reflecting activities at the meeting indicate that there were discussions of the contents of the memoranda at the meeting.

I recognize Complainant's argument, on brief, that there was a violation under the Order if the referenced documents were distributed at the meeting without a discussion of the contents thereof. The submission is bottomed on the proposition that Section 10(e) is designed to preclude any distribution of documents that is accompanied by a prohibition against discussion of the contents of the documents. I find the submission and proposition to be without merit. They fail, properly, to recognize so much of the unambiguous language of the section as involves representation "at formal discussions ...concerning..." (underscoring supplied). I find no language in the section designed to control the act of distribution of written documents as tendered by Complainant.

It is my determination that the group manager's November 13, 1975, meeting with her group was not a formal discussion within the meaning of Section 10(e) of the Order. My determination is based on my finding that the meeting did not concern grievances, personnel policies and practices, or other matters affecting general working condition of employees in the unit.

In view of the foregoing, no decisional purpose will be served by a resolution of the issue relating to whether discussions of changes in personnel policies and practices, and other matters affecting general working conditions are dispositive in identifying formal discussions under Section 10(e).

April 11, 1978

Recommendation

I recommend that the complaint be dismissed.


David W. Pelkey
Administrative Law Judge

Dated: October 31, 1977
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NATIONAL LABOR RELATIONS BOARD,
REGION 17, and NATIONAL LABOR RELATIONS BOARD
A/SLMR No. 1015

This case involved an unfair labor practice complaint filed by David A. Nixon (Complainant) against the National Labor Relations Board, Region 17, and the National Labor Relations Board (Respondents). The complaint alleged, in substance, that the Respondents violated Section 19(a)(1), (2) and (4) of the Executive Order by virtue of their actions in according the Complainant an adverse performance appraisal on April 30, 1976, which was in retaliation for his pressing grievances under a negotiated agreement as well as for his filing complaints under the Executive Order.

The Administrative Law Judge found that the Complainant's exercise of his protected rights was not the basis for the adverse appraisal accorded the Complainant. In this connection, he found, in agreement with the appraisal, that although otherwise a competent attorney, the main reason for the Complainant's adverse rating was his inability to get along with others, his insensitivity in interpersonal relations, and the continual objections raised by the Complainant with respect to instructions given him. The Administrative Law Judge cited various instances, recounted in the appraisal, of the Complainant's behavior with respect to his opposition to supervision in case handling, as well as personality difficulties with his peers, as symptomatic of the appraisal's finding that he was unfit to be a supervisor. The Administrative Law Judge found as well that nowhere in the appraisal does it appear that any supervisor relied upon or gave consideration to the Complainant's processing of grievances or complaints during this evaluation period. Accordingly, he recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL LABOR RELATIONS BOARD,
REGION 17, and NATIONAL LABOR
RELATIONS BOARD

Respondents

and

Case No. 60-4909(CA)

DAVID A. NIXON

Complainant

DECISION AND ORDER

On November 3, 1977, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 60-4909(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 11, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of

NATIONAL LABOR RELATIONS BOARD,
AND NATIONAL LABOR RELATIONS BOARD,
REGION 17

Respondents

Case No. 60-4909 (CA)

and

DAVID A. NIXON

Complainant
.....

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For the Respondents

DAVID A. NIXON, ESQ.

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Appearing Pro Se

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on February 23, 1977 by the Regional Administrator for Labor-Management Service of the U.S. Department of Labor, Kansas City Region, a hearing in this case was held before the undersigned on April 4, 5, 6, 7, 8, 12, 13 and 14, 1977 at Kansas City, Missouri.

This proceeding arises under Executive Order 11491, as amended (herein called the Order). A complaint was filed on September 28, 1976 by David A. Nixon (herein called Complainant or Nixon) against the National Labor Relations Board and Region 17 of the National Labor Relations Board (herein called Respondents or the Board). The said complaint alleged, in substance, that Respondents prepared and rendered a discriminatory appraisal, dated April 30, 1976, of Complainant; that said adverse rating governed Complainant's eligibility for promotion, and was in retaliation for his pressing grievances under the collective bargaining agreement as well as his filing complaints under the Order; and that the test applied to Complainant in the appraisal was more onerous than applied to co-workers - all in violation of Sections 19(a)(1)(2) and (4) of the Order. Respondents filed an answer to the complaint on November 5, 1976, which essentially denied any discriminatory motivation behind the appraisal. The alleged disparate treatment of Complainant by Respondents was likewise denied.

Both parties were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered. 1/

Upon the entire record herein, from my observation of the witnesses and their demeanor, and based on all the testimony and evidence adduced at the hearing, I make the following findings of fact, conclusion, and recommendations:

Findings of Fact

1. At all times material herein a collective bargaining agreement has existed between the General Counsel of the Board and the National Labor Relations Board union covering the professional employees (Examiners and Attorneys) employed in the Regional, sub-regional and resident offices of the Board.

2. Article VI of the aforesaid agreement provides for career development of employees under the responsibility of the Regional Director. Provision is made in said article for annual evaluations and appraisal interviews of unit

1/ In his brief Complainant moved to correct the transcript in respect to certain errors contained therein. The motion is granted, and the transcript is corrected as set forth in the attachment herein marked "Appendix".

employees, as well as discussion with an employee before any adverse recommendation is forwarded by a Regional Director to Washington. In respect to promotions of unit employees, provision is also made for review of the said evaluations and rating of such employees as "well qualified" or "not ready" for supervisory positions. Employees rated "well qualified" are to be placed on applicable competitive promotion registers.

3. The collective bargaining agreement also contains a grievance procedure (Article XII) for the resolution of disputes over the interpretation or application of the agreement.

4. Complainant is employed by the Board as a GS-14 Field Attorney in the Kansas City, Missouri Regional Office. He was first hired by the agency in 1965 as a GS-9 attorney in the sub-regional office at Peoria, Illinois. In 1966 Nixon was promoted to a GS-11 and received a superior performance award in January 1967. During the latter year he was transferred to the Kansas City Office - Region 17 - where he has remained to this date. 2/ In the latter part of 1967 Complainant was promoted to a GS-12. Two interim appraisals of Nixon were accorded him on July 31, 1968 and August 8, 1968 respectively by his supervisor Robert Uhlig and Regional Attorney Thomas Hendrix. While the appraisal reflected that Nixon performed his duties in a competent manner, criticism was leveled toward him in respect to his relationships with the public and staff personnel. However, based on recommendations of his supervisors, Complainant was promoted to a GS-13 attorney in February 1969.

On November 4, 1970 Regional Director Thomas Hendrix and Regional Attorney Harry Irwig recommended that Nixon be rated not well qualified for a GS-14. Although both supervisory officials rendered adverse appraisals 3/ of this employee, their conclusions were predicated on his inability to get along with others and not upon his competency as an attorney.

2/ Complainant's supervisor in the Peoria Office, S. Richard Pincus, rendered an appraisal which complimented Nixon's performance and skills but indicated that he had difficulty in the area of "personal relations." Pincus commented that unnecessary friction was created between Complainant and others.

3/ These appraisals covered the period from November 1969 to November 1970.

Appraisals were subsequently accorded Complainant by both Hendrix and Irwig covering October 1970 - June 24, 1971. Relying on Irwig's appraisal of June 24, 1971, which recommended that Nixon not be rated well qualified for a GS-14 non-supervisory attorney, Hendrix concurred and adopted the conclusion of the Regional Attorney that this employee engaged in various altercations with staff attorneys and was remiss in certain aspects of case handling. 4/ Grievances were filed by the Union and Nixon on July 14, 1971 and August 3, 1971 respectively under the negotiated grievance procedure, wherein it was alleged that the rating procedure had not been in accordance with the contract. The grievance was found to be meritorious by Associate General Counsel John Irving, new appraisals were accorded Complainant, and the latter was promoted to a GS-14 non-supervisory attorney in February 1972.

Subsequent appraisals were accorded Complainant by both Hendrix and Irwig for the period June 1, 1971 - June 2, 1972. Once again references were made to Nixon's inability to get along with others, as well as accept criticism or follow instructions, and he was rated not well qualified for a GS-14 supervisory position. Appraisals were accorded Complainant on June 23, 1973 (referred to as the 1973 appraisal and covering June 1972 - June 1973); on June 14, 1974 (referred to as the 1974 appraisal and covering June 1973 - June 1974); on May 1, 1975 (referred to as the 1975 appraisal and covering June 1974 - May 1975); and on April 28, 1976 (referred to as the 1976 appraisal and covering April 1975 - April 1976). 5/ In each appraisal since June 1973, Complainant was faulted for poor workmanship and interpersonal relationships, as well as reluctance to accept criticism or follow instructions, and he was rated not well qualified for GS-14 supervisory position.

5. During his tenure with the Kansas City Regional Office, Nixon has frequently sought to protect his interests, as well as others, as employees of the Board. To this extent he has engaged in various acts of protected activity in the Regional office as follows:

4/ The appraisal conceded that the cited examples of poor performance by Nixon were of minor importance.

5/ An appraisal was, in fact, prepared by supervisor Herzog for the period April 26, 1975 - December 1, 1975 and by supervisor Gerald A. Wacknov for the period February 5, 1976 - April 28, 1976. Since Wacknov relied upon Herzog's adverse comments as foreclosing any recommendation to rate Nixon as well qualified for GS-14 supervisor, Complainant attacks Herzog's appraisal as being discriminatorily accorded.

(a) Since about 1972 Complainant has acted as chairperson of the "Committee to Implement Executive Order 11491." In that capacity he has communicated at various times with Felix Brandon, Director of Personnel for the Board regarding the Order and its revisions. Further, he has requested the Board to comply with the Order and state its policies how it would be implemented, and Nixon has, on occasion, posted notices on bulletin boards.

(b) Since 1970 Complainant has filed various grievances under the negotiated grievance procedure. In some instances these grievances were personal, i.e. (1) his grievance filed in October 1974 against Hendrix for being assigned to Herzog's team; (2) his grievance filed on October 10, 1975 against Hendrix for being charged with annual leave for October 6, 1975. In other instances Nixon filed grievances on behalf of other staff members which involved conditions of employment pertaining to them. Management was aware of Complainant's role in seeking implementation of the Order by the Board, and it was likewise cognizant of his having filed grievances under the contract.

(c) Upon being accorded adverse appraisal for the years 1972, 1973, 1974, and 1976, Complainant filed complaints against the Board and its Region 17 under the Order herein. He alleged discrimination in not being rated well qualified for a GS-14 supervisory position; and he contended that such discrimination was due to filing grievances under the collective bargaining agreement or unfair labor practice complaints under the Order. In the prior cases Complainant asserted the reasons advanced for denying him a rating of "well qualified" for supervisory attorney were pretextual in nature; that the true basis for such denial was his protected concerted activity as aforesaid. 6/

6/ Cases No. 60-3035 (A/SLMR No. 295 and 664 -1972 appraisal) and No. 60-3721 (A/SLMR No. 671 - 1974 appraisal) involved additional acts of alleged discrimination by the Board. In both of these cases and in No. 60-3449 (A/SLMR NO. 670 - 1973 appraisal) Nixon alleged disparate treatment visited upon him by the Board. The Assistant Secretary held, in all of the aforesaid cases, that legitimate considerations prevailed - based on Nixon's interpersonal relationships and personality problems - for not rating him well qualified for a GS-14 supervisory positions. In A/SLMR No. 671 he found a violation of 19(a)(1) and (4) based on adverse comments by

(d) In addition to the complaints filed against the Board alleging unfair labor practices based on discriminatory appraisals for the particular years, as aforesaid, Complainant filed a grievance under the contract based on an adverse appraisal accorded him for 1975. He contended therein that such appraisal was discriminatory and disparate, and that management's rating him as "not ready" for supervisory positions should be overturned. The matter proceeded to arbitration, and on January 28, 1977, arbitrator Anthony v. Sinicropi denied the grievance and sustained the decision of the Board wherein it concluded Nixon was not well qualified for a GS-14 supervisory position. 7/

6. Record facts show that field attorneys Richard Auslander, Ron Broun, John P. Hurley, William V. Johnson, Edward D. Pribble, and Gerald A. Wacknov - all in Region 17 - were rated well qualified for supervisory positions; that each employee was an official of the local union; and that Auslander and Wacknov were supervised and appraised by Herzog. Further, Auslander filed several grievances in 1973 and 1974, some of which were worked on by Nixon; that Auslander filed a grievance in 1973 prepared by Nixon and concerning the latter and two other attorneys; and that Auslander was rated well qualified for supervisory attorney thereafter.

7. In November 1969 Frederick C. Herzog became supervisor of Complainant. After a three week period, Nixon was re-assigned to work under another supervisor due to Herzog's inexperience. On October 15, 1974 Herzog was designated as Nixon's supervisor once again. Several discussions ensued between these two individuals. The supervisor suggested they attempt to get along, stating he would treat Nixon fairly. Herzog asked Nixon what he could do to show good faith in this respect. The latter requested that Herzog assign a new attorney to work with him so that, to refute the claim of Hendrix and Irwig, Nixon would show he could get along with others. The supervisor agreed to consider the idea, but latter rejected it as not being feasible or expedient. During these discussions Complainant commented that he saw no reasonable basis for trusting Herzog - that

6/ [Cont'd]. Nixon's supervisor in the 1974 appraisal due to Nixon's having engaged in certain protected activity under the Order.

7/ Certain portions of the evaluation which were unsubstantiated in the arbitrator's opinion, were ordered expunged therefrom. These included criticisms made in the appraisal regarding Nixon's conduct or performance when handling particular cases.

the latter was identified with management and part of the same group which had rendered unfavorable appraisals of the employee in the past.

8. The career development program, set forth in the collective bargaining agreement, is intended to provide means for identifying persons who are suitable for advancement by the Board. Further, it is designed to prepare employees for top positions as trial or investigative professionals and administrative posts. The keystone of the system is the annual appraisal which is composed of two parts: (a) Part I consisting of 20 evaluation factors dealing with such items as employee's performance, personal characteristics or traits, and abilities to deal with others, organize and plan work, delegate responsibility and direct others, accept responsibility, as well as train or develop others. Each factor has several accompanying descriptive comments, and the supervisor must check that comment along side every factor which most nearly reflects his assessment of the individual employee who is being appraised; (b) Part II consists of a narrative statement concerning the employee rated, and should include specific examples supporting an evaluation of the individual's progress, readiness for promotion, and potential within the agency.

9. The 1976 appraisal 8/ of Complainant, upon which his rating was based, consists of the marked or checked evaluation factors together with the narrative and its appendices prepared by supervisor Herzog. In respect to the evaluation factors checked by Herzog, they reflected adverse comments regarding Nixon's judgment, dependability, ability to get along with others, oral communication, ability to direct others, and acceptance of responsibility. The narrative portion of this appraisal specifies the particular cases wherein Nixon is faulted for either poor performance or causing difficulties involving interpersonal relationships. In summation Herzog concluded that certain aspects of Complainant's work were not correct - and that the employee is thus not performing as expected from a higher grade level. Further, he stated that Nixon requires detailed supervision, disregards routine operating procedures, does not accept normal supervision, and continues to have problems in getting along with others. In Herzog's opinion,

8/ Complainant's Exhibit 2.

Nixon was not properly ratable as well qualified for a supervisory position. As a result of this appraisal, and the concurrence therewith by Regional Director Hendrix, the Complainant was rated by the Board's review panel as "not ready" for a GS-14 supervisor or higher levels.

10. The narrative comment by Herzog in the 1976 appraisal referred to the various number of assigned cases to Nixon involving investigations of non-priority as well as priority unfair labor practice charges and representation positions, noticing representation matters for hearing, drafting of complaints, and litigation work performed by this employee. In connection therewith, reference was made to the number of days elapsing from the original date of assignment to Nixon of each case until the date he completed his handling of the matter. Except as noted infra, no criticism was leveled by Respondents against Nixon re the timeliness and quantity ^{9/} of his work, and Herzog commented that Complainant is very industrious and conscientious. The particular aspects of Nixon's work deemed incorrect by his supervisor, as well as criticism of his conduct, are referred to in the specific cases or matters mentioned in the narrative. These matters and the incidents which occurred are as follows:

(a) Paniplus Company 17-CA-6631

A regional agenda was held to consider this case on July 29, 1975 attended by Nixon and the supervisory staff. A decision was made to "Collyerize" ^{10/} this case, and Nixon pointed out that the case had a few unusual aspects, including an unclear provision in the contract, so that it might not serve as a good vehicle for arbitration. It was agreed that Nixon would draft a memo with the recommended language for the Collyer letter. ^{11/}

^{9/} The narrative comment alludes to the fact that Nixon's work show remarkable improvement in these areas. While Complainant deems this a negatively implied criticism, I do not agree. Moreover, except as specifically noted, no fault is found in Nixon's timeliness or quantity of case handling. Accordingly, I make no adverse finding in this regard.

^{10/} This term refers to a policy whereby certain cases would be deferred to the grievance and arbitration procedure of an existing collective bargaining agreement. In such instances no complaint would issue.

^{11/} Revised guidelines were issued by the General Counsel re "collyer" letters to be issued.

On July 31, 1975 Herzog approved the second paragraph of the Collyer letter prepared by Nixon and noted in writing that footnotes 1 and 2 set forth in the "Collyer -Revised Guidelines" were inapplicable. The supervisor then spoke to Complainant, in the presence of local union president Eric Wagner. He told Nixon that the letter omitted a paragraph required by the established guideline, and that the requisite language had been changed. After advising Nixon that the Collyer letter was incorrect, Herzog left the document with the Complainant and returned to his office. Later Nixon went to Herzog's office, said he can't find any error and that it comports with the decision made at the agenda. Herzog disagreed that it was in accordance with the agenda decision. The Complainant remarked he didn't like the way Herzog tossed the paper at him and spoke in such cavalier tones. The discussion became somewhat heated, Nixon's voice became loud, and both individuals were pointing fingers at each other. The supervisor said he wanted it done properly ^{12/}, and that Nixon should sit down and stop pointing his finger. The latter remarked he was asserting his rights, that nobody tells him when he can gesture, whether to sit or stand, or how to talk.

Wagner, who became worried that Nixon might be fired, asked Herzog if he could talk to Nixon. The supervisor assented, saying he just wants the Collyer letter to issue. Wagner called Nixon at home, telling him that if Nixon changed the letter, the matter would be forgotten. Complainant became real angry, saying the letter was tailored to fit this case. Wagner told Nixon it was a real bad situation. The next day Wagner brought the letter in final form to Herzog, but changed "respondent" to "charged employee". The supervisor wrote Nixon a memo to the effect that he would let it go.

Several days later Wagner and Herzog discussed the incident again. The union official was concerned that Complainant would be fired and inquired if it would be in Nixon's appraisal. The supervisor stated that he has recommended adverse action be taken against Nixon but Regional Director Hendrix disagreed; that the incident would not be in the appraisal if Wagner assured Herzog the Complainant understood his conduct was not allowed in a business office. No such assurance was made.

^{12/} Nixon's testimony indicates he made an issue as to whether Herzog found the Collyer letter incorrect or was told by Regional Attorney Irwig it was faulty. Since it is apparent that the supervisor conveyed the idea that the letter was not properly prepared, the factual issue raised by Complainant needs no resolution.

(b) Admiral Merchants Motor Freight - 17CA6566
Inland Center - 17CA6577

Complainant drafted dismissal letters 13/ in both of these cases. In each instance the language employed by Nixon appeared on a single page and required extensive modifications. Quite a few lines were stricken by the supervisor, and the latter added language as well as revised the particular wording employed by Nixon. In his narrative comment Herzog stated that the editing was excessive, particularly on routine work, and typified required modification of Nixon's work.

(c) IBEW, Local 265 (Ed Peeks Electric Co.)
17CC602

During his investigation of this priority case, involving a secondary boycott, Nixon obtained an affidavit from the charging party's production superintendent on June 5, 1975. He wrote a memo on June 6, 1975 to Hendrix and Herzog recommending dismissal of the charge based on lack of merit. His supervisor, Herzog, wrote a memo to the file on June 9, 1975 concurring with the recommendation but suggested that Nixon's affidavit taking technique would be improved. Specifically, he noted that (1) there was no commerce data therein; (2) the description of the physical layout could be more specific; (3) picket sign language should have been included in the affidavit; (4) it was not clearly stated where the "reserved" gate was placed; and (5) details were needed re crossing picket line. Nixon wrote a memo to the file on the same date explaining that the affiant was not familiar with the details which Herzog stated were necessary, and the company attorney agreed to submit the commence date; that the physical layout as given was sufficient to decide the merits of the case; that the criticism re the "reserved" gate is ill founded and is plain from any fair and reasonable reading of the affidavit; that Nixon does not require a witness to record his knowledge and recollection of matters encompassed within his affidavit.

The record also shows that Nixon did not impart this information directly to Herzog, nor did he write a memo to the file explaining the absence of this information.

13/ Complainant's Exhibit 2, Attachments B and C.

Neither did Herzog discuss these deficiencies with Nixon or inquire of the latter the reason for such absence. 14/

(d) Northern States Beef 17RC7731

On May 21, 1975 Nixon was assigned this case for decision writing 15/ with a draft to be due on June 2, 1975. Criticism was leveled against him for submitting the draft 15 days late and for various errors contained therein. He was faulted for: (1) using the wrong form for the decision; (2) inserting the name of the intervening union in the caption; (3) failing to insert the names of the Petitioner and Intervenor in the direction of election as choices to be selected as the bargaining representative by employees; (4) extensive corrections in the draft of the decision itself. 16/

(e) Fremont Manufacturing Company 17CA6688

Complainant was called upon to prepare, in this case, a written response to the company's motion seeking answers to its interrogatories. The draft was approved by Richard Auslander, acting supervisor, who gave it to Herzog, acting Regional Attorney. The latter told Auslander the draft was not satisfactory since it did not "get to the point", did not cite the lead case in opposition to the motion, and did not state that discovery proceedings were inapplicable to Board matters. Herzog referred to a prior case handled by Jill Brown wherein she drafted such a response, he gave Auslander a copy thereof and said that is how he wanted Nixon's response to be drafted.

14/ This case was filed on June 3, and the case file was turned in to Herzog by Nixon on June 6 (Friday) at approximately 4:45 p.m. Although Respondents contend it took 6 days to complete the investigation - since Herzog could not review it till Monday - I do not conclude that Nixon is subject to criticism therefor. The record establishes that Respondents did not fault him for timeliness and I make no finding that Nixon was remiss in this respect.

15/ During the evaluation period Nixon was not required to write any other Decision and Directions of Elections than this one.

16/ No denial was made by Nixon as to the errors alleged in respect to his draft of this decision. He adverts, however, to several decisions drafted by other field attorneys which required considerable revisions; and that, nevertheless, these individuals were rated well qualified for supervisory positions. Reference will hereinafter be made to these decisions as well as Nixon's contention with regard thereto.

Auslander spoke to Nixon and told him the draft was unacceptable, and that Herzog wants him to follow the response of Jill Brown as a guide. Nixon replied that his draft was all right; that it was hard to accept Herzog's in place of his own. Whereupon Auslander advised Herzog of his difficulty in getting Nixon to accept Jill Brown's response as a sample, and he asked Herzog to speak to Nixon in regard to the matter. Latter Herzog spoke to Nixon as requested. The latter inquired if it was terribly wrong. Herzog replied in the negative but stated it was not what he wanted, and that the form used by Jill Brown should be followed. It was resubmitted by Nixon as requested.

(f) Harmon Industries, Inc. 17CA6753

This case was investigated by Complainant herein, and an agenda was held when he was not in the regional office. A decision was reached to issue complaint subject to obtaining additional information, and Auslander - who was supervising Nixon at the time - wrote a memo advising Nixon of that decision. Upon his return Complainant spoke to Auslander who agreed that perhaps the information wasn't really necessary. Nixon asked him to write a dissent, which Auslander agreed to consider doing but finally just wrote a memo which was characterized by Nixon as a "whitewash". The latter told his supervisor it was one of the best investigations he conducted; that Irwig was trying to retaliate after the decision of Administrative Law Judge Devaney in Case No. 60-3721. Nixon and Auslander also discussed the advisability of interviewing the three witnesses at the plant, but Nixon was concerned about bypassing the employer's attorney. The supervisor then told Herzog he was having difficulty getting Nixon to pursue the investigation. Herzog spoke to Nixon who remarked it was not his style to skip counsel. Whereupon Herzog said the data could be obtained from the three rank and file employees, and no "skipping" of counsel was involved. The additional information was obtained. 17/

(g) Kustom Electronics 17RC7669

Complainant is faulted by Respondents for not setting this case for hearing until 12-13 days after the date it was due to be set.

17/ No criticism was directed to Nixon in respect to the quality of his investigation in the Harmon case.

This post-election matter involved 22 objections to a representation election and 47 challenged ballots of voters in the election. Record facts show it was assigned to Nixon on October 29, 1975 when he was out of town; that he returned on that date, but was again out of town on November 4, 5 and 12 investigating unfair labor practice cases; and that he was on leave November 7 and 10. There was some question as to whether one-half of the objections were timely and should have been made by the regional office. Nixon conferred with the attorneys involved in the matter on November 11.

On November 6 Herzog spoke to Nixon re issuing a Notice of Hearing. On November 10 and 11 they discussed whether to proceed since unfair labor practice charges had been filed. Herzog told Nixon to ascertain whether a request to proceed could be obtained, and if not, to proceed with the hearing. Record testimony indicates the language was prepared on November 12; that Nixon secured a date for the hearing and submitted it for typing at that time; and that he wrote a memo to the Assistant Regional Director on November 18, that the Notice of Hearing had not yet issued. The Notice of Hearing was thereafter issued on November 20.

(h) Day and Zimmerman 17RC7871

It is asserted that this case, originally assigned to Nixon, was transferred to another Board agent since Nixon failed to timely check the authorized cards or set the case for hearing. Record facts show, and I find, this matter was assigned to Nixon just prior to his going on approved annual leave; that he had spoken to the employer who advised him the firm would have an attorney; that Nixon left a message for the attorney to call him; that Nixon told his acting supervisor, Ward Summerville, he couldn't follow up on the matter since he was going on annual leave, but he would do as much as possible. Summerville told Nixon not to worry; that he would reassign the case and have someone else handle it. Nixon came in the office on that weekend, and he wrote a memo to Summerville advising that he had not heard from the attorney.

(i) R. L. Jones, 17CA6469, 17CB1459

In regard to the trial of these cases set for July 21, 1975, it was agreed beforehand that each case would be tried by a different attorney in the regional office - Nixon to try the CA case, and Ward Summerville to try the CB case. It was suggested that each act independently since both

attorneys would be privy to information which, if exchanged, could result in a breach of ethics. Moreover, Nixon was concerned that his primary witness might be discredited by Summerville and thus prejudice the trial of the CA case. Both field attorneys agreed that a motion would be made to the Administrative Law Judge to proceed with the CA case first and then try the CB case afterward; that Summerville would make no appearance in the CA case but would be present at the hearing.

Just prior to the hearing Summerville sat at the counsel table next to Nixon. The latter, in a loud voice, said to Summerville, "what are you doing? - you're not in this case." Whereupon Summerville left the table with his files and told Herzog what happened - and he further stated he had been so embarrassed that he never wanted to try a case with Nixon again. Summerville returned to the courtroom and sat in a spectator's seat. Regional Attorney Irwig appeared at the hearing room and inquired why Summerville was not at the counsel table, Nixon replied that Summerville had no part in the CA case. Irwig said he belonged there and directed Nixon to make room for Summerville. The latter thereupon sat at the table, and some place was made available by Nixon for Summerville thereat. After the parties came to the hearing room, and they explained the contemplated procedure for trying both cases, Summerville moved away from the counsel table.

(j) Staff Meeting at the Regional Office
on September 5, 1975

A meeting of the regional office staff was convened for September 5, 1975 as a result of the very poor record established by the region with respect to settlement of cases. Representatives from Washington were also present thereat. Associate General Counsel Joseph De Sio, who conducted the meeting, and Thomas M. Harvey, Assistant General Counsel. De Sio informed the staff that they contemplated instituting a system whereby weekly reports would be made by the professional re settlement efforts made by them in assigned cases. Several members of the staff spoke in response to this proposal. Wagner objected to management's effecting this plan without bargaining about it, and he stated it should have been negotiated. Field Attorney Broun also asserted it should have been discussed with the union. In reply thereto, De Sio said he disagreed; that the matter was a right belonging to management and hence was not a bargainable issue. Complainant spoke at the meeting and stated

that De Sio was giving them a "fiat"; that while the staff was asked for their views, they were meeting a brick wall; that notification should have been given beforehand and the matter made a subject for collective bargaining. He inquired why management asked for their views if it was not attaching any weight to them.

Field Examiner Joseph M. Logan then spoke, remarking that Nixon was an independent contractor and did not speak for anyone but himself; that it was a shame that De Sio and Harvey had to come from Washington to listen to Nixon. Whereupon Complainant attempted to reply and De Sio cut him off from further comments. Nixon protested that Logan had not been stopped from further discussion, and De Sio stated that he was cutting off the whole discussion. 18/

After the foregoing remarks Nixon, who was seated to the right of Logan, stared at the latter which resulted in Logan saying "anytime". Nixon then replied "anytime what, Logan?". Both individuals repeated these words, and then Logan stated, "anytime, anyplace". Nixon asked "anytime, anyplace what, Logan?". At this point the meeting was concluded and Logan departed hastily from the room. As Logan reached the door, Nixon, who had been following him, remarked, "you better run, Logan." At this point Herzog placed his hand on Nixon's arm and told him that he was out of line. Nixon stated that Herzog didn't know what happened, and the latter replied he didn't have to know. Nixon remarked, anytime you grab me, you better know what happened, particularly if you are going to tell me that I am out of line".

Upon leaving the meeting several of the staff members - Harvey, Field Examiner Johnson, Supervisor Patton, Herzog and Complainant - met for a short time to discuss the matter. Complainant stated he would not file a grievance if management assured him it would be a "dead" issue and he wouldn't read about it in his next appraisal. No commitment was made. Upon leaving for lunch Nixon met Herzog in the hallway and the latter said he wanted to meet about the matter. Complainant replied he would meet but only with the predicate of a grievance; that he had been threatened by Logan, but had no desire to pursue this matter if he were assured it would not be noted in the next appraisal. Herzog agreed to

18/ The appraisal does not refer to or mention the fact that Nixon, Logan, or other employees spoke at this meeting and objected to management's effecting a new procedure without bargaining about the matter. Neither does it set forth, and purport to rely upon, the derogatory comments made by Logan to De Sio.

consider Nixon's terms, but later conveyed a message to Nixon that he should forget it. 19/

11. Case cards were kept by Herzog on the various matters handled by his team members. A memo written by him re Peek Electric Co., on June 23, 1975, reflected that Wagner of the union approached him that day; that he inquired re a memo written by Herzog to Nixon as to his technique in taking affidavits; and that Wagner advised Herzog the union would not file a grievance over the matter as Nixon requested of it.

12. Record facts reveal that management herein criticized at times, various work products of other field attorneys who have been rated well qualified for supervisory position. Thus, it is shown that John Hurley drafted four representation decisions, some of which contained many errors, and which required extensive revision; Richard Auslander, William Bevan, Ronald Broun, and Edward Pribble also drafted decisions of this type - all of which contained deficiencies similar to those present in Nixon's drafts and resulted in editing and modification by management. 20/

A draft of a dismissal letter was prepared by Auslander in Case No. 17 CB 1383 which involved an unfair labor practice charge against a union. Supervisor Herzog revised the essential clause therein, adding language and striking out phrases or words proposed by Auslander. Although the alterations were similar, in type, to those made in the drafts submitted by Nixon in the Admirals Merchants and Inland Center cases, they were not quite as extensive.

During his tenure as an acting supervisor in November and December 1975, Logan became involved in a dispute with Field Examiner Raymond Weghorst who was under his supervision. Logan concluded that Weghorst had mishandled a case in respect to its settlement and wrote a memo criticizing the examiner and his credibility. Weghorst also wrote a memo in explanation thereof, and the conflict between these

19/ Based on a conversation between Johnson and Herzog, it was understood by the former that the matter would be a "dead letter" and not be included in Nixon's appraisal. The record does not support a finding that Herzog agreed not to mention the incident in a forthcoming evaluation.

20/ Exhibits C26 thru C32(a) and C35.

individuals resulted in a grievance being filed by Nixon on Weghorst's behalf. 21/

13. Appraisals of seven other field attorneys in Region 17 rated well qualified revealed that, in some instances, certain of these individuals were faulted for deficiencies of performance or particular aspects of conduct. 22/ Thus, it appears that (a) one such attorney was not meeting time targets in the handling of his case assignments, and several cases were considerably beyond the median time fixed for completion of investigations and drafting complaints; (b) criticism was leveled against three of these staff attorneys for their untimely submission of drafts of decisions and directions of elections prepared by them. Moreover, drafted decisions submitted by two of the attorneys required reworking by them or their supervisors; (c) one of the seven colleagues was faulted for temperament which was described as sometimes giving the appearance of a negative or pessimistic outlook upon his work or life in general. The trait was not accorded undue emphasis, and the appraisal of such employee recited that it would appropriate for the supervisor to discuss with the individual his willingness to control this factor.

14. Except as heretofore indicated, all seven appraisal examined in camera reflect that each attorney performed excellent work in the handling of representation and unfair labor practice cases. Moreover, each field attorney was described as possessing different characteristics which the supervisor deemed supportive of the rating given for the attorney. Some of these were: (a) generating trust among professionals, (b) communicating clearly without appearing dogmatic, (c) accepting responsibility, (d) displaying willingness to undertake additional assignments and carry them out in a responsible fashion, (e) establishing

21/ Nixon contends that this conflict demonstrates the unprofessional conduct exhibited by Logan which precipitated a confrontation. Moreover, Logan was ultimately promoted to a supervisory examiner.

22/ These appraisals were furnished by Respondents at the Request of Complainant and submitted to the undersigned at the hearing. In accordance with the ruling of the Federal Labor Relations Council in FLRC No. 73A-53, the appraisals of these attorneys - who were either GS-13 or GS-14 - were examined in camera by the undersigned at the hearing. Further, mention was made on the record by him re criticisms directed in the appraisals toward those employees, who were unidentified, by their supervisors.

excellent personal and professional relations in the office, (f) displaying a willingness to discuss shortcomings and take steps to correct them.

15. Prior to leaving the Kansas City regional office Herzog completed the appraisals required by him as a supervisor. On or about December 30, 1975 Tom Harvey spoke to him re this completion and Herzog informed Harvey he had two more to finish, one of which was Nixon's appraisal; that he needed corroboration on some points if the case ever went to trial. Harvey told Herzog to inquire of other participants if they agree with the facts, and Herzog said he intends to do so. 23/

Contention of the Parties

It is contended by Complainant that Respondents violated Sections 19(a)(1), (2) and (4) of the Order by according him a discriminatory 1976 appraisal, which resulted in his being rated not well qualified for a GS-14 supervisory position. He asserts that the alleged deficiencies ascribed to his work performance, as well as criticisms of his personal traits, are pretextuous in nature. Complainant insists that Respondents harbor animus against him by virtue of his having filed and pressed both grievances under the contract and complaints pursuant to the Order; and that such activity, which is protected, prompted the adverse rating accorded him. Moreover, he contends, in support of the alleged discrimination that Respondents applied a disparate test to him - vis a vis other similary situated members of the staff - by imposing more onerous standards upon his performance than upon such other co-workers.

In denying that it has violated the Order, Respondents insists the 1976 appraisal of Nixon was based on his poor work performance and the existence of various personal traits or characteristics which are antithetical to being a supervisory field attorney. Respondents firmly aver that neither Complainant's pursuance of his right under the contract by filing grievances, or his filing of complaints under the Order, motivated the adverse evaluation. Further, it insists no disparate and discriminatory test in evaluating Nixon, more onerous than applied to other employees, was utilized in said appraisal by the supervisor.

23/ Summerville testified that certain information which he imparted to Herzog, reflecting credit upon Nixon during the Jones trial in excluding certain evidence, was not part of Nixon's appraisal by Herzog.

Conclusions

The Order herein is designed, inter alia, to protect employees who exercise certain right assured them thereunder. Thus, any action by an agency or activity undertaken to discourage or interfere with an employee's filing of grievances pursuant to a negotiated agreement, is destructive of such right and violative of 19(a)(1) of the Order. See Department of Defense, Arkansas National Guard, A/SLMR No. 53. Moreover, Section 19(a)(2) thereof specifically prohibits discrimination in regard to conditions of employment which encourages or discourages union membership. It is also violative of Section 19(a)(4) for agency management to discipline or discriminate against an employee based on his having filed a complaint under the Order. In the instant case Complainant asserts that Respondents were illegally motivated in rendering an unfavorable appraisal - all in violation of the foregoing provisions.

Alleged Discriminatory Motivation of Respondents

In support of his claim that management's actions reflected animus against him because he engaged in concerted and protected activities, Complainant particularly adverts to the following:

(a) Initially, he maintains that the letter 24/ dated December 18, 1974, which he received from Herzog, demonstrates animosity due to pursuing his rights under the Order. I do not agree. While it patently expressed Herzog's exasperation with Nixon re the latter's accusation against management, as well as the futile efforts to establish a constructive relationship with the employee, it does not contain express or implied threats to interfere with Nixon's concerted ation. Reference is made, it is true, to grievances filed by Complainant. However, the language employed by Herzog reflects he was desirous that Complainant separate his comments regarding case handling from matters relating to his grievances. In truth, Herzog stated therein that Nixon should file grievances or actions (sic) under the Order, but to refrain from harassing him. Further, the supervisor declared his concern that the counter exchange between them has resulted in the continuation of a personality conflict - all of which derogated from the processing of cases in the regional office. I view the aforesaid letter as an expression of discontent by Herzog with Nixon based upon the latter's assertions regarding his supervisor. It

24/ Complainant's Exhibit 51.

does not, in my opinion, indicate an attempt to thwart Complainant from filing grievances or complaints, nor does it reflect animus against Nixon for engaging in such actions.

(b) It is also argued that the findings of the Assistant Secretary in National Labor Relations Board et. al, A/SLMR No. 671, involving the same parties reveals animus toward Complainant for exercising protected activities under the Order. In the cited case the Respondents were found to have violated 19(a)(1) and (4) by basing an adverse 1974 appraisal of Nixon, in part, upon his notification of an intention to file an unfair labor practice complaint. Moreover, it was concluded that Respondents violated 19(a)(1) by adversely criticizing Nixon in the appraisal for filing grievances; and that the inclusion of comments, re Nixon's request to his Congressman for assistance in removing an administrative law judge from an earlier case by him against Respondents, was violative of 19(a)(1) and (4) of the Order. Respondents were ordered to reappraise Nixon without consideration of his filing grievance or a complaint. While any reliance there on in 1964 was manifestly improper, I am unable to conclude that this appraisal was, a fortiorari, illegally motivated. The remarks were made in the earlier case by a different individual, and, albeit Respondents are responsible for their utterance, they do not serve to show animus two years later toward Complainant. Moreover, a reappraisal was made of Nixon without reliance upon such protected activity, and no discrimination or interference was found with respect thereto. In the case at bar no such reference were made in the 1976 appraisal, and I am loath to conclude that the improper comments made in the earlier appraisal should be deemed operative herein so as to warrant the inference that the appraisal was predicated on a discriminatory motive.

(c) Complainant relies, in part, upon the case card in Peeks Electric, supra which was kept by Herzog. The latter made a notation that Wagner discussed with him the memo written by Herzog to Nixon re his affidavit - taking technique; and that, further, the union would not file a grievance over the matter as Nixon requested of it. It is contended that memorializing the fact that Nixon sought union assistance, and any reliance thereon, evinces discriminatory intent on the part of the supervisor. I disagree with such contention. Apart from the fact that it does not appear Herzog based his appraisal upon the information imparted to him that Nixon requested union assistance, the notations were merely a summary of the discussion between supervisor

and the union president which were actually concerned with Nixon's technique in taking affidavits. The fact that Wagner volunteered the information that the union would not file a grievance as requested - which Herzog recorded on the case card - does not, in my opinion, render the recordation an inherently discriminatory act or reflect improper motive. Nixon cites Western Div. of Naval Facilities, A/SLMR No. 264 wherein a written notation in the personnel file that an employee was "active in the union" was held violative of the Order. However, that comment was specifically referable to the employee's unionism, and is distinguishable from a recitation that the union does not intend to file a grievance re a criticism made by management of an employee. Moreover, such a comment did not serve to establish, in the cited case, a discriminatory motive for refusing to transfer the complainant therein as alleged.

(d) To further his argument that the alleged deficiency of Nixon were pretextuous, he urges that management's failure to inform him of his unsatisfactory conduct at the Jones trial was probative evidence of a desire to use the incident in an adverse evaluation. Apart from the fact that Nixon was, in fact, informed that Respondent disapproved of his actions thereat, I cannot agree that management conspired to desist from notifying Nixon of its disapproval with such an intention in mind. Respondents were never averse to communicating their dissatisfaction to Complainant, and no record facts suggest they abstained from doing so in this instance in order to utilize the incident in a subsequent appraisal. Such an inference is not warranted and no basis exists therefor.

(e) Emphasis is also placed by Complainant upon the recitation in the appraisal of his conduct at the September 5, 1975 staff meeting. It is urged that such comments by Herzog abridged Nixon's protected rights since his conduct was intricably bound up with the exercise by him of such right; and that, further, the recital of the incident is per se violative of the Order.

It is noted by the undersigned that the remarks by acting supervisor Logan regarding Nixon, which were uttered at the meeting, were improper and may well be deemed an unwarranted interference with the complainant's protected activities, i.e. the right to voice himself re the negoti-

ability of management's proposed new procedure. 25/ As an acting supervisor who represented management in that capacity, Logan overstepped his bounds in stating to Associate General Counsel De Sio, after Nixon spoke and suggested the new procedure was a bargainable matter, that Nixon was an independent contractor who spoke only for himself and should not be heeded. However, the appraisal itself makes no reference to the protestations offered by Nixon re the negotiability of the proposed procedure. It does not focus upon the exercise by him of his rights at the meeting or the fact that he voiced opposition to management's proposal. It is limited in scope to the challenging remarks by Nixon to Logan, i.e. "anytime what" and "you'd better run, buddy." The conclusion drawn by Herzog, as delineated in the appraisal, was that the conduct of Nixon was of a menacing nature which might lead to physical violence; and that the failure by Nixon to accept any responsibility therefor was worthy of criticism. 26/ As such, I do not construe the critical comment to be an indicia of discriminatory motivation. 27/

Criticism of Nixon's Work Performance and Conduct
in 1976 Appraisal

The 1976 appraisal refers adversely to Nixon's work products and his interpersonal relationships with supervisors and other employees. Both factors are relied upon by management as being unsatisfactory in terms of performance by

25/ Since the complaint herein is limited to discrimination based on the appraisal itself, no finding or recommendation is made as to whether Respondents violated 19(a)(1) by reason of Logan's statements to Associate General Counsel De Sio at the September 5, 1975 meeting.

26/ Record facts reveal Logan's conduct to have been a precipitous factor in this confrontation and equally culpable. Except for the apology tendered by Logan and his admission of wrongdoing, management erred in faulting Nixon and not the acting supervisor. In sum, I would have grave reservations in accepting Nixon's conduct as supportive of the conclusion that he was not qualified for a supervisory attorney. Nevertheless, I do not view any disparate treatment between these employees as being bottomed upon discriminatory considerations.

27/ The case of Environmental Protection Agency, A/SLMR No. 136, cited by Complainant is clearly distinguishable. Comments by management in that case re the union president were directly critical of her union activities and her being the focal point of all troublemakers. Moreover, attempts [Cont'd]

Nixon, resulting in Respondents' rating him not ready for a supervisory position. Contrariwise, Complainant deems the criticisms pretextual, and insists they mask the true reason for such a rating - the actions of Nixon in filing grievances and unfair labor practice complaints.

(1) Reference is made in the 1976 appraisal herein to various cases in which Nixon allegedly drafted documents that were deficient in certain respects. Thus it appears revisions were necessary in certain dismissal letters prepared in Admiral Merchants Motor Freight and Inland Center cases involving unfair labor practices. Moreover, in the representation case of Northern States Beef, Nixon was faulted for errors in using the wrong form, failing to include the names of the unions in the direction of election, and using language considered inappropriate. In Fremont Manufacturing Co., an unfair labor practice case assigned to him, Nixon's draft of a response to requested interrogatories was deemed unacceptable in that it did not cite a "lead" case, failed in its directness, and should have followed language utilized in a prior case involving similar response. Finally, it is asserted in the appraisal that in Ed Peeks Electric Co., a priority case involving a secondary boycott, Nixon failed to obtain certain jurisdictional data and necessary information from the charging employer and to incorporate same in an affidavit taken by him - all of which resulted in his supervisor's faulting his technique in taking affidavits.

While I do not feel it incumbent upon me to substitute my judgment for that of the Respondents in appraising or evaluating the work of its field personnel, record facts do establish that many of the errors attributable to Complainant were either explainable or, in some instances, also committed by his colleagues. Thus, the in camera inspection of the seven appraisals submitted of other staff members, similarly situated, reveals that several of these professionals who were rated well qualified to be supervisors, also drafted decisions or documents requiring modifications and revisions; and that errors in phraseology or the use of language appeared therein. Though comparisons of such errors with these attributable to Nixon may show they were not so extensive as appeared in the latter's documents, the difference is one of degree. Moreover, Complainant was called upon to draft but one representation decision during the appraisal period, and it is questionable whether he should have been expressly faulted for his mistakes appearing in the Northern States Beef decision. In respect to the

27/ [Cont'd] were made to restrict her activities as union president, and she was harassed and intimidated because she intervened as a union official, on behalf of a unit employee. No such union animus is evident herein, nor do I find that Respondent retaliated against Nixon for his union or concerted activities.

affidavit taken by Nixon in the priority case, record facts reflect he obtained all the relevant information which the superintendent possessed, and that the Employer's attorney agreed to furnish the additional information. Accordingly, it may well be that Complainant's technique in obtaining affidavits was not justifiably singled out as being below par in this instance.

Despite the fact that the foregoing deficiencies might not be sufficient in the minds of others to deny the rating sought by Nixon, I am not persuaded that advertence to them demonstrates they were, in fact, a pretext for the actual basis of such denial, i.e. the "concerted" activity undertaken by Nixon in the past. To the extent that other colleagues committed like mistakes or performed poorly, and were rated well qualified to be supervisors, there may well be some disparity of treatment toward Complainant. However, unless this disparity arises from an illegal motivation, it cannot be concluded that such treatment is evidentiary of a violation of the Order. The evidence herein does not support such a conclusion.

(2) The appraisal lays stress upon Nixon's conduct in his relations with supervisory personnel and other staff members. Record facts do support a finding that, in many instances, Complainant was argumentative and hostile; that he resisted supervision as well as directions and instructions given him; that his resistance, as aforesaid, was expressed in a challenging manner; and that he refused to accept responsibility for his actions. In the Panipus situation, supra, Nixon became somewhat incensed at the criticism regarding the "Collyer" language he drafted in the dismissal letter. Admittedly, he became loud and angry, confronted Herzog with pointed finger, and challenged the suggested changes to the point of Herzog's exasperation. The union president, Wagner, attested to the "bad" reaction of the Complainant. In the Fremont and Harmon Industries cases acting supervisor Auslander was compelled to complain to management that he was having difficulty persuading Nixon to follow instructions. Although Auslander told Nixon that Herzog wanted the response to interrogatories in the Fremont case to follow a past sample, Nixon continued to maintain his draft was sufficient. In Harmon Industries the Complainant herein continued to assert that the additional information, which Regional Attorney Irwig wanted in the case, was not necessary; that Irwig was merely retaliating for the finding of an unfair labor practice on A/SLMR No. 671. Nixon pressed Auslander strongly to

write a dissent - since the latter was inclined to agree that the additional data was not a prerequisite to a determination - and labeled the memo which Auslander wrote as a "whitewash".

The continual objections raised by Complainant to instructions given him, coupled with an insistence that his performance and prepared documents were satisfactory, were so posited that any supervisor might well conclude Nixon refused to perform as directed. While he did ultimately adhere as instructed, it frequently required the intercession of other individuals.

Moreover, Nixon's behavior in the Jones case and at the staff meeting manifested a belligerent attitude toward both his fellow workers and supervision. Although his reluctance to allow Summerville to sit at the counsel table may have been justified in view of previous arrangements between them, Nixon's reaction to his colleague's presence was harsh and resentful. It resulted in embarrassment to Summerville, and displayed poor interpersonal relations. In respect to the staff meeting in September, I agree that Logan's remarks to Nixon more provocative. Nevertheless, one may easily conclude that such challenging phrases by Logan do not justify a threat in return. ^{28/} Management may have acted hastily in impugning blame to Nixon without learning all the facts, but it could well refuse to countenance the threatened remark by Nixon to Logan.

The foregoing actions of Nixon during the course of his work performance, as set forth in the instant appraisal, were the focal point of Respondents' reluctance to evaluate him as qualified for a supervisory position. Nowhere does it appear in the said appraisal, as it did in the 1974 appraisal, that any supervisor relied upon or gave consideration to Nixon's processing of grievances or filing complaints during this evaluation. Neither am I convinced, based on the record as a whole, that such considerations were responsible, in whole or in part, for such an adverse rating. I cannot agree with Complainant that Respondents' dissatisfaction with him stems from a desire to retaliate by virtue of his protected activities or the findings of the

^{28/} Emphasis is placed upon the fact that Logan had a confrontation with employee Weghorst in the past; that such conduct, together with Logan's actions at the meeting, showed that this individual interacted poorly. Since Logan was later rated well qualified to be a supervisor, Complainant argues it shows disparate treatment. The record does not show consistent traits of rebellion by Logan, and I cannot conclude, in any event, that any such treatment sprang from discriminatory motivation.

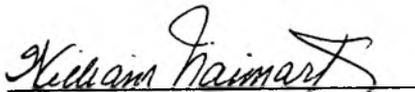
Assistant Secretary in A/SLMR No. 671. Contrariwise, I am persuaded that Respondents genuinely believed that rating Nixon qualified to be supervisor would be inimical to the best interests of the regional office.

In sum, the accusations leveled against Complainant in the appraisal re his personality traits do find support in the record herein. There is corroborative evidence that he has evinced continued resistance to directives and that Nixon's temperament has induced confrontation with his supervisors. Under such circumstances, Respondents could well conclude, as they did, that such characteristics would militate against rating Complainant well qualified for a GS-14 supervisory position. While Nixon seeks to immunize his conduct from critical evaluation, by reason of its concerted or union activity, I am constrained to conclude that he was faulted for his behavior and attitude in handling case assignments rather than for his actions in filing grievances or complaints. This conclusion is buttressed by the fact that other co-workers, who were rated well qualified to be supervisors or appointed acting supervisors, occupied positions as either president of the union or some other official beforehand.

Viewing Complainant's behavior in the context of the record facts herein, and taking into consideration the past history of cases wherein it was found that Nixon's conduct warranted Respondents' refusal to rate him well qualified to be a supervisor, I am not persuaded that the refusal by the Board in the case at bar sprang from illegal considerations. Accordingly, I conclude that the 1976 appraisal was not discriminatorily motivated and that Respondents did not violate Sections 19(a)(1)(2) and (4) of the Order as alleged.

RECOMMENDATION

Having found that Respondents have not engaged in conduct prohibited by Sections 19(a)(1)(2) and (4) of Executive Order 11491, as amended, it is hereby recommended that the complaint herein be dismissed in its entirety.


WILLIAM NAIMARK
Administrative Law Judge

Dated: 3 NOV 1977
Washington, D.C.

WN:mjm

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION
A/SLMR No. 1016

This case involved a petition for consolidation of units filed by the National Association of Government Employees Union (NAGE) seeking to consolidate 19 units for which certain of its constituent local chapters are the current exclusive representatives at 15 Veterans Administration (VA) hospital facilities. Through the subject petition, the NAGE sought to establish a consolidated unit consisting of all the professional and nonprofessional employees employed in the Department of Medicine and Surgery who it represents exclusively. The VA contended, essentially, that the proposed consolidated unit was not appropriate because it did not meet the criteria established by Section 10(b) of the Order.

The Assistant Secretary noted that in its review of appeals from certain of the Assistant Secretary's decisions involving consolidation of units, the Federal Labor Relations Council (Council) construed the Assistant Secretary's establishment of a presumption in favor of consolidation "---as a recognition and affirmation of the strong policy in the Federal labor-management relations program of facilitating consolidation---." Based on the facts and policy considerations involved, the Assistant Secretary found that the proposed consolidated unit was appropriate for the purpose of exclusive recognition under the Order. Thus, he found that the unit sought essentially included all nonprofessional employees at the various hospitals involved, and the employees shared a common mission, essentially similar job classifications and working conditions, and similar labor relations practices in accordance with the VA's delegation of authority. He also noted that the VA and the NAGE had negotiated separate agreements covering the various units at the individual activities involved herein and that many of the subjects included in such agreements are dealt with uniformly. Under these circumstances, he concluded that the employees in the petitioned for consolidated unit share a community of interest and that this more comprehensive bargaining unit would promote effective dealings and efficiency of agency operations consistent with the policy of the Order.

Accordingly, he directed an election in the consolidated unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION

Agency

and

Case No. 22-07730(UC)

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Bridget Sisson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Petitioner, National Association of Government Employees, herein called NAGE, filed the instant petition seeking to consolidate 19 units at 15 Veterans Administration (VA) hospital facilities for which certain of its constituent locals are the current exclusive representatives. Through the subject petition, the NAGE seeks to establish a unit consisting of all the employees represented by the NAGE in the VA's Department of Medicine and Surgery. The NAGE represents the nonprofessional employees of the Department of Medicine and Surgery in the units set forth in Appendix I; the professional and nonprofessional employees in the units set forth in Appendix II; and the professional employees in the units set forth in Appendix III.

The VA contends that the proposed consolidated unit is not appropriate for the purpose of exclusive recognition because it does not meet the criteria established by Section 10(b) of the Order as it is not geographically or administratively coherent and, therefore, would not promote effective dealings and efficiency of agency operations and it is based solely on the extent of organization in the Agency's Department of Medicine and Surgery. On the other hand, the NAGE argues that the consolidation would merge 19 separate units into one thereby curtailing the need for excessive time spent at the bargaining table, could eliminate redundancy and would effectuate a more efficient bargaining process, and would enable the parties to negotiate a master agreement as well as supplemental agreements covering activities below the level of recognition.

The VA is engaged in a complete program for eligible veterans. It is divided for administrative purposes into three major departments, a National Cemetery system, 1/ and other administrative components. The Department of Medicine and Surgery, one of the three departments, provides medical care and treatment for veterans. This includes extensive medical education and research programs as well as the operation of hospitals and clinics. The proposed consolidated unit constitutes all of the units represented by the NAGE within this department. In this connection, the NAGE represents essentially all the nonprofessional employees at the particular facilities involved, two units of registered nurses, and two units which include professional as well as nonprofessional employees.

Although the record reveals that the hospitals may specialize in various types of medical care, the basic medical care engaged in by all hospitals is similar, as is the maintenance of such hospitals. In addition, the employees covered by the subject petition have essentially similar job classifications and working conditions. In this regard, the record shows that in the nonprofessional category, there are employed in the hospitals, among others, administrative, clerical, maintenance, and security employees. Within the professional category, there are, among others, nurses, doctors, and dentists.

Each of the hospitals is headed by a Hospital Director who has been delegated and effectively exercises day-to-day authority with respect to such matters as hiring, firing, transfer, promotion, reduction-in-force procedures, the resolution of grievances, and other matters affecting employee interests. The Hospital Directors negotiate the labor agreements for their facilities, subject to the approval of the Chief Medical Director of the Department of Medicine and Surgery. Hospital Directors report, through the Associate Deputy Chief Medical Director for Operations, to the Chief Medical Director of the Department of Medicine and Surgery in Washington, D.C. The record reveals that only a few employees transfer to other activities and are assigned temporary details.

In its review of appeals from certain of the Assistant Secretary's decisions involving the consolidation of units, 2/ the Federal Labor Relations Council, hereinafter called Council, construed the Assistant

1/ The NAGE represents five units in the National Cemetery system.

2/ Education Division, Department of Health, Education, and Welfare, Washington, D.C., A/SLMR No. 822 (1977), FLRC No. 77A-88; Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, A/SLMR No. 831 (1977), FLRC No. 77A-112; and Bureau of Field Operations, Office of Program Operations, Social Security Administration, Department of Health, Education and Welfare, Chicago Region V-A, A/SLMR No. 876 (1977), FLRC 77A-136.

Secretary's establishment of a presumption in favor of consolidations "---as a recognition and affirmation of the strong policy in the Federal labor-management relations program of facilitating consolidation---." The Council noted further that such affirmation accurately reflects the Council's 1975 Report and Recommendations to the effect that the Assistant Secretary should be mindful of facilitating the consolidation of existing units which conform to the appropriate unit criteria contained in Section 10(b) of the Order.

Based on the foregoing facts and policy considerations, I find that the petitioned for consolidated unit is appropriate for the purpose of exclusive recognition under the Order. Thus, as indicated above, the unit sought encompasses all the employees within the Department of Medicine and Surgery represented by the NAGE which, in effect, includes essentially all the nonprofessional employees at the various hospitals involved. All the employees within the petitioned for consolidated unit share a common mission, essentially similar job classifications and working conditions, and similar labor relations practices in accordance with the VA's delegation of authority. Moreover, although the record shows that the VA and the NAGE have negotiated separate agreements covering the various units at the individual activities involved herein, many of the subjects included in such agreements are dealt with uniformly, including, among others, such subjects as evaluation of performance, annual ratings, training, position classification, equal employment opportunity, leave, health and safety. Under all of these circumstances, I find that the employees in the petitioned for consolidated unit, which includes essentially all the nonprofessional employees at the particular facilities involved, share a community of interest.

I find further that the petitioned for consolidated unit will promote effective dealings and efficiency of agency operations. Thus, the record reflects that all personnel and administrative authority for the VA lies with the Administrator of the VA. In this connection, the Agency's Central Personnel Office (CPO) develops agency policy on matters relating to personnel, which is set forth in the VA Personnel Manual and which is disseminated to the field, and the various facilities must implement those policies locally within that framework. The CPO also advises the field facilities on recruitment and placement of individuals in categories difficult to recruit and has prepared recruitment bulletins or advertising to be placed in publications. It also provides advice on the administration of the wage programs and salary. With respect to labor-management relations, the record reveals that the labor relations operations division of the CPO includes approximately six labor relations specialists. It advises the field facilities on labor relations matters and also provides advice to the Chief Medical Director of the Department of Medicine and Surgery in connection with approval of negotiated agreements. Although the CPO has only occasionally become directly involved in local negotiations, the record reveals that when its involvement has become necessary and it has been called upon, the staff has entered into local negotiations.

The evidence establishes that locally negotiated agreements or amendments to original agreements are sent to the labor relations operations division of the CPO for review, and the latter, in turn, forwards the agreements to the various specialty areas which return the agreements with their comments. The labor relations operation division then prepares memoranda either approving or disapproving the agreement involved, or approving with exceptions to certain agreement provisions. The final approval of negotiated agreements for the Department of Medicine and Surgery is made by the Chief Medical Director. Further, field activities must promptly notify the CPO when requests are made to negotiate new agreements, or to change existing ones; when requests are made to use the services of the Federal Mediation and Conciliation Service or the Federal Service Impasses Panel; when negotiability appeals are to be made to the Council; or when questions of grievability are raised with the Assistant Secretary. In addition, where negotiated agreements provide for automatic renewal upon notice, such notices may not issue without the approval of the CPO.

Under these circumstances, although the VA contends that the respective Hospital Directors have provided active input into the negotiated agreements, with the central office staff merely acting in a review capacity, and that the VA will be unable to continue to do this should the Assistant Secretary approve the consolidation, in my opinion, the evidence does not establish that the VA would have to substantially change its current labor relations procedures if the proposed consolidation is effectuated. Thus, it could, as before, utilize its field personnel and use their input as the basis for negotiations. Further, the establishment of such unit would not preclude the continued delegation to Hospital Directors of certain authority, such as the resolution of grievances. 3/ In addition, as indicated above, the evidence shows that the current agreements between the NAGE and the VA are essentially similar in many instances thereby evincing the commonality of interests throughout the units sought by the NAGE herein. Consequently, in my view, the proposed consolidation will not necessarily require a wholly new organizational entity for the purpose of negotiating agreements and will not necessarily affect the VA's decision making authority with respect to all matters affecting employee terms and conditions of employment. 4/

3/ Cf. AFGE Council of Prison Locals, FLRC No. 76A-38 (1977).

4/ It is noted that although the VA contends that some 28 "Medical Districts" might constitute separate appropriate units in a consolidation, the record indicates that the districts, which are not fully operative, provide only a mechanism for cooperation between hospitals in the districts, including the allocations of funds to the hospitals in the district, the placement of new programs, services, etc. and that their purpose is to provide health care to veterans within a given geographic area. They have not been established with authority over the hospitals in the districts or for the purpose of negotiating agreements. Thus, the "District Medical Director," who is also a

(CONTINUED)

Based on these factors, including particularly the centralization of personnel functions and policies at the national level, I find that the proposed consolidated unit will promote effective dealings. Further, I find that as the proposed consolidated unit, covering all the employees represented by the NAGE in the Department of Medicine and Surgery, will provide for bargaining in a single unit rather than in the existing 19 bargaining units, it will promote a more comprehensive bargaining unit structure and will, therefore, promote the efficiency of the Agency's operations, and is consistent with the policy of the Order set forth above. 5/

Accordingly, I find that the petitioned for consolidated unit, consisting of professional and nonprofessional employees as set forth in Appendices I, II, and III, is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended. 6/

The VA requested that in the event the proposed consolidated unit was found to be appropriate an election be held to determine whether or not the employees involved desire to be represented in the proposed consolidated unit by the NAGE. As noted above, the unit found appropriate includes professional employees. However, the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to the inclusion in a unit with nonprofessional employees must be ascertained. I shall, therefore, direct that separate elections be conducted in the following voting groups:

- 4/ a Hospital Director of one of the hospitals in the district, brings together directors of the facilities for planning and development purposes. The record reveals that the districts have only small administrative staffs with no personnel staff at the district level.
- 5/ The fact that the proposed consolidated unit applies only to existing units in the Department of Medicine and Surgery and, therefore, includes and excludes similarly situated employees does not render such unit inappropriate inasmuch as it is noted that consolidation procedures apply only to situations where there is no question concerning representation and the unit herein meets the criteria specified in Section 10(b) of the Order and will promote a more comprehensive bargaining unit structure. See FLRC No. 77A-88, cited above in footnote 2.
- 6/ Insofar as the actual state of the exclusively recognized units set forth in Appendices I, II, and III at the time of the consolidation election may differ, if at all, from the unit found appropriate herein, such unit descriptions should be so modified.

Voting Group (a): all the professional employees in the units set forth in Appendices II and III.

Voting Group (b): all the nonprofessional employees in the units set forth in Appendices I and II.

Employees in the nonprofessional voting group (b) will be polled whether they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the National Association of Government Employees.

Employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the National Association of Government Employees, and (2) whether or not they desire to be represented in a separate consolidated professional unit if the proposed consolidated unit is approved by a majority of all the employees voting.

The valid votes cast by all the eligible employees will be tallied to determine if a majority of the valid votes have been cast in favor of the proposed consolidated unit. If a majority of the valid votes have not been cast in favor of the proposed consolidated unit, the employees will be taken to have indicated their desire to continue to be represented in their current units of exclusive recognition. If a majority of the valid votes are cast in favor of the proposed consolidated unit, the ballots of the professional employees in voting group (a) will then be tallied to determine whether they wish to be included in the same consolidated unit with the nonprofessional employees. Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same consolidated unit as the nonprofessional employees, the professional employees will be taken to have indicated their desire to constitute a separate consolidated professional unit, and an appropriate certification will be issued by the Area Administrator.

The unit determination in the subject case is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find the following units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

- (a) All professional employees in the units set forth in Appendices II and III.

- (b) All nonprofessional employees in the units set forth in Appendices I and II.

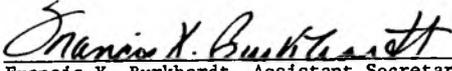
2. If a majority of the professional employees votes for inclusion in the same consolidated unit as the nonprofessional employees, I find the following unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All General Schedule and Wage Grade professional and nonprofessional employees in the units set forth in Appendices I, II and III.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the voting groups described above, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the National Association of Government Employees.

Dated, Washington, D.C.
April 11, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

All employees located at the Newington Veterans Administration Hospital, with the exception of managerial executives, employees engaged in personnel work in other than a purely clerical capacity, supervisors and professional employees.

All nonprofessional employees of the Veterans Administration Hospital, Topeka, Kansas, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

All nonprofessional employees at the Veterans Administration, Bedford, Massachusetts, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

All employees of the Brockton Veterans Administration Hospital, except professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

All nonprofessional employees of the Northhampton Veterans Administration Hospital, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

All nonprofessional General Schedule and Wage Board employees of the West Roxbury Veterans Administration Hospital, and all non-professional canteen employees, excluding management officials, employees engaged in Federal personnel work except in a purely clerical capacity, guards, and supervisors as defined in the Order.

All General Schedule and Wage Board employees, including canteen employees, of the Veterans Administration Hospital, Manchester, New Hampshire, except professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

All General Schedule and Wage Grade employees of the Veterans Administration Hospital, Butler, Pennsylvania, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

All General Schedule, Wage Grade and canteen employees of the Veterans Administration Hospital at Coatesville, Pennsylvania, except professional employees, management officials employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

All employees at the Veterans Administration Hospital, Charleston, South Carolina, excluding all management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, employees on temporary limited appointments, guards, and supervisors as defined in the Order.

All employees assigned to the Memphis Veterans Administration Hospital, excluding professional employees, management officials, employees engaged in Federal personnel work except in a purely clerical capacity, guards, and supervisors as defined in the Order.

All General Schedule, Wage Grade and canteen employees of the Veterans Administration Hospital at Hampton, Virginia, except professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

All nonprofessional employees at the VA Center, Martinsburg, West Virginia, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined by the Order.

All Police Officers employed by and assigned to the Veterans Administration Hospital, Brockton, Massachusetts, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

All Police Officers employed by the Veterans Administration Hospital, Lexington, Kentucky, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order, and all employees in the exclusively recognized units of the American Federation of Government Employees, and the Kentucky Nurses Association.

All employees, professional and nonprofessional, of the Veterans Administration Hospital, Grand Junction, Colorado, excluding management officials, employees engaged in Federal personnel work except in a purely clerical capacity, guards, and supervisors as defined in the Order.

All professional employees and nonprofessional employees of the Veterans Administration Hospital, Lexington, Kentucky, including all non-managerial nonsupervisory physicians, dentists and canteen employees, excluding all registered nurses, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined in the Order.

All full time and regularly scheduled part time registered nurses employed at the Veterans Administration Hospital, Bedford, Massachusetts, excluding nurse anesthetists, all other professional employees, all non-professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

All professional registered nurses employed at the Veterans Administration Hospital, Brockton, Massachusetts, excluding all other professional employees, all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined in the Order.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION
A/SLMR No. 1017

This case involved an unfair labor practice complaint filed by American Federation of Government Employees, Local 12, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to meet and confer in good faith with regard to the implementation of a plan to relocate the office space of various unit employees, and by bypassing the AFGE by negotiating directly with unit employees on the impact of the relocation plan outside the presence of union representatives. The Respondent contended that none of the alleged actions constituted a violation of the Order.

In agreement with Administrative Law Judge, the Assistant Secretary found that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to provide information relevant to the Respondent's relocation decision and by its continuing refusal to negotiate on the matter of the implementation of the relocation and the impact on employees adversely affected by such action. Noting the lack of exceptions by the AFGE, he further found, in agreement with the Administrative Law Judge, that the Respondent did not improperly bypass the AFGE in violation of Section 19(a)(1) and (6) of the Order by having discussions with the unit employees without AFGE representatives present. Accordingly, the Assistant Secretary issued an appropriate remedial order for the violations found herein.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Respondent

and

Case No. 22-7751(CA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 12, AFL-CIO

Complainant

DECISION AND ORDER

On January 11, 1978, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed an answering brief. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the entire record in this case, including the Respondent's exceptions and supporting brief and the Complainant's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Occupational Safety and Health Review Commission shall:

1/ The Administrative Law Judge recommended dismissal of that portion of the complaint alleging that the Respondent improperly bypassed the Complainant in violation of Section 19(a)(1) and (6) of the Order by having discussions with unit employees without affording the Complainant the opportunity to be present. No exceptions were filed with respect to this determination by the Administrative Law Judge.

1. Cease and desist from:

(a) Relocating unit employees without first notifying the American Federation of Government Employees, Local 12, AFL-CIO, the exclusive representative of its employees, and affording it a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be used in effectuating the decision to relocate and on the impact such decision will have on employees adversely affected by such action.

(b) Withholding or failing to provide, upon request by the American Federation of Government Employees, Local 12, AFL-CIO, any information concerning the relocation of employees which is relevant and necessary to enable the American Federation of Government Employees, Local 12, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmation actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Notify the American Federation of Government Employees, Local 12, AFL-CIO, or any other exclusive representative of its employees, of any future decision to relocate personnel prior to its effectuation and afford it a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be used in effectuating the decision and on the impact such decision will have on employees adversely affected by such action.

(b) Provide, upon request by the American Federation of Government Employees, Local 12, AFL-CIO, any information concerning the relocation of employees which is relevant and necessary to enable the American Federation of Government Employees, Local 12, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(c) Post at the facilities of the Occupational Safety and Health Review Commission copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Chairman, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Chairman shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges that the Respondent violated Section 19(a)(1) and (6) of the Order by negotiating directly with unit employees be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 12, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT relocate unit employees without first notifying the American Federation of Government Employees, Local 12, AFL-CIO, the exclusive representative of our employees, and affording it a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be used in effectuating the decision to relocate and on the impact such decision will have on employees adversely affected by such action.

WE WILL NOT withhold or fail to provide, upon request by the American Federation of Government Employees, Local 12, AFL-CIO, any information concerning the relocation of employees which is relevant and necessary to enable the American Federation of Government Employees, Local 12, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify the American Federation of Government Employees, Local 12, AFL-CIO, or any other exclusive representative of our employees, of any future decision to relocate personnel prior to its effectuation and afford it a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be used in effectuating the decision and on the impact such decision will have on employees adversely affected by such action.

WE WILL provide, upon request by the American Federation of Government Employees, Local 12, AFL-CIO, any information concerning the relocation of employees which is relevant and necessary to enable the American Federation of Government Employees, Local 12, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusive recognized unit.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly the the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Bldg., 3535 Market St., Philadelphia, Pennsylvania 19104.

.....
In the Matter of

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION,
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 12, AFL-CIO,
Complainant
.....

Case No. 22-7751(CA)

PAUL WALLACE, Counsel to the Commission
and PETER G. KILGORE, Assistant Counsel
1825 K Street, N.W. 4th Floor
Washington, D.C. 20036
For the Respondent

JANICE XAVER, ESQ., and
WILLIAM WHEAT
1825 K Street, N.W. 4th Floor
Washington, D.C. 20036
For the Complainant

Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding arises under the provisions of Executive Order 11491, as amended (hereinafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter referred to as the Assistant Secretary), a Notice of Hearing on Complaint issued on March 24, 1977 with reference to alleged violations of Sections 19(a)(1) and (6) of the Order. The complaint, filed on January 27, 1977 by American Federation of Government Employees, Local 12, AFL-CIO (hereinafter referred to as the Union or Complainant), alleged that the

Occupational Safety and Health Review Commission (hereinafter referred to as the Activity or Respondent), violated the Order by refusing to meet and confer in good faith with regard to the implementation of a plan to relocate various office spaces of unit employees and bypassing the Union by negotiating directly with unit employees on the impact of the relocation plan outside the presence of Union representatives.

At the hearing held on May 16, 17 and July 14, 1977 the parties were represented and afforded full opportunity to adduce evidence and call, examine and cross-examine witnesses. Respondent made oral argument and both parties filed briefs. ^{1/}

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following findings of fact and conclusions of law:

Chronology of Events

On September 16, 1976 the Union was certified as the exclusive collective bargaining representative of all professional and nonprofessional employees of the Activity excluding Administrative Law Judges, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Order. The unit encompassed approximately 100 employees.

^{1/} During the hearing on May 17 the parties agreed to informally settle the case. The settlement consisted of the Activity sending a letter to the Union addressing the matters set forth in the complaint and the Union's submission of a letter of withdrawal to the appropriate authority. The hearing was adjourned indefinitely during which time the Activity sent the required letter to the Union. However, the Union refused to execute the withdrawal request alleging that the Respondent refused it use of the Activity's copying facilities to make duplicates of the settlement letter for submission with the withdrawal request. The Union moved that the hearing be reopened and the Activity opposed challenging the Union's recitation of the facts in this regard. I granted the Union's motion and denied the Activity's motion to forward the "settlement" to the Assistant Regional Administrator. I hereby reaffirm my rulings.

Around this same time, the Activity decided it would abolish a rarely used courtroom in order to provide more space in an effort to alleviate the overcrowding which existed in some of its offices. ^{2/} Although the specific details had not been worked out, it was decided at this time to relocate the library to the courtroom space and relocate various staff employees. Pursuant thereto, between September 24 and 28, 1976 the Activity submitted to the General Services Administration (GSA) various requests that construction and alteration work be authorized to accommodate staff relocation. However, according to the Activity's Assistant Executive Secretary, the construction plans could be and indeed were modified before actual work began since the work authorization requests were not final until early November 1976 at which time they were authorized by GSA and certified by the Activity. Actual construction under the work authorizations commenced on November 4, 1976. Employees began to be relocated between November 5 and 10.

With regard to the decision to move the library to the courtroom space, sometime in late September 1976 a management representative informed the librarian, a unit employee, that the library would be relocated and presented the librarian with a room sketch and asked her to give her comments and recommendation as to how the library furniture and shelving should be arranged. The librarian complied with this request and discussed the matter with management on numerous occasions thereafter.

The librarian informed Janice Xaver, the Union's designated Spokeperson, of the possible future relocation of the library. Further, through rumor Xaver heard that the courtroom was going to be used for some other purpose. Accordingly, on September 30, 1976 Xaver sent a memorandum to Lane Gaebler, the Activity's Executive Director, indicating the Union's concern over "...several actions management has taken or apparently is planning to take, which involve changes in working conditions..." Xaver went on to state that the Union believed that "...management should affirmately seek to confer with...(the Union)...concerning such proposed changes while they are still in the planning stage rather than attempting to promulgate the changes and having...(the Union) ...protest." ^{3/} Xaver concluded by requesting a

^{2/} The Activity's operations were housed on the 4th, 6th, 7th and 11th floors of a privately owned building.

^{3/} This sentiment was previously expressed during a Union-Activity meeting conducted on September 16.

meeting, as soon as possible, to discuss six items including the "physical relocation of offices on the 4th floor" and "(a)ny other proposed changes...." By October 5, 1977, no response to this request was received by the Union and on that day another request for a meeting was sent to Gaebler by Xaver.

On October 8, 1976, Xaver and Gaebler met. Both were accompanied by another representative of their respective organizations. The Union representatives indicated they understood the Activity planned to physically relocate various offices and expressed the view that anything concerning the relocation was negotiable. The Union stated that any kind of plan or proposal which affects working conditions was a negotiable matter and the Activity should have the Union's input and proposals and negotiate on how the change would occur and the effects thereof before any such plan was implemented. Gaebler responded that there were no definite plans to relocate at that time, no plans to show the Union and therefore nothing to talk about.

On October 13, 1976 Gaebler called Xaver by telephone and told her that management had decided to proceed with a relocation and management had visited the four offices involved and talked with the employees who were affected by the plan. 4/ Xaver asked which offices were involved and was told the Office of Information, Gaebler's staff, the library and the Chief Administrative Law Judge's office. 5/

Around this same time Paul Wallace, Counsel to the Commission and "titular head" of the Information Office, approached William Wheat, an employee in the Information Office, and asked him the whereabouts of the Director of Information. On being informed that the Director was not present, Wallace asked Wheat to go to the Executive Director's Office to look at the proposed plans for relocating the Information Office and "see what he thought" of them. At the Executive Secretary's office Wheat was shown a blueprint of the Activity's fourth floor covered by a transparent overlay on which proposed office space was penciled in. Wheat never

4/ The Activity's November 30, 1976 response to the Union's October 29 unfair labor practice charge, *infra*, acknowledged that on or about October 13 representatives of the Activity met with each staff affected and discussed the changes and, where feasible, employee suggestions were incorporated in the relocation plans.

5/ Ultimately the relocating affected a substantial number of staffs housed on three floors, in addition to those named above.

made known his reactions to the plan to anyone in management. In any event, the plan was not implemented and at some undisclosed time a second floor plan relocating the Information Office to the seventh floor was shown to Information Office employees by the Director of Information. The employees discussed the plan with the Director and the plan was modified by constructing an additional wall and installing another telephone extension before the relocation occurred.

On October 20, 1976 Union Spokesperson Xaver met with Stanley Schwartz, the Activity's designated liaison for day-to-day relations with the Union. Xaver took the position that any matters dealing with the relocation of office space was a negotiable subject and requested to negotiate on the matter including being shown any diagrams or blueprints which would indicate the Activity's specific plans. Xaver indicated that the Union needed this information to form their counterproposals to management's proposals on the subject. Schwartz stated that he thought management was going to take the position that the relocation was non-negotiable and related that management personnel had already met with employees on the matter and indicated he thought that was all management was required to do. Xaver expressed her opposition to the Activity's meeting with employees to discuss the relocation. Schwartz contended it was reasonable for management to talk to employees to discuss the subject. Schwartz gave, as an example, a situation on his own staff where Schwartz had to resolve a dispute concerning employees choosing the offices to which they would be assigned. 6/

Xaver and Schwartz met again on October 27, 1976. The meeting was arranged to discuss various items which were the topics of the October 20 meeting. At this time Xaver again requested to see the diagrams and blueprints of the relocation and asked to negotiate on the matter. Xaver stated that the Union already had grounds for an unfair labor practice charge because the Activity had refused to negotiate with the Union and met with employees without giving the Union the opportunity to be present. Schwartz acknowledged that the Activity had met with the employees and "shown them all the furniture" and expressed his belief that this was all the Activity was required to do.

Around this same time Xaver noticed filing cabinets being removed from the Activity's Executive Secretary's office and was told by some employees that the Judge's bench had been

6/ Schwartz is a supervising attorney on one of the Activity's Commissioner's staffs.

removed from the hearing room. Accordingly, on October 29, 1976 the Union filed with the Activity the unfair labor practice charge from which these proceedings arise.

Positions of the Parties

The Union contends that the Activity violated the Order by its failure to furnish the Union information necessary to negotiate on the relocation; by its failure to meet and confer on matters concerning the implementation and impact of the relocation; and by its discussing the relocation with unit employees outside the presence of the Union. The Activity denies that any of its actions constituted a violation of the Order and specifically contends that no violation of the Order occurred since management did not finally decide on a particular floor plan for the relocation until early November 1976. Therefore, the Activity urges, there was no obligation to negotiate with the Union on the matter until that time, which was subsequent to the filing of the charge.

Discussion and Conclusions

Under the provisions of Section 11(b) and 12(b) of the Order the Activity was privileged to unilaterally decide on relocating certain of its unit employees without negotiating with the Union on that decision. 7/ However, the Activity nevertheless was obligated to afford the Union the opportunity to meet and confer in good faith, to the extent consonant with law and regulation, on the procedures to be utilized in effectuating the decision and on the impact such decision would have on employees adversely affected by such action. 8/

In the case herein the decision to relocate some of the employees was made sometime in mid-September when it was decided to eliminate the courtroom to make available more office space. While that decision was final, the Activity had not completely decided on how that decision would be implemented in all requests. I find it was at this point that the obligation to inform the Union of the decision to relocate arose and upon request, bargain on matters concerning implementation and adverse affect to the extent that the Activity's plans were formulated.

7/ See Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 828; U.S. Department of Transportation, Federal Highway Administration, Vancouver, Washington, A/SLMR No 612.

8/ Social Security Administration, supra.

The Union, at all times since at least September 30, 1976 made a broad continuing demand on the Activity to bargain on the relocation to whatever extent the action was negotiable. This request was met on October 8 with a false denial that a decision had been made to relocate employees and a refusal to produce whatever plans were available at the time. On October 13, 1976 the Activity informed the Union of its decision to proceed with a relocation. However, in response to further Union requests on October 20 and 27 for information and negotiation on the subject, the Activity took the position that the matter was not negotiate and provided the Union with no information on the relocation.

I conclude that the Activity was obliged to provide the Union what information it had at the time of demand, even though it had not yet decided on precisely where all employees would ultimately be located. I further conclude that the Activity never had any intention to provide the Union with information or plans or to negotiate with the Union relative to the relocation at any time material hereto. Accordingly, I conclude the Activity violated Sections 19(a)(1) and (6) of the Order by its continuing refusal to provide information relevant to the relocation and by its continuing refusal to negotiate on the matter of implementation of the relocation and impact on employees adversely affected by such action. 9/

With regard to the Activity's discussion of matters with employees outside the presence of Union representatives, a threshold requirement to establish a violation of the Order by management's dealing directly with a unit employee is that the matter under consideration must relate to the collective bargaining relationship. 10/ By the specific provisions of Sections 11(b) and 12(b), the Order substantially circumscribes the realm of negotiable matters and sets out privileged areas of management functions.

9/ The Activity's November 30, 1976 response to the Union's October 29 unfair labor practice charge, supra, invites the Union to advise the Activity of an adverse impact so the parties "may meet...to seek a proper solution." I find that meeting at this juncture, without the Activity having provided relevant information and bargained about implementation, in these circumstances, would have been futile.

10/ See generally Department of the Navy, Naval Air Station, Fallon, Nevada, FLRC No. 74A-80 (November 14, 1975), Report No. 87 and National Aeronautics and Space Administration (NASA), Washington, D.C., FLRC No. 74A-95 (October 24, 1975), Report No. 84;

Section 11(b) of the Order provides, in relevant part:

"...the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit; work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change."

Section 12(b) provides:

"management officials of the agency retain the right, in accordance with applicable laws and regulations-

- (1) to direct employees of the agency;
- (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
- (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
- (4) to maintain the efficiency of the Government operations entrusted to them;
- (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
- (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency...."

Thus, in my view, by operation of the Order, decisions involving Section 11(b) and 12(b) management prerogatives are to be treated as though they do not relate to the

collective bargaining relationship except as to the implementation and adverse impact of those decisions. Therefore, I conclude that conversations with employees relative to the privileged aspects of Sections 11(b) and 12(b) matters may be conducted outside the presence of a union without running afoul of the unfair labor practice proscriptions of the Order. On the other hand, conversations with unit employees relative to implementation and the adverse impact of those decisions would have to be judged by a different standard. Further, while I have concluded that the relocation itself was not negotiable, the Federal Labor Relations has held that certain matters which might arise by virtue of a relocation are negotiable. In its decision in National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (February 24, 1976), Report No. 98, the Council found negotiable union proposals concerning the location of employees and the maintenance of adequate lighting. In that same decision, the Council declared non-negotiable specific proposals regarding office space and the location of office equipment and telephones.

In the case herein the precise nature of the conversations between agency management and unit employees must be evaluated to determine whether the discussions related to legitimate matters of Union concern, or otherwise. The record evidence reveals that conversations occurred between management and the librarian at which time the librarian's opinion was solicited as to the arrangement of library furniture and shelving; between management and employees where general opinions about office layout and furniture were sought; and between management and employees where the changes were discussed after which some employees suggestions were incorporated into the relocation plans. While the Activity's representative Schwartz acknowledged resolving a dispute between employees over office selection, the testimony in this regard, as with the instances mentioned above, is conclusionary and devoid of essential facts and details necessary to determine the exact nature and context of the conversation. Accordingly, I find, that the record evidence is insufficient to establish that the Activity's discussions with employees encompassed matters which the Activity was obligated to bargain with the Union. I therefore will recommend dismissal of the allegation that the Activity violated the Order by conducting meetings with employees and bypassing the Union.

Recommendations

Having found that Respondent has engaged in conduct violative of Sections 19(a)(1) and (6) of the Order through its failure to provide relevant information to the Union and negotiate with the Union with regard to the implementation of the relocation and the impact upon employees adversely affected, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Order. As to all other allegations, I recommend the complaint be dismissed.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Occupational Safety and Health Review Commission, shall:

1. Cease and desist from:

(a) Relocating unit employees without notifying American Federation of Government Employees, Local 12, AFL-CIO, the exclusive representative, and affording it a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be used in effectuating the decision and on the impact such decision will have on employees adversely affected by such action.

(b) Withholding or failing to provide, upon request by American Federation of Government Employees, Local 12, AFL-CIO, any information relevant to the relocation of employees, which information is necessary to enable American Federation of Government Employees, Local 12, AFL-CIO, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

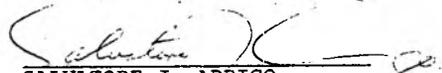
(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Notify the American Federation of Government Employees, Local 12, AFL-CIO, or any other exclusive representative of the employees, of any future decision to relocate personnel prior to its effectuation, and upon request, make available to such representative any information relevant to the relocation and afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

(b) Post at the facilities of the Occupational Safety and Health Review Commission, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Chairman, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Chairman shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.


SALVATORE J. ARRIGO
Administrative Law Judge

Dated: 11 JAN 1978
Washington, D.C.

SJA:mjm

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT fail to notify the American Federation of Government Employees, Local 12, AFL-CIO, or any other exclusive representative of our employees, of a decision to relocate personnel prior to its effectuation, and, upon request, make available to such representative any information relevant to the relocation and afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify the American Federation of Government Employees, Local 12, AFL-CIO, or any other exclusive representative of our employees, of any future decision to relocate personnel prior to its effectuation, and, upon request, make available to such representative any information relevant to the

relocation and afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

April 12, 1978

A/SLMR No. 1018

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
A/SLMR No. 1018

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Activity-Petitioner

and

Case No. 22-08069 (CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 12, AFL-CIO

Labor Organization

DECISION AND ORDER

This case involved a petition for clarification of unit filed by the Occupational Safety and Health Review Commission (OSHRC) seeking to clarify whether OSHRC Commissioners' staff attorneys, and staff attorneys in OSHRC's Office of Central Review, should be excluded from the exclusively recognized unit represented by the American Federation of Government Employees, Local 12, AFL-CIO (AFGE). The OSHRC contended that the Commission's integrity as an impartial adjudicatory body would be jeopardized by potential conflicts of interest that the attorneys could face in reviewing cases involving AFL-CIO affiliated unions, and petitioned to have them excluded from the AFGE unit under Section 3(d) of the Order.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Daniel F. Sutton. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Assistant Secretary concluded that the attorneys should not be excluded from the unit. In this regard, he found that the Occupational Safety and Health Act of 1970 was not a "labor-management relations law" within the meaning of Section 3(d) and that the conflicts of interest that Section 3(d) was intended to eliminate were not present here. He also noted that there was no contention, nor any basis to find, that the employees at issue should be excluded as supervisors or management officials, or under any other exclusionary category set forth in Section 10(b) of the Order.

Upon the entire record in this case, the Assistant Secretary finds:

Accordingly, the Assistant Secretary ordered the petition dismissed.

The Activity-Petitioner, herein called OSHRC or "the Commission," filed a petition for clarification of unit to determine whether the OSHRC Commissioners' staff attorneys and staff attorneys in OSHRC's Office of Central Review should be excluded from the exclusively recognized unit represented by the American Federation of Government Employees, Local 12, AFL-CIO, herein called AFGE. 1/ The OSHRC contends, among other things, that its integrity as an impartial adjudicatory body would be jeopardized by potential conflicts of interest faced by the employees at issue when reviewing cases involving unions affiliated with the AFL-CIO, if those employees were represented by the AFGE. 2/ The OSHRC maintains that,

1/ The AFGE was granted exclusive recognition on September 16, 1976, for a unit of professional and nonprofessional employees at the OSHRC, with the standard exclusions. Administrative Law Judges also were expressly excluded from the unit.

2/ The parties stipulated that between three and four percent of the cases reaching the OSHRC involve labor organizations as intervenors. The percentage of cases actually involving AFL-CIO affiliates as intervenors was not specified.

notwithstanding the amount of supervision the attorneys receive, their present role in the decision-making process is considerable and places them in a position to bring about decisions favorable to AFL-CIO affiliates. Thus, the Commission seeks to have the employees at issue excluded from the unit 3/ as "employees engaged in administering a labor-management relations law" under Section 3(d) of the Order. 4/

The OSHRC, created by the Occupational Safety and Health Act of 1970, is a three-member adjudicatory body which resolves disputes arising between private employers and the Secretary of Labor regarding employer compliance with Federal safety and health standards. The Commission is not connected with the Department of Labor. Its hearings are conducted by an independent panel of Administrative Law Judges whose decisions are subject to discretionary review by the OSHRC Commissioners.

Cases which are before the OSHRC are screened by its Office of Central Review (OCR), whose staff attorneys, one of the groups at issue herein, recommend either further review or dismissal. These recommendations are subject to at least one level of supervisory review before submission to the OCR Chief Counsel, who, in turn, transmits those cases recommended for review to the Chief Counsel of each Commissioner. Cases are then assigned to the Commissioner's staff attorney, who prepares an agenda memorandum recommending final disposition. Each memorandum goes through a supervisor and the Commissioner's Chief Counsel, and then reaches the Commissioner. After an oral agenda, the case is returned to a staff attorney who drafts a final decisional memorandum. At each level of the decision-making process, attorneys, supervisors, chief counsels, and the Commissioners can disagree, either orally or in writing, with a proposed case disposition.

Based on the circumstances herein, I conclude that the employees in question should not be excluded from the existing bargaining unit. In this regard, I find that the Occupational Safety and Health Act of 1970 is not a "labor-management relations law" within the meaning of Section 3(d) of the Order, in that the primary mission of OSHA is to regulate safety and health standards. Its mission does not involve the administration of a labor-management relations law as that term is utilized in the Executive Order. The purpose of the Section 3(d) prohibition is to protect against potential conflicts of interest which could be faced by Federal employees responsible for administering provisions of labor relations programs if they were represented by a labor organization which competes with other labor organizations for benefits under such programs. 5/ In my view, no such potential conflict

3/ I have been advised administratively that these employees were eligible to vote in the representation election which was held in June 1976. There is no evidence that their voting status was challenged at that time.

4/ Section 3(d) of the Order provides "Employees engaged in administering a labor-management relations law or this Order shall not be represented by a labor organization which also represents other groups of employees under the law or this Order, or which is affiliated directly or indirectly with an organization which represents such a group of employees."

5/ See Section L. of the Study Committee's Report and Recommendations (August 1969).

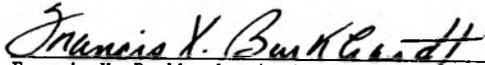
is present here, especially in view of the limited number of cases reaching the OSHRC involving labor organizations as intervenors in general and AFL-CIO affiliates as intervenors in particular.

Accordingly, I shall order that the petition herein be dismissed. 6/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-08069(CU) be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 12, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

6/ There was no contention, nor is there any basis to find, that the employees at issue should be excluded from the exclusively recognized unit as supervisors or management officials, or under any other exclusionary category set forth in Section 10(b) of the Order.

-3-

April 13, 1978

A/SLMR No. 1019

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVAL AIR TEST CENTER/NAVAL AIR STATION,
PATUXENT RIVER, MARYLAND
A/SLMR No. 1019

NAVAL AIR TEST CENTER/NAVAL AIR STATION,
PATUXENT RIVER, MARYLAND 1/

Activity

and

Case No. 22-08279 (RO)

FRATERNAL ORDER OF POLICE, FEDERAL
LAW ENFORCEMENT OFFICERS, LODGE 5-F

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1603, AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTION

In this case, the Fraternal Order of Police, Federal Law Enforcement Officers, Lodge 5-F, (FOP) filed a representation petition seeking an election in a unit of all police and detectives employed by the Activity. The Activity and the American Federation of Government Employees, Local 1603, AFL-CIO, (AFGE) took the position that the petition was, in effect, an attempt to sever the claimed employees from the activity-wide unit represented exclusively by the AFGE. While conceding that such employees were excluded from the activity-wide unit description contained in their current negotiated agreement, they contended that such exclusion was due to a mutual mistake which had been corrected. Assuming arguendo that the claimed employees were unrepresented, the Activity and the AFGE contended that the petitioned for unit was inappropriate because the claimed employees do not share a separate and distinct community of interest, and such a unit would not promote effective dealings and efficiency of agency operations.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Daryl F. Stephens. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Assistant Secretary concluded that the unit of guards and detectives sought in the petition was appropriate for the purpose of exclusive recognition. In this connection, he noted that the petitioned for employees were not included in the AFGE's existing exclusively recognized unit as there were no employees in their job classifications at the time AFGE was granted exclusive recognition. He noted also that they were specifically excluded from the AFGE's unit in the parties' current agreement, and there was no evidence that they had been effectively represented by the AFGE, or that the parties had sought to amend their agreement with respect to the exclusion of guards.

Upon the entire record in this case, including briefs submitted by the Activity and the Intervenor, the American Federation of Government Employees, Local 1603, AFL-CIO, herein called AFGE, the Assistant Secretary finds:

Noting that the claimed employees are employed in the Security Department of the Activity and that they perform similar and related work under similar working conditions and under the same position classification, the Assistant Secretary found that the petitioned for unit constituted both a functionally distinct grouping of employees within the meaning of Section 10(b) of the Order, and a residual unit of all the unrepresented nonprofessional employees of the Activity. Under these circumstances, he concluded that the claimed employees share a community of interest which is separate and distinct from other employees of the Activity and that such a unit would prevent further fragmentation thereby promoting effective dealings and efficiency of agency operations.

1. The labor organizations involved claim to represent certain employees of the Activity.

2. The Petitioner, Fraternal Order of Police, Federal Law Enforcement Officers, Lodge 5-F, hereinafter called FOP, seeks an election in a

1/ The name of the Activity appears as amended at the hearing.

Accordingly, the Assistant Secretary ordered that an election be conducted among the employees in the unit found appropriate.

unit consisting of all police officers and detectives of the Naval Air Test Center/Naval Air Station, Patuxent River, Maryland, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order. Both the Activity and the AFGE contend that the claimed employees currently are included in an activity-wide unit represented exclusively by the AFGE, and, therefore, the subject petition is, in effect, an attempt to sever the claimed employees from such unit. In this regard, while the Activity and the AFGE concede that the claimed employees are expressly excluded from the activity-wide unit description contained in their current negotiated agreement, they contend that such exclusion was due to a mutual mistake which has been corrected. Assuming arguendo that the claimed employees are unrepresented, the Activity and the AFGE contend that the petitioned for unit is inappropriate because the claimed employees do not share a separate and distinct community of interest and such a unit will not promote effective dealings and efficiency of agency operations.

The petitioned for employees are located in two of the three branches of the Activity's Security Department, which is under the operational direction of the Commanding Officer of the Naval Air Station (NAS). The latter, in turn, is responsible for maintaining and operating facilities and for providing services and material support to the head of the Activity, the Commanding Officer of the Naval Air Test Center (NATC), whose mission essentially is to perform tests and evaluations of the Naval aircraft system.

On July 7, 1966, the AFGE was granted exclusive recognition under Executive Order 10988 for a unit comprised of all employees of the Activity, excluding supervisory and professional employees. In 1968, a civilian detective was hired, the first employee hired in the category at issue herein. Thereafter, another detective was hired in 1970 and a police division was created in the latter part of 1972 to replace the military police who had performed the security and police functions. The Activity and the AFGE negotiated two agreements during this period, dated January 17, 1968, and July 5, 1972, both of which retained the general unit definition as noted above with no specific mention made of police officers or detectives in either agreement. However, in their current three-year agreement dated October 25, 1974, the parties added guards to the exclusionary portion of their unit definition. 2/

Both the AFGE and the Activity agree that the claimed employees were considered by them to be excluded from the unit until the February 6, 1975, amendment of Executive Order 11491 which they contend caused them to

2/ The record indicates that the parties agreed to this exclusion in order to conform to the Section 10(b)(3) requirement of Executive Order 11491, in effect at that time, that guards could not be included in units with non-guards. On February 6, 1975, the Order was amended revoking that section of the Executive Order.

reconsider such exclusion. However, there is no evidence that either party subsequently attempted to amend the agreement with respect to such exclusion or to take any other action to reflect a change in the scope of the unit.

The record reveals that police officers hired after 1974 had received the impression from their orientation that they could not join or be active in a union. In this connection, there is no evidence that the AFGE represented any of the police or detectives in a grievance matter. 3/ Although the record indicates that one police officer who transferred from another job in the unit was retained on dues withholding until he became a supervisor, he testified that he took no part in union activities and, in fact, believed that he no longer could participate in such activities after he became a police officer.

Under the foregoing circumstances, I find that the petitioned for employees are not included in the AFGE's existing exclusively recognized unit. Thus, there were no employees in the job classifications covered by the subject petition at the time the AFGE was granted recognition. In fact, guards are specifically excluded from the AFGE's unit in the parties' current negotiated agreement, and there is no evidence that they have been effectively represented by the AFGE, or that the parties sought to amend their agreement with respect to the exclusion of guards.

In this context, the employees sought are the only unrepresented employees of the Activity, other than professional employees who were excluded from the unit at the time that exclusive recognition was granted. As noted above, organizationally, the petitioned for employees are located in two of the three divisions of the Security Department which provides overall security for the entire Patuxent complex. 4/ Both the police and the detectives have the same classification and are involved in law enforcement and insuring the security of the complex. The police are engaged in patrol duty, in guarding the physical security of the complex and in enforcing its regulations and the law. The detectives spend the majority of their time in investigations involving crimes, security, and traffic violations. Both the detectives and the police process cases involving criminal violations and major traffic violations. The police perform the initial investigation and the detectives perform the follow-up. Both may also be involved in stake-outs or surveillance activities. While only the police wear uniforms, both police and detectives carry guns and are empowered to detain suspects. The detectives do not work shifts, as do the

3/ While the issue of contracting out of certain service functions, such as police work, was discussed at several regular monthly union meetings, no negotiations on this issue took place which would have affected the claimed employees.

4/ The three divisions are Administrative, Investigative, and Police. The Administrative Division is comprised of clerical employees, and one clerical employee is employed in each of the other divisions.

police; however, they have rotating 24 hour duty responsibilities which may require them to be on the base premises at all hours.

Based on the foregoing, I find that the claimed unit of police and detectives is appropriate for the purpose of exclusive recognition. Thus, the unit sought is, in effect, a residual unit of all unrepresented nonprofessional employees of the Activity. Moreover, such a unit, consisting of all employees of the Activity engaged in security functions, constitutes a functionally distinct group of employees within the meaning of Section 10(b) of the Order, which provides, among other things, for the establishment of units on a functional basis. 5/ Consequently, I find that the employees in the petitioned for functional unit share a community of interest which is separate and distinct from other employees of the Activity. Further, such a residual unit of the Activity's unrepresented nonprofessional employees will, in my view, promote effective dealings and efficiency of agency operations as it will reduce the possibility of further fragmentation by establishing only one additional unit for the remaining unrepresented nonprofessional employees of the Activity. 6/

I shall, therefore, direct an election in the following unit:

All police officers and detectives of the Naval Air Test Center/Naval Air Station, Patuxent River, Maryland, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Order.

In view of the AFGE's clear desire to represent the claimed employees as part of its existing unit, I find that the employees in the unit found appropriate should be afforded the opportunity to choose whether or not they wish to become part of the existing unit represented by the AFGE. 7/ Accordingly, if a majority of the employees in the unit found appropriate votes for the AFGE, they will have indicated a desire to be included in the existing activity-wide unit represented by the AFGE and the appropriate Area Administrator will issue a certification to that effect. If, on the other hand, a majority of the employees votes for the FOP, they will be taken to have indicated a desire to be included in the unit found appropriate, and the appropriate Area Administrator will issue a certification to that effect.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise

5/ See Department of the Navy, Naval Support Activity, Long Beach, California, 6 A/SLMR 150, 152, A/SLMR No. 629 (1976).

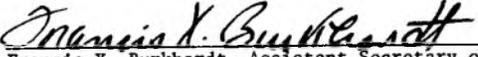
6/ Id. at 153.

7/ Cf. Department of the Navy, Naval Support Activity, Long Beach, California, cited above, and Department of the Interior, National Park Service, National Capital Parks, John F. Kennedy Center for the Performing Arts, 3 A/SLMR 520, A/SLMR No. 305 (1973).

the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the Fraternal Order of Police, Federal Law Enforcement Officers, Lodge 5-F; by the American Federation of Government Employees, Local 1603, AFL-CIO; or by neither labor organization.

Dated, Washington, D. C.

April 13, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

April 13, 1978

A/SLMR No. 1020

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION,
CONCORD, CALIFORNIA

DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION,
CONCORD, CALIFORNIA
A/SLMR No. 1020

Respondent

and

Case Nos. 70-5700(CA) and
70-5701(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1931, AFL-CIO

Complainant

DECISION AND ORDER

This case involved two unfair labor practice complaints filed by the American Federation of Government Employees, Local 1931, AFL-CIO (AFGE). One complaint alleged, in essence, that the Respondent violated Section 19(a)(1) and (6) of the Order by issuing an official "instruction" which changed working conditions relating to the operation of certain government-owned vehicles without first giving the Complainant an opportunity to negotiate on the matter, and on the impact and implementation of the alleged change. The second complaint alleged that the Respondent violated Section 19(a)(1) and (6) by issuing an official "note" to accomplish the same change.

On January 30, 1978, Administrative Law Judge Randolph D. Mason issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaints and recommending that the complaints be dismissed in their entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Administrative Law Judge found that the Respondent had not violated Section 19(a)(1) and (6) and recommended that the complaints be dismissed. In reaching this conclusion, he found that there was insufficient evidence to establish that the Respondent's instruction or note had any impact upon the bargaining unit employees. He also noted that the Respondent had cancelled both the instruction and the note.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in these cases, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

At the hearing, the Complainant raised a second issue relating to an alleged change in working conditions regarding the use of government vehicles. The Administrative Law Judge declined to consider the merits of this issue because it was not raised in the complaint, as required by the Assistant Secretary's Regulations.

ORDER

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the two complaints be dismissed.

IT IS HEREBY ORDERED that the complaints in Case Nos. 70-5700(CA) and 70-5701(CA) be, and they hereby are, dismissed.

Dated, Washington, D. C.
April 13, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



RECOMMENDED DECISION AND ORDER

This proceeding was heard in San Francisco, California, on October 28, 1977, and arises under Executive Order 11491, as amended. Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter called the Assistant Secretary) a Notice of Consolidated Hearing on Complaints was issued on September 6, 1977, and on October 14, 1977, an Order Rescheduling Hearing was issued. These cases were initiated by separate complaints, both of which were filed on March 18, 1977, by the American Federation of Government Employees, Local 1931, AFL-CIO (hereinafter the "Union"). Each of the complaints, one of which was amended without objection at the hearing, simply alleged that the Naval Weapons Station, at Concord, California, (hereinafter the "respondent") violated sections 19(a)(1) and (6) of the Executive Order by issuing certain instructions.

The only issue properly presented for decision is whether or not the respondent violated sections 19(a)(1) and (6) of the Order by unilaterally changing the policies relating to the operation of government-owned vehicles equipped with catalytic converters without affording the complainant a meaningful opportunity to negotiate on the matter, and by failing to afford complainant the opportunity to negotiate on the impact and implementation of any change in such policies. The Union raised a second issue at the hearing relating to the use of government vehicles for transportation to and from lunch. For the reasons set forth in section two of the Conclusions of Law, the latter issue was not raised in a timely manner and must be dismissed.

At the hearing all parties were given an opportunity to examine and cross-examine witnesses, to submit documentary evidence, and to present oral arguments. After the hearing, both parties filed briefs which were duly considered. In light of the entire record in this case, I submit the following Findings of Fact and Conclusions of Law.

Findings of Fact

At all times pertinent hereto the respondent recognized the Union as the exclusive representative of certain employees specified in Article I of the parties' collective bargaining agreement dated March 19, 1974.

.....
In the Matter of: :
: :
DEPARTMENT OF THE NAVY :
NAVAL WEAPONS STATION, :
CONCORD, CALIFORNIA :
Respondent :
: :
and :
: :
AMERICAN FEDERATION OF :
GOVERNMENT EMPLOYEES, LOCAL: :
1931, AFL-CIO :
Complainant :
.....

Case Nos. 70-5700(CA)
70-5701(CA)

Richard C. Wells, Esquire
Senior Labor Advisor
Department of the Navy,
Western Field Division
760 Market Street
San Francisco, California
For the Respondent

Curtis Turner,
National Representative,
American Federation of Government
Employees,
620 Contra Costa Blvd.,
Pleasant Hill, California
For the Complainant

Before: RANDOLPH D. MASON
Administrative Law Judge

On January 17, 1977, the respondent's Commanding Officer issued "Wpnsta Concord Instruction 11240-8F" relating to the assignment and operation of government-owned vehicles. This Instruction cancelled and superseded Instruction 11240-8E, dated April 8, 1976. Both Instructions were applicable to all military and civilian personnel working at the respondent Activity. The January 17 Instruction was identical to the earlier Instruction in all respects with the exception of paragraph 7(f), which was added by the new Instruction. The fact that paragraph 7(f) constitutes the only addition to the earlier Instruction is highlighted by an "A)" (symbolizing the word "addition") appearing in the left-hand margin next to the new paragraph. The new paragraph reads as follows:

f. Drivers of Vehicles having catalytic converters are prohibited from operating the vehicles within 100 feet of fuel storage areas and transfer operations [where fuel is transferred from one container to another], except service stations, where low-lying accumulations of flammable vapors or hazardous ignition combustible material sources are present. In addition such vehicles will not be parked over any grassy areas or unpaved surfaces which could be considered to be "oil-soaked." These restrictions are noted on the dashboards of vehicles which are so equipped.

Paragraph 5(a) is identical in both the old and new Instructions, and reads in part as follows:

(1) Use of Government-owned vehicles will be limited to authorized personnel on official business. The term "Official Business" shall not include the transportation of officers and employees between home and work. Transportation to or from lunch areas is also prohibited except in cases when officers and employees are engaged in field work, the character of whose duties makes such transportation necessary and then only when approved by the head of the department concerned.

The respondent admittedly failed to provide the Union with an opportunity to consult or confer with respect to paragraph 7(f) of the January 17 Instruction.

On February 16, 1977, the respondent received a telegraphic message from higher headquarters which stated, in pertinent part, as follows:

A. Catalytic converter equipped vehicles may be operated within ammunition/explosives areas, but will not be permitted to stand or park within 50 feet of any structure containing ammunition/explosives or any outside facility containing such commodities.

B. Vehicles equipped with catalytic converters will not be used for transporting ammunition/explosives.

C. Vehicles equipped with catalytic converters will not be permitted to stand or park in areas where vegetation or other combustible materials beneath the vehicle may catch fire from converter heat.

D. Catalytic converter equipped vehicles may operate within the general POL areas but not stand or park within 50 feet of any fuel storage tank, pump, or dispensing unit.

.....

G. Commanding Officers/Commanders/Officers-in-Charge will ensure that military guards civilian police and applicable staff agencies take necessary measures to assure adherence to the above restrictions.

In compliance with the above telegraphic message, the Acting Commanding Officer issued "WPNSTA CONCORD NOTE 8020" dated February 18, 1977. A copy of the above telegraphic message was attached to Note 8020. The Note stated that the message contained a new policy regarding the use of vehicles equipped with catalytic converters. Again, the respondent admittedly did not provide the Union with

an opportunity to consult or confer with respect to the substance, implementation, or impact of the new policy.

On March 2, 1977, the Union filed pre-complaint charges against the respondent with respect to the January 17 Instruction and Note 8020, respectively. Immediately thereafter, the Acting Commanding Officer met with the President of the Union to discuss the charges. At this meeting, the Union proposed that if the respondent would cancel the new Instruction and Note 8020, the Union would withdraw the charges. The Acting Commanding Officer agreed to rescind these documents. On March 9, 1977, the same officer sent a memorandum to the President of the Union stating that the Instruction and Note in question "are being cancelled" and that this was his "final decision." The Administration Department was then ordered to publish and distribute the appropriate cancellation notices. The Administration Department was able to effectuate a formal cancellation of Note 8020 on March 17, 1977, but for some reason was unable to formally cancel the January 17 Instruction until April 5, 1977. Meanwhile, the Union had filed the complaints in the instant proceeding with the Department of Labor on March 18, 1977.

The formal cancellations of the Instruction and Note were distributed to all appropriate supervisory personnel. In addition, the respondent's employees were informed of the cancellations in a military publication entitled "Plan of the Day." That publication stated that the regulations had been changed with respect to the use of government-owned vehicles equipped with catalytic converters, and that the only "restriction" regarding these vehicles was to ensure that these vehicles received regular tune-ups.

The evidence of record fails to prove that the Instruction and Note had any impact upon the bargaining unit employees with respect to the operation of government vehicles equipped with catalytic converters. In this regard, there were no more than three of these vehicles that might have been available to the unit employees. However, these three vehicles may have been assigned to supervisors, Marine Guards, or other military personnel, and may not have been available to the bargaining unit employees during the period in question.

Conclusions of Law

1. The first issue presented for decision is whether the respondent violated section 19(a)(1) and (6) of the Executive Order by refusing to consult, confer, or negotiate with the Union regarding the substance, impact and implementation of the January 17, 1977, Instruction and the February 18, 1977, Note. Both of these documents required that government-owned vehicles equipped with catalytic converters be parked a specified distance from certain buildings. Respondent had been informed that catalytic converters have a tendency to overheat and pose a fire hazard when parked near fuel vapors or other combustible materials.

On March 2, 1977, the Union filed its pre-complaint charge. Immediately thereafter, the Commanding Officer met with the Union President and agreed to rescind the offending documents. Also, the Commanding Officer wrote a memorandum to the President of the Union on March 9, 1977, in which he stated that the documents "are being cancelled" and that this was his "final decision." Due to administrative delays, the February 18 Note and the January 17 Instruction were not formally rescinded by appropriate publication until March 17 and April 5, 1977, respectively.

In response to the respondent's argument that the above rescissions rendered this issue moot, the Union argued that the policy set forth in the Instruction and Note was still in effect after the documents were rescinded. In this regard, the Union President pointed to the fact that one of the signs imposing parking restrictions on vehicles equipped with catalytic converters was still posted subsequent to the above rescissions. Apparently this sign, which was on one of the field buildings, stated that such vehicles should be parked more than 50 feet from the building. I do not view respondent's inadvertent failure to remove this sign as a continuation of the policy in question. The Union and the employees were informed that the former parking restrictions had been cancelled.

Respondent argues that no violation of the Executive Order occurred in this case because the Union has failed to prove that either the Instruction or the Note had any impact whatsoever upon the unit employees. I agree with the Respondent in this regard and consider this to be the most important reason why this aspect of the complaint should be dismissed. During the period in question, there were

only three vehicles equipped with catalytic converters on the entire Naval Weapons Station that might conceivably have been available to the unit employees. However, it is quite possible that all of these vehicles were assigned to supervisors or military personnel, and that no unit employee would have had an opportunity to drive any of these vehicles during the period that the parking restrictions were in effect. When these circumstances are coupled with the fact that respondent cancelled the offending documents, it cannot be said that the respondent violated the Executive Order.

2. At the hearing the Union raised a further objection to the January 17, 1977, Instruction. Paragraph 5(a) of the Instruction prohibited employees from using government vehicles for transportation to and from lunch. As previously indicated, this Instruction merely reiterated the language of previous instructions in this regard. On its face, the only change in prior policy made by the January 17 Instruction related to the catalytic converter issue. In spite of the longstanding published rule prohibiting the use of government vehicles for transportation to and from lunch, the Union argued at the hearing that certain supervisors had allowed a contrary practice to be established. The Union contends that the January 17 Instruction "changed" the practice established by the supervisors.

I need not consider the merits of this issue. In the first place, the issue was not raised in the complaint. That document merely alleged that the respondent should have consulted and conferred with the Union regarding the issuance of the Instruction. The latter document merely added a paragraph regarding catalytic converters. Therefore, it was perfectly reasonable for the respondent to have concluded after reading the complaint that the only issue in the case related to catalytic converters.

At the hearing, the respondent's attorney stated that he was completely surprised and unprepared to litigate the issue regarding transportation to and from lunch. This attorney had represented the respondent during the entire proceeding before the Department of Labor. The Union President admitted that he had not raised this issue with the respondent's attorney. However, the President did state that he had raised the issue with the Commanding Officer at the informal level. I believe that the President was mistaken on this point, and I credit the testimony of the Commanding Officer to the effect that this issue was never previously raised by the Union.

The Union did not comply with section 203.3(a)(3) of the regulations of the Assistant Secretary because the complaint did not contain a clear and concise statement of the facts constituting the alleged unfair labor practice in question. The respondent would have had no way of knowing that the "transportation to lunch" issue would be raised, and it would be patently unfair to force the respondent to litigate this issue at this time. 1/

Recommendation

Having concluded that the respondent did not violate sections 19(a)(1) and (6) of the Order, I hereby recommend that the complaints filed in this case be dismissed in their entirety.

Randolph D. Mason

 Randolph D. Mason
 Administrative Law Judge

Dated: January 30, 1978
 Washington, D.C.

1/ I have considered the affidavit the Union President filed with the Area Director stating, in part, that the employees were no longer able to use government cars to go to the EM club while working overtime in remote areas. Although a copy of this affidavit was ultimately sent by the Government to the respondent's representative prior to the hearing, this was not an appropriate means of raising a new issue. The Union admittedly did not raise the issue with the respondent's representative. However, even assuming arguendo that the Union properly raised an issue regarding transportation to and from the EM club while working overtime, the evidence of record does not prove a violation of the Order. Even if the President's supervisor had allowed this practice to be established in spite of the Activity's outstanding instruction to the contrary, the supervisor admittedly never changed the practice even after the January 17 Instruction.

rdm:vg

April 13, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
AERONAUTICAL CENTER,
OKLAHOMA CITY, OKLAHOMA
A/SLMR No. 1021

This case involved a petition for consolidation of units filed by the American Federation of Government Employees, AFL-CIO, Local 2282 (AFGE) seeking to consolidate seven units for which it is the current exclusive representative. The proposed consolidated unit would consist of nonprofessional or Wage Grade employees in seven of the Activity's 16 organizational divisions. The record revealed that employees in two other divisions were represented by other labor organizations, with the remainder of the employees unrepresented. The Activity opposed the proposed consolidated unit on the basis that it did not meet the unit criteria contained in Section 10(b) of the Order. In this regard, it argued that while each of the divisions, considered individually, had a separate community of interest, the employees in the proposed unit, which was limited to only a portion of the Activity's employees, did not share a clear and identifiable community of interest which was separate and distinct from the unrepresented employees. The Activity further contended that future organizational attempts with regard to the unrepresented employees could result in a fragmented unit structure which would artificially divide employees, and that effective dealings had already been achieved as evidenced by the negotiated agreements between the parties.

In reviewing previous Assistant Secretary decisions in the area of unit consolidation, the Federal Labor Relations Council (Council) construed the Assistant Secretary's establishment of a presumption in favor of consolidations as "a recognition and affirmation of the strong policy in the Federal labor-management relations program of facilitating consolidation" and noted that this affirmation accurately reflected the policy guidelines concerning consolidation enunciated in the Council's 1975 Report and Recommendations. In this context, and based upon the facts of this case, the Assistant Secretary found that the petitioned for unit was appropriate for the purpose of exclusive recognition inasmuch as it satisfied the criteria contained in Section 10(b) of the Order. He noted that the employees in the unit sought enjoyed a clear and identifiable community of interest in that they shared a common mission, common overall supervision and uniform personnel policies and practices. He further found that as all employees were serviced by the same personnel office which also handled labor relations matters for each of the divisions in which the AFGE held recognition, the proposed

consolidated unit would promote effective dealings and efficiency of agency operations. Similarly, he noted that the consolidated unit which would provide for bargaining in one, rather than the existing seven units, would promote a more comprehensive bargaining unit structure, thereby reducing fragmentation.

Accordingly, the Assistant Secretary directed an election in the consolidated unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
AERONAUTICAL CENTER,
OKLAHOMA CITY, OKLAHOMA

Activity

and

Case No. 63-7445 (UC)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2282

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer A. Jack Lewis. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Petitioner, American Federation of Government Employees, AFL-CIO, Local 2282, herein called AFGE, seeks to consolidate seven existing units for which it is the current exclusive representative at the Federal Aviation Administration's (FAA's) Aeronautical Center, Oklahoma City, Oklahoma. ^{1/} These seven units include the Wage Grade employees in the Facility Support Division (formerly Plant Engineering), and the nonprofessional employees in the following organizational divisions: Accounting and Audit, Administrative Services, Data Services, FAA Depot, Airmen and Aircraft Registry (formerly Flight Standards Technical Division), and the FAA Management Training School, located in Lawton, Oklahoma.

The Activity contends that the proposed consolidated unit is inappropriate inasmuch as it does not meet the unit criteria contained in Section 10(b) of the Order. With respect to community of interest, the Activity argues that because each division has a separate mission and supervisory hierarchy, it is axiomatic that the employees in each division would have a separate community of interest. On the other hand, in the Activity's view, the employees in the proposed consolidated unit, which is limited only to a portion of the Activity's employees, do not share a clear and identifiable community of interest which is separate and distinct from some 600 other employees who are currently unrepresented

^{1/} The record reveals that there are approximately 1200 Activity employees currently represented by the AFGE.

but who would otherwise be eligible for inclusion in the type of unit the AFGE is seeking. The Activity further argues that future organizational attempts with regard to its currently unrepresented employees could result in a fragmented unit structure which would artificially divide the employees at the Activity, and that effective dealings have already been realized by virtue of the fact that the AFGE and the Activity have entered into negotiated agreements. Finally, the Activity requests that an election be held if the consolidated unit is found to be appropriate.

The Aeronautical Center is an intermediate field organization of the FAA with operating, research and support functions, national in scope, which are not required to be performed in the central office, and which are not susceptible of assignment to, or division among, the regions as regional operating programs. The Center is comprised of 16 organizational components, including the seven divisions noted above in which the AFGE represents certain employees. ^{2/} Those divisions which provide support not only for the Activity, but for the entire FAA, report directly to the Director of the Center, who maintains overall responsibility for the management of the operating, research and support functions. The remainder of the divisions, which give primary support to the Center itself, report to the Director through an Executive Officer, who is responsible for directing and coordinating the administrative support services of the Activity and for providing technical guidance in internal administration to the program divisions. Each division has its own internal organizational structure and supervisory hierarchy, with the head of the division exercising the authority to hire, fire, award and promote the employees assigned to that division.

The record reveals that certain divisions provide services to others. For example, the Personnel Management Division implements personnel policies and practices established by the Agency with respect to all Activity employees, and establishes and implements personnel policies which are designed to meet the particular needs of the Activity. This Division also handles labor relations matters at the Activity and, in this connection, the record indicates that during contract negotiations, a labor relations specialist from the Division serves as chairperson of the negotiating sessions.

The evidence establishes that the AFGE and the Activity have entered into separate negotiated agreements for each of the seven divisions. An examination of these agreements indicates that they have been limited, for the most part, to a dues withholding provision and the establishment of a grievance procedure. Monthly labor-management meetings are held in each of the divisions, although the record reveals that the local president of the AFGE is only permitted to attend the meetings for the division in which he is employed.

^{2/} Employees in two other divisions are represented by other labor organizations with the employees in the remaining divisions currently unrepresented.

All employees of the Activity are covered by the Agency's merit promotion plan as well as its adverse action and grievance appeals procedures. Division heads are authorized to act as the deciding official in cases of minor adverse actions, while the Director performs this same function with regard to major adverse actions, although the latter can redelegate this authority. Both the Director and division heads, as well as the Executive Officer, can render final decisions on formal agency grievances. The area of consideration in filling vacancies is Activity-wide, although, in some instances, the area of consideration may be broader.

In reviewing the Assistant Secretary's decisions concerning the consolidation of units, 3/ the Federal Labor Relations Council (Council) construed the Assistant Secretary's establishment of a presumption in favor of consolidations ". . . as a recognition and affirmation of the strong policy in the Federal labor-management relations program of facilitating consolidation. . . ." The Council noted further that such affirmation accurately reflects the Council's 1975 Report and Recommendations that the Assistant Secretary be mindful of facilitating the consolidation of existing units which conform to the appropriate unit criteria contained in Section 10(b) of the Order. In this context, and based upon the foregoing circumstances, I find that the proposed consolidated unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended, in that it meets the three unit criteria set forth in Section 10(b).

Contrary to the Activity's assertion, I find that the employees in the unit sought, consisting of all employees currently represented by the AFGE in a number of existing bargaining units within the Activity, enjoy a clear and identifiable community of interest in that they share a common mission, common overall supervision, and uniform personnel policies and practices. 4/ Further, I find that the proposed unit consolidation will promote effective dealings and efficiency of agency operations. Particularly noted in this latter regard is the fact that all employees are serviced by the same personnel office, which also handles labor relations for each of the divisions in which the AFGE holds recognition. Moreover, considering the scope of the agreements which have thus far been negotiated by the parties, it seems reasonable

3/ See e.g. Education Division, Department of Health, Education and Welfare, Washington, D.C., A/SLMR No. 822 (1977), FLRC No. 77A-88 (1978).

4/ Cf. U.S. Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Region V, Area IV, Cleveland, Ohio, 6 A/SLMR 481, A/SLMR No. 706 (1976), FLRC No. 76A-151 (1977). Cf. also Education Division, Department of Health, Education and Welfare, Washington, D.C., cited above, in which the Council, quoting from its 1975 Report and Recommendations, stated that "(t)he procedure for consolidating a labor organization's existing exclusively recognized units should have application only to situations where there is no question concerning the representation desires of the employees who would be included in a proposed consolidation."

to conclude that the Activity could realize more effective dealings by bargaining in one consolidated unit. Similarly, the petitioned for consolidated unit, which provides for bargaining in a single, rather than in the existing seven bargaining units, will reduce unit fragmentation and promote a more comprehensive bargaining unit structure, which is consistent with the policies of the Order.

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All employees of the Federal Aviation Administration, Aeronautical Center, Oklahoma City, Oklahoma, assigned to the Facility Support Division, Accounting and Audit Division, Administrative Services Division, Data Services Division, FAA Depot, Airmen and Aircraft Registry and the FAA Management Training School, located in Lawton, Oklahoma, excluding all professional employees, General Schedule employees assigned to the Facility Support Division, confidential employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order. 5/

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll

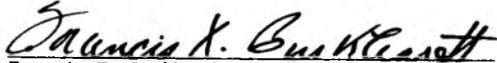
5/ There appears to be some ambiguity as to whether or not guards were intended to be included in the proposed consolidated unit inasmuch as several of the certifications or grants of recognition held by the AFGE specifically exclude guards, while others are silent as to their inclusion or exclusion. As noted in Education Division, Department of Health, Education and Welfare, cited above, proposed consolidated units are limited to, and/or defined by, the parameters of the existing exclusively recognized units at the time of the filing of a consolidation petition. Accordingly, the unit found appropriate herein should conform to the unit descriptions of the current exclusively recognized units.

April 13, 1978

period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented in the proposed consolidated unit by the American Federation of Government Employees, AFL-CIO, Local 2282.

Dated, Washington, D.C.

April 13, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, BUREAU OF
RETIREMENT AND SURVIVOR'S INSURANCE
A/SLMR No. 1022

This case involved an unfair labor practice complaint filed by the National Council of Social Security Payment Center Locals, American Federation of Government Employees, (AFGE), AFL-CIO, (Council) alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by its refusal to negotiate over the impact and implementation of an employee performance assessment program prior to its institution. The Respondent argued that the Complainant lacked authority to request negotiations and, in the alternative, if the Complainant had such authority, it had not demonstrated a desire to bargain at the proper level.

The Administrative Law Judge found, based on correspondence between Respondent and the National President of the AFGE, that the National Office of the AFGE was the exclusive representative of the employees in the bargaining unit. Under these circumstances, he concluded, in effect, that the Council was without bargaining authority in this matter. Therefore, the Administrative Law Judge recommended that the complaint be dismissed.

While the Assistant Secretary agreed with the conclusion reached by the Administrative Law Judge, he did so for different reasons. Contrary to the Administrative Law Judge, he found that the Council was a proper party to request negotiations since it was, at a minimum, recognized by the Respondent as the agent of the National Office of the AFGE and had standing to act on behalf of the exclusive representative. However, the Assistant Secretary further found that no violation of the Order occurred since, in his view, the Respondent's contention that consultation take place at the local, rather than Bureau-level, was no more than a good faith interpretation of the parties' negotiated agreement and did not constitute an improper refusal to bargain. He also found that the Council had not established by a preponderance of the evidence that the Respondent had failed to fulfill its obligation to bargain at the local level.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, BUREAU OF
RETIREMENT AND SURVIVOR'S INSURANCE

Respondent

and

Case No. 22-07777(CA)

NATIONAL COUNCIL OF SOCIAL
SECURITY PAYMENT CENTER LOCALS,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On November 1, 1977, Administrative Law Judge John W. Earman issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in the subject case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The complaint herein alleges that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by its refusal to negotiate over the impact and implementation of an individual performance assessment program prior to its institution. 1/

1/ The Notice of Hearing, the Administrative Law Judge's Recommended Decision and the briefs of the parties make no reference to an alleged Section 19(a)(2) violation. Hence, it appears that such allegation was either withdrawn or dismissed prior to the hearing in this matter.

The essential facts of the case are set forth, in detail, in the attached Administrative Law Judge's Recommended Decision, and I shall repeat them only to the extent necessary.

The Respondent has six Program Service Centers located throughout the Nation. At each Program Service Center there is a local union affiliated with the American Federation of Government Employees, AFL-CIO, (AFGE) which is a member of the National Council of Social Security Payment Center Locals (Council). The exclusive representative of the Respondent's employees is defined in Article I of the parties' negotiated agreement as "the National Office of the American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), hereinafter referred to as the Council." 2/ This negotiated agreement was signed by the parties on March 15, 1974, and was extended by them in 1976 to March 15, 1977. 3/

2/ Specifically, Article I of the parties' negotiated agreement states:

The Bureau of Retirement and Survivor's Insurance of the Social Security Administration (DHEW), hereinafter referred to as the Bureau, in a letter dated June 10, 1969, signed by the Bureau Director, has recognized the National Office of the American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), hereinafter referred to as the Council, as the exclusive representative for a unit consisting of all nonsupervisory employees (including professionals) in the Social Security Administration Program Centers."

3/ The negotiated agreement, among other things, provides:

Article 2 Council - Bureau Relations at the National and Local Level

* * * * *

Section e - The Bureau will consult with the Council on matters within the authority of the Bureau Director relating to personnel policies, practices, and working conditions.

The Program Center will consult with its respective Local on matters within the authority of the Regional Representative relating to personnel policies, practices, and working conditions.

The parties agree to initially consider and, to the extent possible, settle each matter of business between the Bureau and the Council at the point nearest its origin, and at the lowest level of management where there is authority for a decision. Matters will ordinarily not be considered at higher levels until reasonable effort has been made to reach agreement at such lower level.

(Continued)

As indicated above, the Council alleged, essentially, that Respondent violated Section 19(a)(1) and (6) of the Order by instituting an individual performance assessment program and refusing to negotiate on the impact of the system on employee working conditions. In reply, the Respondent contends that the Council lacked bargaining authority, that if the Council had the authority, it had not shown its desire to bargain, and that the only bargaining which could take place, by virtue of a past practice between the parties, would occur at the end of the term of the Master Agreement.

The instant dispute centers around a decision in December 1975, by the Acting Director of the Respondent to improve employee production and efficiency, and his drafting of a paper on managing employee workloads which included an individual employee assessment system. This paper was furnished to the Council for comment in December 1975. In its January 1976, response, the Council objected to the new program, stating that the matter of employee "workload management" was an appropriate matter for bargaining at the Bureau level. On March 12, 1976, the Respondent replied to the Council enclosing an advance copy of the former's final paper on workload management, which was in the process of being distributed to the Respondent's Program Centers. The Respondent stated that the Bureau-level paper was meant only to constitute a broad framework within which each Program Service Center would work out its own workload management plan, and that the Bureau expected the management staffs of the six Program Service Centers to consult with the respective locals of the Council in developing and implementing the specific details of their respective individual assessment systems. During the summer and early fall of 1976, the individual Payment Service Center developed and implemented their respective employee assessment programs.

Based on correspondence sent to the Respondent by the National President of the AFGE, the Administrative Law Judge concluded that the National Office of the AFGE has considered itself to have exclusive recognition with the Respondent. He reasoned that the past practice of the parties with regard to bargaining supported this view since the National Office of the AFGE, not the Council, had requested and headed all negotiations with the Respondent concerning a new Master Agreement.

3/ Article 24 Reviewing Performance Requirements . . .

* * * * *

Section c - The Bureau agrees that if the Program Center decides to review or revise any performance requirement for positions in the unit, the Local shall be given the opportunity to comment prior to the issuance of such new or revised requirements. . .

* * * * *

Section e - The Bureau agrees to consult with the Council prior to issuing any new or revised performance requirements for positions in the unit.

The Administrative Law Judge also found that the use of the term "confer and consult" in the parties' negotiated agreement 4/ was not understood by the parties to include bargaining between the Council and the Respondent concerning mid-contract changes in personnel policies and practices. Under these circumstances, he concluded, in effect, that the Council was without bargaining authority in the matter and recommended dismissal of the instant complaint.

While I concur in the recommendation by the Administrative Law Judge that dismissal of the instant complaint is warranted, I do so for different reasons. Thus, contrary to the Administrative Law Judge, I find that the Council was a proper party to request negotiations in this matter. As noted above, the parties' negotiated agreement identifies the exclusive representative as the "National Office of the American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), hereinafter referred to as the Council." 5/ Furthermore, a February 1969, letter sent by the National Office of the AFGE to the Respondent requesting recognition closes with the sentence, "Therefore the National Office of the American Federation of Government Employees is the bargaining agent for this Council" (emphasis supplied). The record also shows that all correspondence by the Respondent which was intended to serve as notice to the exclusive representative of the Respondent's intention to institute the new personnel practice involved herein was addressed to the Council, not the National Office of the AFGE.

Under these circumstances, I find that the parties' negotiated agreement, coupled with the Respondent's course of conduct, noted above, serves to establish, at a minimum, that the Council was recognized by the parties as the agent of the National Office of the AFGE for purposes of representing the employees within the unit. Consequently, I conclude that the Council was a proper party to request negotiations in this matter and to file the subject complaint.

With regard to the gravamen of the complaint, the Council asserts that the Respondent's "workload management," including the individual employee assessment system, was a matter appropriate for bargaining at the Bureau level. The Respondent, on the other hand, contends, as noted

4/ Article 2 Council - Bureau Relations at the National and Local Level

Section a - It is understood that representatives of the Bureau and Council shall meet semiannually on a scheduled basis on dates which are mutually satisfactory to both parties to confer and consult with respect to personnel policies and practices or other matters affecting general working conditions as permitted within the meaning and intent of Executive Order 11491, as amended.

5/ The actual letter of recognition by the Respondent was not admitted into evidence at the hearing in this matter.

in its memorandum of March 1976, that the Bureau-level paper constituted only a broad framework within which each Program Service Center would develop its own workload management plan, including whatever changes in employee assessment they felt necessary. 6/ Further, the Respondent asserts, relying on the provisions of Article 2 and Article 24 of the parties' negotiated agreement, that this was a matter appropriate for bargaining at the Program Service Center level and, in this regard, it notes that it had advised both the Council and the Program Service Centers that it expected that the management staff of each of the Centers would consult with the respective locals of the Council in developing and implementing the specific details of their respective plans and systems.

As noted above, Articles 2 and 24 of the parties' negotiated agreement provide, in essence, that matters relating to personnel policies and practices and working conditions, within the authority of the Regional Representative, including performance requirements for positions within the unit, will be matters for consultation between the Program Service Center and the local involved, and that such matters would be settled at the lowest level of management where there is authority for a decision. In this context, I find that the Respondent's contention that consultation between management and the Council take place at the Program Service Center level reflected a good faith interpretation of the rights and obligations of the parties under their negotiated agreement, and did not, standing alone, constitute an improper refusal to bargain in good faith. 7/ Further, in view of the absence in the record of evidence that the appropriate locals of the Council requested and were denied the right to bargain with their respective Program Service Centers, I find that the Council has not established by a preponderance of the evidence that the Respondent failed to fulfill its obligation to bargain with regard to the contents and implementation of the individual Program Service Center plans.

Accordingly, I shall order that the complaint herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-07777(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 13, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

6/ Only the Respondent's memorandum was introduced into evidence at the hearing. The Bureau guidelines which originally were attached to the memorandum were not introduced. In this context, the Bureau's characterization of its paper as merely a broad framework within which each Program Service Center would develop its own program stands un rebutted.

7/ Cf. Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark, Ohio, 6 A/SLMR 361, A/SLMR No. 677 (1976).

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of :
: National Council of Social Security :
: Payment Center Locals, AFGE :
: Complainant :
: and :
: Case No. 22-07777 (CA) :
: Department of Health, Education and Welfare :
: Social Security Administration, Bureau of :
: Retirement and Survivor's Insurance :
: Respondent :
.....

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For the Complainant

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Baltimore, Maryland 21235

For the Respondent

Before: JOHN W. EARMAN
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

This is an unfair labor practice proceeding in which a hearing of record was held pursuant to Executive Order 11491, as amended. The Complaint was filed on February 10, 1977 charging Respondent with violating Sections 19(a)(1) and 19(a)(6) by instituting an individual performance assessment program and refusing to negotiate the impact of the system on working conditions. Both parties were represented by counsel at the hearing and briefs were submitted.

In its very able brief Complainant argues that the National Council of Social Security Payment Centers Local has exclusive recognition for the non-management employees and that the Bureau of Retirement and Survivor's Insurance should have negotiated the impact of an individual performance assessment system on bargaining unit employees. Respondents contend that the Council lacks bargaining authority, that, if the Council had the authority, it had not shown its desire to bargain and that the only bargaining, by past practice, takes place at the end of the term of the Master Agreement.

Findings of Fact

The Bureau of Retirement and Survivor's Insurance, Social Security Administration, Department of Health, Education and Welfare, the Respondents in this matter have six Programs Service Centers located throughout the nation. At each Program Service Center there is a union local affiliated with the American Federation of Government Employees, AFL-CIO, which are members of and represented by the National Council of Social Security Payment Center Locals.

In a letter to the Commissioner, Social Security Administration, dated February 27, 1969, the National President of AFGE, stated that the National Executive Council had approved the constitution of the Council for

Social Security Administration Payment Center Locals and that exclusive recognition will be granted to AFGE rather than the Council. In summary he says:

"Therefore the National Office of the American Federation of Government Employees is the bargaining agent for this Council."

The reply from the Director, Bureau of Retirement and Survivor's Insurance, dated June 10, 1969, with Department concurrence, gave formal notice that the National Office of the American Federation of Government Employees, AFL-CIO (Council of Social Security Payment Center Locals) was granted exclusive recognition for a unit consisting of all non-supervisory employees in the Social Security Payment Centers. The Master Agreement here involved, which is dated March 15, 1974, refers to the June 10, 1969 letter and is signed by the National President of AFGE and the six Presidents of the Local unions of which four also signed in their capacity as officers of the Council. The Agreement provides that the Bureau will consult with the Council on matters within the authority of the Bureau Director while a Program Center will consult with its respective local on matters within the authority of the Regional Representative on personnel matters. It was the practice under the Agreement for the Council or the Locals to consult with the Bureau or Program Center by written comments or discussions of proposals and meetings between the union and management.

In August 1975 the Northeast Program Service Center asked the Local for comments on a proposed individual assessment system. This was a system to closely monitor the amount and quality of production of individual employees. The Local replied with comments but urged that the Program Service Center meet and confer with the Local on the matter.

The new Acting Director of the Bureau in attempting to improve the Bureau's work product drafted a paper on managing workloads which included an individual assessment system. The paper was furnished the Council on December 29, 1975 for comment. The Council responded on January 27, 1976

prefacing its comments by saying that workload management is appropriate for bargaining rather than merely comment on proposed drafts of plans. This position was expressed to management over the next several months.

In January 1976 the Bureau and the AFGE worked out a memorandum of understanding as a preliminary to commencing negotiations on a new agreement in February. At the request of the National President of AFGE the memorandum was nullified and the 1974 agreement extended one year, in accordance with its terms. The request discussed an understanding as to official time which was not in the agreement and expressed the expectation that any difficulties arising over the interpretation of the agreement would be resolved under the procedures as provided in the agreement.

On March 12, 1976 the Bureau commented upon the Council's concerns about the assessment plan as expressed in its memorandum of January 1976. The Bureau noted that it was the intent for each Program Center to work out its own workload management plan within the framework of the Bureau plan and that each Center was expected to consult with its respective Local in developing and implementing the details of their individual assessment system. The Program Centers proceeded to do so.

The Director, Contract Negotiation Department, AFGE gave notice on October 22, 1976 that, in accordance with the provisions of Article 35 of the Master Agreement, they wished to renegotiate the Agreement. Those negotiations have reached an impasse.

On November 5, 1976 a complaint was made by memorandum to the Bureau, however, the complaint herein was filed on February 10, 1977.

In 1975 the Federal Labor Relations Council made its Report and Recommendations on the Executive Order in which it said that it believed confusion has developed over the apparent interchangeable use of the terms "consult," "meet and confer" and "negotiate." The FLRC went on to say that

parties to exclusive recognition have an obligation to "negotiate" rather than to "consult" on negotiable issues unless they have mutually agreed to limit this obligation. ^{1/}

Respondent's motion made at the hearing to admit into evidence the Assistant Secretary's Formal Exhibits is denied since ample evidence was introduced by the parties.

Discussion and Conclusions

There is no question that prior to the FLRC Report the Bureau and the Council never engaged in mid-term negotiations under the agreement. The practice had been to exchange ideas both in writing and at the semi annual meetings provided in the Agreement. A request for mid-term negotiations was first made concerning the individual assessment system. However, long standing practice does not negate the Council's rights to bargain if it is the recognized exclusive representative of the employees. ^{2/}

The concept of negotiation set forth in Section 11 of the Executive Order contemplates that a labor organization have exclusive recognition in order to participate in bargaining. Neither Section 11 of the Executive Order or the FLRC Report confers the right to bargain on a labor organization that does not have exclusive recognition. The question then is whether the Council has been granted exclusive recognition by the Bureau? It is found that it has not.

In his letter of February 27, 1969 the National President of AFGE simply states "Moreover the recognition will be granted to the AFGE rather than Council" (emphasis added) Nothing could be clearer, however, the Master Agreement muddled the waters somewhat by including the

^{1/} The interpretation did not result in a change or amendment of the Executive Order.

^{2/} U.S. Army Finance and Accounting, Cntr., Ft. Benjamin Harrison, Indianapolis, Ind. A/SLMR No. 651.

Council in parenthesis after naming the National Office of the AFGE as the organization recognized to be the exclusive representative in 1969. A fair reading of the Agreement shows the Council was denied bargaining powers through the use of the terms "confer" and "consult" as they were then understood. Also, the first signatory for labor on the Agreement was the National President of AFGE.

In withdrawing the AFGE request for renegotiation of the Agreement at the first renewal date in 1976 the National President used the following significant language:

"..., should there be any difficulty arising over the interpretation or application of the Agreement, we believe it in our best interest to protect a long standing relationship. I would, therefore, expect us to resolve these difficulties under the procedures as provided in the Agreement."

Such language is especially significant when viewed against the background of the FLRC Report and the proposed Workload Management Program. By the use of this language under these circumstances and considering past practice, it is evident that the National Office of AFGE did not believe that the Council had exclusive recognition or it would have indicated that difficulties could be resolved under the Executive Order.

In addition to the above the National Office of AFGE requested negotiations in accordance with the agreement on the 1977 renewal date. This also shows that the AFGE still considers itself to have the exclusive recognition. It would appear that only the Council feels that it has exclusive recognition with the resulting powers to negotiate under the Agreement.

Respondents argument that the Council has not shown its desire to bargain is not substantiated by the facts and is moot in light of the decision. The claim that bargaining only takes place at the end of the agreement is contra to the FLRC Report and Recommendation where the exclusive bargaining unit is involved.

RECOMMENDATION

On the basis of the foregoing Findings and Conclusions it is recommended that the Assistant Secretary dismiss the complaint.


JOHN W. EARMEN
Administrative Law Judge

Dated: November 1, 1977
Washington, D. C.

JWE:jp

April 18, 1978

A/SLMR No. 1023

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE AIR FORCE SYSTEMS COMMAND,
UNITED STATES AIR FORCE REGIONAL HOSPITAL,
EGLIN AIR FORCE BASE, FLORIDA
A/SLMR No. 1023

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE SYSTEMS COMMAND,
UNITED STATES AIR FORCE REGIONAL HOSPITAL,
EGLIN AIR FORCE BASE, FLORIDA

Activity 1/

and

Case No. 42-4030 (RO)

LOCAL 1897, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

DECISION AND ORDER

This case involved a petition filed by Local 1897, American Federation of Government Employees, AFL-CIO (AFGE) seeking to represent a unit of all professional employees assigned to the United States Air Force Regional Hospital, Eglin Air Force Base, Florida. The Activity contended that to establish a unit of only hospital professionals would result in needless fragmentation of the professional employee complement at Eglin Air Force Base which would be inconsistent with the policies enunciated by the Federal Labor Relations Council. The Activity further contended that the proposed unit would hamper, rather than promote, effective dealings and efficiency of agency operations.

Applying the three criteria set forth in Section 10(b) of the Order the Assistant Secretary found that the unit sought was not appropriate for the purpose of exclusive recognition. In this regard, he noted that although the evidence established that the sought unit herein consisting of all civilian professional employees of the Activity is a functional grouping of all of its professional employees and that these employees enjoy a clear and identifiable community of interest separate and distinct from all other professional employees of the Armament Development and Test Center (ADTC), such a unit would lead to the artificial fragmentation of the professional employees of the ADTC and would not promote effective dealings or efficiency of agency operations.

In this latter regard, he noted that the Activity is but one of the several divisions of ADTC, and, as such, the 18 employees in the claimed unit share with the approximately 700 other Eglin Air Force Base professional employees, common overall supervision, essentially uniform personnel policies and practices initiated and implemented by the same Civilian Personnel Office and common labor relations policies and practices established and implemented by the same Civilian Personnel Officer and his labor relations staff. He also noted the 11 year bargaining history of the nonprofessional employee unit currently represented exclusively by the AFGE encompassing all nonprofessional employees of the ADTC at the Base, including the nonprofessional employees of the Activity.

Accordingly, since the claimed unit did not satisfy equally each of the three criteria set forth in Section 10(b) of the Order, the Assistant Secretary ordered that the petition be dismissed.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Danny L. Curry. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Upon the entire record in the subject case, including the brief filed by the Activity, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, Local 1897, American Federation of Government Employees, AFL-CIO, hereinafter called AFGE, seeks an election in a unit composed of all professional employees assigned to the United States Air Force Regional Hospital, Eglin Air Force Base, Florida, excluding all nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors.

The Activity contends that to establish the claimed unit composed solely of professionals at the Hospital would result in needless fragmentation which would be inconsistent with the policies of the Order. It further asserts that a unit composed only of Hospital professionals, as opposed to an Activity-wide unit of all professionals at Eglin Air Force Base, would impede, rather than promote, effective dealings and efficiency of agency operations.

The Activity is a division of the Armament Development and Test Center, hereinafter called ADTC, located at Eglin Air Force Base. The mission of the ADTC is to plan, conduct and manage programs for the

1/ The name of the Activity appears as amended at the hearing.

development, testing and acquisition of air armaments. The employee complement of the ADTC consists of both military and civilian personnel. Its civilian complement consists of approximately 3,000 nonprofessional employees and approximately 700 professional employees.

Since September 30, 1966, the AFGE has represented a Base-wide unit of all nonprofessional civilian employees of the ADTC, including those employed by the Activity. There is currently in effect a negotiated agreement executed by the parties on March 6, 1975, which by its terms is effective for a period of three years with provision for automatic renewal for three year terms thereafter. The professional civilian employees of the ADTC, consisting of doctors, nurses, attorneys, dentists, engineers, accountants, scientists and meteorologists, are currently unrepresented.

The mission of the Activity is to provide medical care for all authorized personnel, provide services for other military hospitals in the region on a referral basis, and also act as a teaching facility. It is under the direction of a Hospital Commander, who has authority over the day-to-day operations of the Activity, but who receives functional supervision and direction from the Air Force Chief Surgeon, and administrative support and direction from the Base Commander. The Hospital Commander has the authority to set hours of work, tours of duty, and authorize transfers and leave pursuant to policies established for the hospital.

The petitioned for unit, consisting of the 18 civilian professional employees working at the Activity, includes the job classifications of Dental Officer, Clinical Nurse, Medical Technologist and General Medical Officer. 2/ With the exception of several employees who are stationed at the Hurlburt Field Dental Facility, which is a branch of the Activity located 16 miles away, all of the employees work in the hospital on the Base and have no contact with the other non-hospital professionals working at the Base except in cases where medical care is being provided. The nurses work three eight hour rotating shifts seven days a week, while the other employees in the hospital work a normal 40 hour week.

The record discloses no evidence of interchange or transfer of employees in the petitioned for unit and the other professional employees of the ADTC as the various skills and training required do not allow movement from one professional classification to another. The Activity's professionals are under the immediate supervision and direction of the Activity's supervisors and the overall supervision of the Base Commander. Unlike the other ADTC professional employees, the Activity's professional employees are required to wear uniforms, maintain their professional licenses, and continue their medical education and training.

2/ The parties stipulated that all of these employees are professionals.

All the civilian employees of ADTC are serviced by the Base Civilian Personnel Office and are governed by essentially the same personnel regulations, policies and practices. 3/ The Civilian Personnel Officer and his labor relations staff, under authority delegated to him by the Base Commander, are responsible for handling all civilian labor relations activities for the Base.

Based on all the foregoing circumstances, I find the petitioned for unit is not appropriate for the purpose of exclusive recognition under Section 10(b) of the Order. Thus, in my view, although the evidence establishes that the sought unit herein consists of a functional grouping of all civilian professional employees of the Activity, and that such employees enjoy a clear and identifiable community of interest separate and distinct from all other professional employees of the ADTC, it further establishes that such unit will not promote effective dealings or efficiency of agency operations. 4/ In this latter regard, it was noted that the Activity is but one of several divisions of the ADTC, and, as such, the 18 professional employees in the claimed unit share with the approximately 700 other ADTC professional employees, common overall supervision, essentially uniform personnel policies and practices established and implemented by the same Civilian Personnel Office, as well as common labor relations policies and practices initiated and implemented by the same Civilian Personnel Officer and his labor relations staff. Also noted was the effective dealings demonstrated by the 11 year collective bargaining history of the unit represented exclusively by the AFGE, encompassing all nonprofessional employees of the ADTC at the Base, including the nonprofessional employees of the Activity. Under these circumstances, I find that the petitioned for unit will not promote effective dealings or efficiency of agency operations but, rather, will lead to the artificial fragmentation of the professional employees of the ADTC.

3/ The record reveals that the Activity has certain policies in the area of leave that are peculiar to the Activity because of the nature of the Activity's operations.

4/ The Federal Labor Relations Council stated in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, et al., FLRC Nos. 75A-14, 75A-128, and 76A-9 (1977) that:

Before the Assistant Secretary may find that a proposed unit is appropriate for purpose of exclusive recognition under the Order, he must make an affirmative determination that the proposed unit satisfies equally each of the three criteria contained in Section 10(b). That is, he must consider equally the evidence going to each of the three criteria and, as required by Section 10(b), find appropriate only units which not only insure a clear and identifiable community of interest, but also promote effective dealings and efficiency of agency operations.

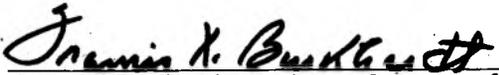
April 21, 1978

Accordingly, since the claimed unit does not satisfy equally each of the three criteria set forth in Section 10(b) of the Order, I find that the unit sought herein by the AFGE is not appropriate for the purpose of exclusive recognition under the Order, and I shall order the instant petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 42-4030(RQ) be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 18, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION,
NORTH CHICAGO VETERANS HOSPITAL,
NORTH CHICAGO, ILLINOIS
A/SLMR No. 1024

This case involved unfair labor practice complaints filed by Local 2107, American Federation of Government Employees, AFL-CIO, (AFGE) alleging that the Respondent violated Section 19(a)(1), (2) and (4) of the Order by its actions with respect to Dr. Oksana Mensheha beginning with alleged interference with her duties as a shop steward, infringement upon her protected right to join and assist a labor organization, discrimination against her because of union activities, and culminating with her improper termination, in part, because of asserted union animus, and, in part, as a reprisal for the filing of a prior unfair labor practice complaint. The Respondent contended that Dr. Mensheha was discharged for valid reasons unrelated to her union activities.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1), (2) and (4) of the Order. In reaching this determination, he noted numerous instances of actions on the part of the Respondent directed at Dr. Mensheha, and other active members of the AFGE, which established the Respondent's union animus and discriminatory motive in terminating Dr. Mensheha. In addition, the Administrative Law Judge noted the timing of, and the lack of justifiable reasons for, Dr. Mensheha's termination by the Respondent. Under these circumstances, the Administrative Law Judge recommended that the Respondent reinstate Dr. Mensheha and make her whole for any loss of income she had incurred.

The Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge. In this regard, he noted that but for the exercise of her rights assured under the Order, Dr. Mensheha would not have been discharged. Further, the Assistant Secretary noted that the issue of Dr. Mensheha's discharge was not barred by Section 19(d) of the Order since the only "appeals" procedure available to Dr. Mensheha did not provide for third-party review of the Respondent's action. Accordingly, the Assistant Secretary ordered that Respondent cease and desist from the conduct found violative of the Order, and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
NORTH CHICAGO VETERANS HOSPITAL,
NORTH CHICAGO, ILLINOIS

Respondent

and

Case Nos. 50-15408(CA) and
50-15412(CA)

LOCAL 2107, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On October 26, 1977, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceedings, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed an answering brief.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. 1/ The rulings are hereby affirmed. Upon consideration of the entire record in the subject cases, including the

1/ In its exceptions, the Respondent moved for a new hearing before a new Administrative Law Judge based on its contention that certain conduct and statements by the Administrative Law Judge at the hearing indicated that he was biased against the Respondent and raised serious doubts as to whether he would be able or willing to fairly weigh the evidence. Upon evaluating the entire record herein, I conclude that the conduct of the Administrative Law Judge did not constitute bias, or in any way prejudice the Respondent in this matter. Accordingly, the Respondent's Motion is hereby denied.

Respondent's exceptions and supporting brief and the Complainant's answering brief, I hereby adopt the Administrative Law Judge's findings, 2/ conclusions and recommendations.

In agreement with the Administrative Law Judge, and for the reasons set forth in his Recommended Decision and Order, I find that by its action of December 17, 1976, in terminating the employment of Dr. Oksana Mensheha, a Staff Ophthalmologist, the Respondent violated Section 19(a)(1), (2) and (4) of Executive Order 11491, as amended. Thus, I conclude, based upon a review of the entire record herein, that, but for the exercise of her rights assured under the Order, Dr. Mensheha would not have been discharged.

In reaching the foregoing disposition, I find that the issue of Dr. Mensheha's discharge was not barred by Section 19(d) of the Order. In this regard, I take official notice of the provisions of Title 38 of the United States Code, under which Dr. Mensheha was employed. Among other things, Title 38 provides for the establishment of a Disciplinary Board to ". . . determine, upon notice and fair hearing, charges of inaptitude, inefficiency or misconduct . . ." of certain employees, including physicians, employed under Title 38. 3/ Under the provisions of Section 4110 of Title 38, when the Disciplinary Board sustains the charges involved, it recommends suitable disciplinary action to the Administrator of the Veterans Administration, whose decision in the matter is final. Employees, including physicians, employed under Title 38 of the United States Code, are not covered by the Civil Service Appeals Procedure set forth in Federal Personnel Manual Supplement, Part 752. 4/

It has been previously held that the term "appeals procedure" as set forth in Section 19(d) of the Order 5/ is not intended to encompass "appeals" procedures which do not provide for third-party review of an agency action. 6/ Consequently, since, as indicated above, third-party

2/ The Respondent excepted to certain credibility findings made by the Administrative Law Judge. In Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, 2 A/SLMR 377, A/SLMR No. 180 (1972), the Assistant Secretary held that as a matter of policy he would not overrule an Administrative Law Judge's resolution with respect to credibility unless the preponderance of all the relevant evidence established that such resolution clearly was incorrect. Based on a review of the record herein, I find no basis for reversing the Administrative Law Judge's credibility findings.

3/ See 38 U.S.C. 4110.

4/ See Federal Personnel Manual Supplement, Chapter 752-1, Subchapter S2-4.

5/ Section 19(d) of the Order provides, in pertinent part: "Issues which can properly be raised under an appeals procedure may not be raised under this section"

6/ See Department of the Air Force, Offutt Air Force Base, A/SLMR No. 784 (1977), FLRC No. 77A-22 (1977).

review is not provided for under Title 38, I find that Section 19(d) does not preclude consideration of the issue of Dr. Mensheha's termination under the unfair labor practice procedures of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Veterans Administration, North Chicago Veterans Hospital, North Chicago, Illinois, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees with regard to hiring, tenure, promotion, or other conditions of employment, in order to discourage membership in, or activities on behalf of, Local 2107, American Federation of Government Employees, AFL-CIO, or any other labor organization.

(b) Discharging or otherwise discriminating against employees because they have filed a complaint, have had a complaint filed on their behalf, or have given testimony under the Executive Order.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purpose and policies of Executive Order 11491, as amended:

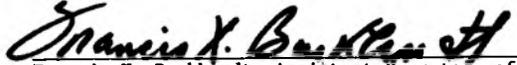
(a) Offer Dr. Oksana Mensheha immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole, consistent with applicable laws and regulations, for any loss of income she may have suffered by reason of its discrimination, by paying to her a sum of money equal to the amount which she would have earned or received from the date of her discharge to the date of the offer of reinstatement, less any amount earned by such employee through other employment during the above noted period.

(b) Take all action, including the immediate unqualified recommendation of the Chief of Surgery of the North Chicago Veterans Hospital, to insure that it unqualifiedly and affirmatively recommends that Dr. Oksana Mensheha's name be restored to the faculty roster of the Chicago Medical School.

(c) Post at its facilities at the North Chicago Veterans Hospital, North Chicago, Illinois, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Hospital Director of the North Chicago Veterans Hospital and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Hospital Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
April 21, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT discharge or otherwise discriminate against employees with regard to hiring, tenure, promotion, or other conditions of employment, in order to discourage membership in, or activities on behalf of, Local 2107, American Federation of Government Employees, AFL-CIO, or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against employees because they have filed a complaint, have had a complaint filed on their behalf, or have given testimony under the Executive Order.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL offer Dr. Oksana Mensheha immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole, consistent with applicable laws and regulations, for any loss of income she may have suffered by reason of our discrimination, by paying to her a sum of money equal to the amount which she would have earned or received from the date of her discharge to the date of the offer of reinstatement, less any amount earned by such employee through other employment during the above noted period.

WE WILL take all action, including the immediate unqualified recommendation of the Chief of Surgery of the North Chicago Veterans Hospital, to insure that we unqualifiedly and affirmatively recommend that Dr. Oksana Mensheha's name be restored to the faculty roster of the Chicago Medical School.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 1060 Federal Office Building, 230 S. Dearborn Street, Chicago, Illinois 60604.

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



RECOMMENDED DECISION AND ORDER

Statement of the Case

.....
 In the Matter of :
 :
 VETERANS ADMINISTRATION :
 NORTH CHICAGO VETERANS HOSPITAL, :
 NORTH CHICAGO, ILLINOIS :
 Respondent :
 and :
 LOCAL 2107, AMERICAN FEDERATION :
 OF GOVERNMENT EMPLOYEES, AFL-CIO :
 Complainant :

Case Nos. 50-15408 (CA)
 50-15412 (CA)

Peter Broida, Esquire
 Staff Counsel
 American Federation of Government
 Employees, AFL-CIO
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 For the Complainant

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 Veterans Administration
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 Washington, D.C. 20420
 Mr. Michael Rudd
 Director of Labor Management
 and Employee Relations
 Veterans Administration
 810 Vermont Avenue, N.W.
 Washington, D.C. 20420
 For the Respondent

Charles M. Johnson, Esquire
 Assistant General Counsel
 On Brief for Respondent

Before: WILLIAM B. DEVANEY
 Administrative Law Judge

This case arises under Executive Order 11491, as amended (herein also referred to as the "Order"). It was initiated by charges filed on, or about, September 29, 1976, and December 17, 1976, a complaint filed on December 28, 1976, alleging violations of Sections 19(a)(1), (2) and (6), Case No. 50-15408(CA) (Asst. Sec. Exh. 1) and a complaint filed January 21, 1977, alleging violations of Sections 19(a)(1) and (4) of the Order (Asst. Sec. Exh. 2). By Order dated March 8, 1977 (Asst. Sec. Exh. 3) the cases were consolidated and Notice of Hearing issued March 8, 1977, on the 19(a)(1), (2), (4) and (6) alleged violations of the Order (Asst. Sec. Exh 4) and scheduled the hearing for Room 717, Chicago Area Office, Federal Office Building, 230 South Dearborn Street, Chicago, Illinois. By letter dated May 4, 1977, the Assistant Regional Administrator, Mr. LeRoy L. Bradwish changed the location of the hearing to Room 12, Building 131, North Chicago Veterans Hospital, North Chicago, Illinois. Pursuant to the Notice of Hearing and the letter of May 4, 1977, a hearing was duly held before the undersigned in North Chicago, Illinois, on May 10, 11 and 13, 1977. The allegation relating to Section 19(a)(6) of the Order was withdrawn at the hearing.

The alleged violations of the Order (Sections 19(a)(1), (2) and (4)) concern Dr. Oksana Mensheha, beginning with alleged interference with the performance of her duties as a Shop Steward, alleged infringement of her protected right to join and assist a union, alleged discrimination against her because of her union activities and culminating with her alleged unlawful termination on December 17, 1976, in part because of asserted union animus and in part as a reprisal for the prior unfair labor practice charge.

All parties were represented by able counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, and extremely comprehensive and helpful briefs, timely filed, have been received from both parties and have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendation:

FINDINGS AND DISCUSSION

A. Dr. Mensheha

Dr. Mensheha received her M.D. degree at the University of Wisconsin in 1968, completed three years of residency in the University of Wisconsin Hospital in Madison, Wisconsin, was in

private practice for two years in Kenosha, Wisconsin, completed a fellowship at Wills Eye Hospital in Philadelphia, Pennsylvania in ophthalmic pathology and retinal oncology, became Board Certified by the American Board of Ophthalmology and Otolaryngology in 1974, and began employment with the Veterans Administration Hospital in North Chicago, Illinois, in September, 1974, as Chief of the Ophthalmology Section. All persons concerned found Dr. Mensheha to be a highly competent physician and her professional competence was wholly unrelated to the termination of her services by Respondent.

Dr. Mensheha is married to a doctor, Lieutenant Commander Manhart, M.C.U.S.N., who is a member of the medical staff, United States Naval Center, Great Lakes, Illinois.

B. Affiliation of Hospital With Chicago Medical School

The North Chicago Veterans Hospital was formerly known as Downey Hospital and its primary mission had been to care for long-term chronic psychiatric patients. Its capability as a general hospital was characterized uniformly as a "first-aid" operation. Downey, over an extended period, experienced extreme difficulty in obtaining and retaining Board Certified psychiatrists. Downey had no medical school affiliation and it was concluded that an academic affiliation was the only solution to the recruitment of eligible or Board Certified interns and residents. Discussions about affiliation with the Chicago Medical School (The University of Health Sciences, Chicago Medical School) began about 1973 and affiliation with the Chicago Medical School was achieved. Neither, the terms of the affiliation nor its precise date was shown; however, the record shows that in the spring of 1975, the affiliation moved forward rapidly; that the North Chicago Hospital initiated its development into a general medical hospital as well as a psychiatric hospital; and that the affiliation brought to the Hospital 150 to 225 additional staff positions, plus funding for equipment and renovation of existing facilities.

C. Events Through September 2, 1975

The Hospital and the Medical School were integrated extensively by making Medical School department chairmen chiefs of Hospital services and by making Medical School faculty Hospital staff. Dr. William Schumer, who had been Chief of Surgery at the Westside Veterans Administration Hospital from 1967 to 1975 and Professor of Surgery at the University of Illinois, in March, 1975, was appointed Professor and Chairman of the Department of Surgery of the Chicago Medical School and Chief of Surgery of the North Chicago Veterans Administration Hospital. Ophthalmology is a section of the surgical service. Dr. Schumer had a very high regard for Dr. Mensheha's professional qualifications and ability and approximately April 11, 1975, recommended

her for the Medical School faculty, to which she was duly appointed Assistant Professor. Indeed, if Dr. Schumer did not actually offer Dr. Mensheha the position of Chief of Ophthalmology of the Medical School, he invited her to apply for the position with his unqualified support because he "felt that she would be a tremendous asset to the program" and the clear implication was that the position was hers for the asking. Dr. Mensheha declined because she was married to a Navy man and the probability of transfer made it doubtful that she would remain long enough to justify acceptance of the duties as head of the Medical School Ophthalmology Department.

Although Dr. Schumer testified that he wanted Dr. Mensheha to remain as Chief of Ophthalmology, "even though she couldn't take the position of the Chief of Ophthalmology Department at the CMS", and there is no reason whatever to doubt his sincerity in April, 1975, circumstances soon changed Dr. Schumer's position.

There is no doubt that the Medical School affiliation caused concern among the old guard of the Hospital with changes in personnel, an increased demand for excellence in staff training and qualification, and a shift to becoming a general hospital. Some, including Dr. Mensheha, came to feel strongly that the Medical School was then running the Hospital. Such concerns prompted Dr. Mensheha to meet with Mr. Paul Kennedy, then Director of the Hospital, probably in late August, 1975. Mr. Kennedy's testimony concerning the meeting with Dr. Mensheha consists almost entirely of his sermonizing his remarks and sheds little or no light on what Dr. Mensheha said to Mr. Kennedy. Accordingly, Dr. Mensheha's testimony is the only direct testimony concerning her statements to Mr. Kennedy. In substance, Dr. Mensheha testified that she told Mr. Kennedy that some of the surgical staff were afraid for their positions and were unhappy; asked if "we might not be able to get a Chief of Surgery who would be primarily a V.A. Chief that we V.A. physicians could work through rather than somebody who was loyal to the Medical School"; asked if it were possible to make the ophthalmology and optometrist sections independent of the surgical service; and mentioned that she had heard that Dr. McDonald was thinking of quitting and that Dr. Miller had quit. Following Dr. Mensheha's statement of her recollection of her statements to Mr. Kennedy, Mr. Shochet, counsel for Respondent asked:

"Q. In other words, you approached Mr. Kennedy about replacing Dr. Schumer as Chief of Surgery?" (Tr. 169)

and Dr. Mensheha responded:

"A. Or making ophthalmology autonomous"
(Tr. 170) 1/

Dr. Mensheha stated that Mr. Kennedy responded that it was not possible at that time to get a Chief of Surgery for the Hospital; but that the dual position was only temporary and that within six months (there was, so Dr. Mensheha reported that Mr. Kennedy stated, a six-month special dispensation from the V.A. to have the dual position) there would be two people, one to be Chief of Surgery for the Hospital and one to be Chairman of Surgery for the Medical School; that ophthalmology could not be autonomous as it was always under the surgical service in the V.A. system; and he had no comment on the rumors concerning Drs. McDonald and Miller.

Mr. Kennedy stated that he reported his conversation with Dr. Mensheha to Dr. Bogan, then Chief of Staff; but Mr. Kennedy's testimony is, again, of little or no value in determining what he told Dr. Bogan. Dr. Schumer testified that Dr. Bogan called him immediately after his conference with Mr. Kennedy and that Dr. Bogan stated that Mr. Kennedy had informed him that Dr. Mensheha "was complaining bitterly about me [Dr. Schumer], and he thought -- he said 'what's going on? What are the problems?'" Dr. Schumer stated that he told Dr. Bogan they should try to straighten this out right away and promptly called a meeting with Dr. Mensheha at which Dr. Bogan and Dr. McDonald were also present.

Dr. Schumer testified,

"Well, the only thing I remember about the meeting, of course, is that Doctor Mensheha became very angry. She became - she called me inept. She called me inept as an administrator. She called me inept as a surgeon. She said that I was not -- I was more interested in the school than I was in patient care. It really became a very difficult situation. (Tr. 580)

* * * *

1/ Later Dr. Mensheha stated,

"I requested we have someone to work through through who was loyal to V.A. If Dr. Schumer wanted to change his loyalty to the V.A., it was all right with me. I did not specifically request that we 'get rid of' Dr. Schumer." (Tr. 171).

The meeting became very difficult and charged, and, as a matter of fact, I got to the point where I made the statement to her that if she couldn't live with my policies and couldn't live with what I was doing, that maybe she ought to transfer or find another job.

"At that time, she said she wasn't going to quit. Apparently she did take this as I wanted to fire her at that time. (Tr. 581)

* * * *

"... I said, 'Oksana, if you can't work with me and if you feel so strongly against me that maybe the best thing to do is have you transferred or leave.' Actually transferred is what I was interested in.

"Oksana took that I was trying to fire her. She says, 'I am not going to leave.'

"Q. Did your voice become raised?

"A. I think I was a little angry after being called an inept -- what I characterized as an inept surgeon after I have been in there 20 years and have a reputation through the country. What bothered me more than anything else, was that I was taking into consideration the school over patient care. I tell you again, sir, that patient care to me is supreme, and thirdly, she called me an inept administrator which I have a little pride. I though I was a pretty good administrator. I was a little angry, I guess." (Tr. 668-669)

Dr. McDonald testified,

"In addition, there was discussions about whether Dr. Mensheha had ... questioned the professional competence of Dr. Schumer in discussions with the director of the hospital ... Dr. Mensheha did not raise her voice and scream and yell, and nobody else did. It was a very definite meeting, but it was not a screaming and yealling sensation or situation, and Dr. Mensheha was very tight, and obviously upset, and she said, 'yes, and I still think that you are ... that you

are not a good doctor and you don't know how to take care of patients', and I froze when she said this. (Tr. 742-743)

* * * *

"... she did further state that in addition she still thought that Dr. Schumer was not ... a good doctor or was able to take care of patients, or did a good job in taking care of patients, and I do remember Dr. Schumer getting up and saying, 'Listen here young lady, this is a very bad thing to say' and so forth. (Tr. 743-744)

* * * *

"Dr. Schumer made an additional statement ... 'young lady, this is enough for me to believe you or fire you from your position because of these statement.'" (Tr. 744-745)

Dr. Mensheha testified that:

"A. Okay. At 12:30 I was called into Dr. Schumer's office in Building 50. I walked in alone to find Dr. Schumer and Dr. Bogan and Dr. McDonald there. Dr. Schumer asked me what I had discussed with Mr. Kennedy. I told him exactly what I had discussed with Mr. Kennedy. Dr. Schumer then proceeded to tell me what I had recounted before -- to shout at me about how he did not consider me to be loyal to him, and he -- I believe he said something about I shouldn't have gone to talk with the Director about this, and how dare I bypass the Chief of Staff, who at that time was Dr. Bogan, and then went into what I had said before. He said that 'I'll fire you. I've got three people to replace you with.'

"Q. ... isn't it a fact that you complained to Mr. Kennedy that Dr. Schumer was concerned with the Medical School and not with the V.A.?

"A. Yes. (Tr. 162)

* * * *

"Q. Didn't Dr. Schumer repeat those accusations to you during this meeting?

"A. No. He asked me to repeat to him what I had told Mr. Kennedy.

"Q. And he didn't repeat this about what you had allegedly said?

"A. No.

"Q. Didn't he complain to you about having gone to the Director without facing him first about the accusations about him and the Medical School?

"A. He complained to me about not having gone to Dr. Bogan first. I don't remember that he complained to me about not going to him first. He may have.

"Q. At this time he threatened to fire you?

"A. Yes.

"Q. Because you had complained to Mr. Kennedy about him?"

"A. I presume so.

"Q. And his loyalties -- where they lay between the Medical School and the V.A.?

"A. Sir, I don't know." (Tr. 163-164)

I did not find Mr. Kennedy either a credible witness or a convincing witness. His testimony concerning the chronology of events was so thoroughly contrary to established facts as to render his version of the succession of events wholly unreliable; his total inability to remember Dr. Mensheha's statements to him, or his discussion with Dr. Bogan concerning Dr. Mensheha's statements to him with regard to Dr. Schumer; and the substance of his testimony which, in some respects, was demonstrably contrary to fact and which, in other respects, was so improbable in light of all testimony as to be unworthy of belief in the absence of corroboration. For example, Mr. Kennedy asserted that Dr. Schumer met with him prior to his meeting with Dr. Mensheha and placed both meetings in September or October, 1975. As the meeting between Drs. Schumer, Bogan, McDonald and Mensheha, which followed Dr. Mensheha's meeting with Mr. Kennedy and resulted therefrom occurred on September 2, 1975, Mr. Kennedy's placing both of his meetings in September or October becomes questionable; but Mr. Kennedy's

testimony that Dr. Schumer, in the meeting preceding the Kennedy-Mensheha meeting, referred to Dr. Mensheha's union activity is not possible as Dr. Mensheha testified that she did not join the union until sometime in September and had not become active as an "unofficial" steward until about October. On the one hand, Mr. Kennedy testified that Dr. Schumer, prior to the Kennedy-Mensheha meeting, discussed the removal of Dr. Mensheha as Chief of the Ophthalmology Section of the Hospital in order that Dr. James Bizzell, to whom he had made a commitment to be Chief of the Ophthalmology Department of the Medical School, could be appointed Chief of the Ophthalmology Section of the Hospital, while, on the other hand Mr. Kennedy testified that he told Dr. Mensheha, shortly thereafter, "... that I had heard from her supervisor that she was a very accomplished and good physician and certainly she had no cause for concern." Not only is such testimony inherently improbable but if true, Mr. Kennedy can only be complimented for his duplicity. Mr. Kennedy denied any further meeting with Dr. Schumer after the September 2, 1975, meeting between Drs. Schumer, Bogan, McDonald and Mensheha and, as found hereinafter, Dr. Schumer after the September 2, 1975, meeting did go to Mr. Kennedy and request that Dr. Mensheha's title as Chief of the Ophthalmology Section of the Hospital be rescinded or that she be let go. Without attempting to further recite the inconsistencies of Mr. Kennedy's testimony, suffice it to say that I do not credit any of Mr. Kennedy's uncorroborated testimony except as specifically noted.

On the other hand, I found Dr. McDonald a wholly credible witness and one who made every effort to be scrupulously fair, accurate, and complete in recounting the events of the September 2, 1975, meeting. Dr. Schumer's testimony concerning this meeting was wholly credible and was corroborated by the testimony of Dr. McDonald. Dr. Mensheha was, in most respects, also a very credible witness and her testimony, although she denied saying to Mr. Kennedy that Dr. Schumer was inept both as a surgeon and administrator and denied saying that Dr. Schumer's conduct was detrimental to the service and the Hospital (Tr. 162-163), was not wholly at odds with the testimony of Drs. Schumer and McDonald. Thus, Dr. Mensheha admitted that she complained to Mr. Kennedy that Dr. Schumer was concerned with the Medical School and not with the V.A.; that she had complained to Mr. Kennedy about Dr. Schumer; that she had approached Mr. Kennedy about replacing Dr. Schumer as Chief of Surgery. Her testimony was, to considerable extent, of a nature that in pleading would be denominated a negative pregnant. Accordingly, I find that on September 2, 1975, Dr. Mensheha acknowledged to Dr. Schumer, in the presence of Dr. McDonald (and Dr. Bogan who did not testify), her criticism of Dr. Schumer to Hospital Director Kennedy; that she stated, or implied by seeking his removal

as Chief of Surgery, a critical regard for Dr. Schumer as a surgeon and as an administrator; and that Dr. Schumer stated, in effect, that her critical remarks about him were grounds for her removal.

I further find, as Dr. Schumer most credibly testified, that following the meeting with Dr. Mensheha he went to Hospital Director Kennedy and told him about the meeting and requested that Dr. Mensheha's title as Chief of the Ophthalmology Section of the Hospital be rescinded or, even, that Dr. Mensheha be let go. Mr. Kennedy took no action pursuant to Dr. Schumer's request beyond, perhaps, asking Dr. Bogan, Chief of Staff, to monitor the situation; however, I specifically reject Mr. Kennedy's testimony that he and/or Dr. Bogan was unaware of any dissatisfaction or concern on Dr. Schumer's part with Dr. Mensheha and that there was any discussion by Dr. Schumer with Mr. Kennedy up to that time about Dr. Bizzell.

Consequently, I conclude that on September 2, 1975, Dr. Schumer requested that the Hospital Director rescind Dr. Mensheha's title as Chief of the Ophthalmology Section of the Hospital and/or that Dr. Mensheha be terminated by Respondent; and that such request was wholly unrelated to any right protected by the Order.

D. Dr. Mensheha Joins the Union in September, 1975

Thereafter, Dr. Mensheha did become a member of Local 2107, American Federation of Government Employees, which has represented the non-management employees of the Hospital since at least the fall of 1974, the professional section of which encompasses physicians, degreed scientists and other medical professional employees but excluding nurses. Dr. Mensheha joined the Union sometime in September, 1975; by October, 1975, had unofficially become a steward; and was officially appointed a steward for the professional unit in February, 1976.

There can be no doubt that Dr. Mensheha's activity as an unofficial Union steward from October, 1975, and as an officially designated Union steward from February, 1976, was well known by Respondent and in particular by the supervisory personnel of the Hospital medical staff, including Dr. Schumer, by the Hospital Director Mr. Kennedy and his successors, Mr. Gathman who served as acting Director of the Hospital from Mr. Kennedy's departure until the new Director took over, and Ms. Marjorie R. Quandt who was appointed Director of the Hospital on May 16, 1976; and that her activity on behalf of the Union was well known by Respondent's Chief of Medical Services, Dr. John Chase; and by the Chicago Medical School, among others.

E. Grounds for Termination Unrelated to Protected Activity

It is equally clear that ample cause was shown for the termination of Dr. Mensheha for reasons wholly unrelated to her Union activity. After September 2, 1975, Dr. Mensheha's relations with Dr. Schumer were strained and barely civil; her relations with Dr. Bizzell, after he joined the Hospital as staff Ophthalmologist, were consistently strained, indeed bordered on open hostility; she was insubordinate; and she repeatedly by-passed the Chief of Surgery, Dr. Schumer and the Assistant Chief of Surgery, Dr. McDonald on critical administrative matters such as the budget for her section of the surgical service, and renewal of a sharing agreement with St. Theresa's Hospital, and equipment and supplies, as well as on other administrative matters; etc. It is recognized that Dr. Mensheha's reception of Dr. Bizzell was not entirely without cause; that prior to September, 1975, she felt that Dr. Schumer was interfering with the operation of the Ophthalmology section and after the September 2, 1975, confrontation with Dr. Schumer may well have feared that Dr. Schumer would not be overly sympathetic to her budget recommendations; and that she had previously had a disagreement with Dr. Schumer over disposition of fees received under the St. Theresa sharing agreement. Nevertheless, Dr. Mensheha, when she met Dr. Bizzell for the first time, in February, 1976, before he "came on board" told him:

"Dr. Schumer and I have had problems. I have not had any quarrel with you, and I don't intend to have any quarrel with you. Occasionally there are fireworks between Dr. Schumer and me. If you get caught in the fireworks, I'm sorry. I don't want to involve you in the quarrel. However, I'm the Chief of Ophthalmology at the V.A." (Tr. 176).

To say the least, the seeds of disharmony were aired even before Dr. Bizzell reported for duty and, as noted above, there were continuing incidents on the part of Dr. Mensheha which could have justified her termination by Respondent wholly apart from activity protected by the Order. The question to be decided is whether her termination was, in part, because of her union activity or because she filed an unfair labor practice charge or whether, as Respondent urges, her termination was solely for reasons unrelated to activity protected by the Order. It is obvious that despite the events of September 2, 1975, Respondent took no action against Dr. Mensheha. It is necessary, therefore, to examine the major incidents thereafter.

F. Major Incidents After March 29, 1976

The initial charge was filed on September 29, 1976, so that attention will be directed to the major incidents beginning with the six month period preceding the filing of the initial charge. Except for incidental background purposes, events prior to March 29, 1976, will not be further considered.

1. Kennedy Transferred to Boise, Idaho

In April, 1976, Mr. Kennedy was transferred from North Chicago to Boise, Idaho, as Director of the very much smaller Veterans Administration Hospital located there. Mr. Kennedy's testimony about this matter is quite interesting. He stated:

"It's been the experience of the Veterans Administration over the years that whenever a major change is taking place -- and certainly what occurred at North Chicago was a very major change -- that in addition to the real benefits and advantages of the crew (sic - that accrue), there is a great deal of unrest and unhappiness that's created, just simply because there are some changes, and I think invariably whoever the changing agent is -- in this instance, it was the Hospital Director, principally -- after two or three years, his -- there's been so much controversy and difficulties and friction that's occurred, that it is generally in everybody's best interest to move that individual along.

"Well, a couple of years after I was here, it was about that time for me to move on. I didn't particularly agree with that decision. I thought there was another year or so that I had to contribute here, but on the other hand, the Chief Medical Director [Dr. Chase] asked me to go to Boise ... And I could certainly understand his reasons for doing so, and after the changes, I agreed with it -- that it probably was time to move along ..." (Tr. 278-279)

When the Union learned of Mr. Kennedy's impending transfer its membership was most unhappy as relations with Mr. Kennedy had been good. Thus, on, or about, April 5, 1976, a delegation, including Dr. Mensheha, attended a council meeting of the City of North Chicago and during the question and answer period following the meeting, brought to the attention of the community the fact that Mr. Kennedy was about to be removed and to urge if anyone wished to express their support, letters, telegrams, or verbal support for Mr. Kennedy. On April 7, 1976, the Union met to discuss the matter further and voted to send three delegates to Washington for the dual purpose of: a) urging retention of Mr. Kennedy and b) stating the Union's concern about the North Chicago Hospital and requesting a full scale investigation of the Chicago Medical School at Veterans Administration Hospital, North Chicago. To this end, two rather long documents (Comp. Exh. 1 2/ and 2) were prepared. The chosen delegates were to go to Washington, D.C. on Monday, April 12. Over the week-end, Dr. Mensheha was selected as one of the three delegates (President John Reeves and Maxine Borcherding were the other delegates of Local 2107) and took emergency leave on Monday, April 2, 1976. The three representatives of Local 2107 met with Congressman Howard, an aide to Senator Proxmire and with Dr. Chase to whom they delivered the documents referred to above. The Veterans Administration Central Office did conduct an investigation (as did the FBI, GAO and Congress) which resulted in the discipline by Respondent on or about February 1, 1977, of four management officials, including Dr. Schumer (Dr. Schumer's discipline consisted of counselling by Director Quandt). On or about, April 16, 1976, Dr. Bogan was replaced as Chief of Staff and Dr. Lester Cohn, Chief of Medical Services since March, 1972, served as Acting Chief Of Staff from that time until April, 1977. 3/

2/ Complainant's Exhibit 1 when presented to Dr. John Chase, Veterans Administration's Chief Medical Director, on April 12, 1976, contained the signatures of the employees who had signed it. The signatures were cut off of other copies for the protection of employees.

3/ Dr. Cohn testified that he had been asked to take the position in March, 1976. Although Comp. Exhs. 1 and 2 contain highly critical comments about Dr. Bogan, his replacement as Chief of Staff does not appear to have resulted from the union's written statements of concern. Dr. Bogan remained as Assistant Chief of Staff for Education.

Respondent contends that "representation" of Hospital Director Kennedy was not protected activity under the Order, citing, Internal Revenue Service, Chicago District, A/SLMR No. 279, 3 A/SLMR 304 4/ (1973); and U.S. Department of The Treasury, Internal Revenue Service, Western Service Center, Ogden, Utah, A/SLMR No. 280, 3 A/SLMR 310 (1973). I do not agree with Respondent's contention and find nothing in the authorities cited and relied upon to support Respondent's position. Internal Revenue Service, Chicago District, supra, involved a grievance by a supervisor; designation by the supervisor of the president of the local union as his representative in the grievance proceeding; and the District Director's refusal to accept the union president as grievant's representative because the Union represented non-supervisory employees in the District. The Assistant Secretary ordered that the complaint be dismissed for the reason that, in agreement with the Administrative Law Judge, "Section 7(d)(1) of the Order does not confer any rights enforceable under Section 19 and that any rights flowing from Section 10(e) of the Order do not flow to supervisors." In this regard, see, also, U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278, 3 A/SLMR 290 (1973). U.S. Department of the Treasury, Internal Revenue Service, Western Service Center, supra presented the identical substantive issue of law as the Chicago District case, supra, and the Assistant Secretary dismissed the complaint stating, "In my view, the principles expressed in Internal Revenue Service, Chicago District, A/SLMR No. 279, are equally applicable to the facts of the instant case. I find, therefore, in agreement with the Administrative Law Judge, that the Respondent's stated policy, of refusing to permit supervisors to be represented in grievance proceedings by a representative of the labor organization that represented employees supervised by the grievant-supervisor, was not violative of Section 19(a)(1) of the Order."

Section 1(a) of the Order provides, in part, that:

"(a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization ... and each employee

4/ The decisions of the Assistant Secretary also appear in bound volumes entitled "Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations". When bound, decisions will be cited by volume and page number.

shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority. ..."

Dr. Mensheha, and other individuals had the right to appear, on their own time, at the meeting of the City Council on behalf of the Union to announce the impending removal of Mr. Kennedy and to encourage expression of support for Mr. Kennedy by the public. Such appeals to the public are protected under Section 1(a) of the Order. Cf. Department of Transportation, Federal Aviation Administration, Las Vegas Control Tower, Las Vegas, Nevada, A/SLMR No. 796, n. 1 (1977); National Treasury Employees Union (Internal Revenue Service), A/SLMR No. 783 (1977). While all activity on behalf of a union may not be protected, it is clear that employees have a protected right to act for the organization and where, as here, the only activity was announcement at a public meeting that the present Hospital Director was about to be removed and public support for him was enlisted, there can be no doubt that such public appeal was constitutionally protected and any limitation imposed by Respondent violates the First Amendment and Section 19(a)(1) of the Order. Cf. Statement on Major Policy Issue, FLRC No. 76P-4 and National Treasury Employees Union, supra. The Order specifically protects the expression of the views of the Union to officials of the executive branch, the Congress, or other appropriate authority, and there is no basis to assert that the expression of its views in support of a Hospital Director are not fully protected. Recognizing that there are important differences between Section 7 of the National Labor Relations Act and Section 1 of the Order, the National Labor Relations Board has long recognized that employees may express in concert their views regarding the selection of their supervisors to the extent that it directly affects their working conditions, In the Matter of Phoenix Mutual Life Insurance Company, 73 NLRB 1463 (1947), enf'd, 167 F.2d 983 (7th Cir. 1948); In the Matter of Container Mfg. Co., 75 NLRB 1082 (1948), enf't denied on other grounds, sub. nom., Sax v. NLRB, 171 F.2d 769 (7th Cir. 1948); but a strike to coerce removal of a supervisor is not protected activity when the moving party acts out of personal resentment at discipline imposed by that foreman, Joanna Cotton Mills v. NLRB, 176 F.2d 749 (4th Cir. 1949), or is not to advance interests of employees, In the Matter of Fontaine Converting Works, Inc., 77 NLRB 1386 (1948); and under the Taft-Hartley amendments, a strike to compel employment, or re-employment,

of a foreman, discharged because two supervisors were not required, violates 8(b)(1)(3) of LMRA, Laborers, Local 478 v. NLRB, 503 F.2d 192 (D.C. Cir. 1974), cert denied, 420 U.S. 926 (1975). Of course, here, nothing more than expression of views concerning Director Kennedy was involved and, as he was considered a moderating influence on the stress of affiliation changes and a Hospital Director with whom relations had been good, directly affected their working conditions.

Respondent further asserts that the statements of concern (Complainant's Exhibits 1 and 2) did not involve "personnel policies and practices and matters affecting working conditions"; but, although this is, indeed, the obligation concerning negotiation of agreements as set forth in Section 11 of the Order, the right to assist a labor organization, as set forth in Section 1(a) of the Order, is not so limited. To the contrary, Section 1(a) assures the right to act for the labor organization in the capacity of an organization representative "including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority". Not only are Section 1 rights not limited to matters appropriate for negotiation, but the presentation of the labor organizations' views to officials of the executive branch, the Congress, or other appropriate authority is not directed exclusively at the negotiating process. There is no question that Dr. Mensheha, and the two other representatives who accompanied her to Washington, were duly selected representatives of Local 2107; were duly authorized to present the views of the union to officials of the executive branch and to members of Congress; and that the three representatives, including Dr. Mensheha did meet with Congressman Howard; and aide to Senator Proxmire; and with Dr. Chase to whom the statements of concern were presented and an investigation "of the activities of the Chicago Medical School at VA Hospital, North Chicago" was urged. As such activity was foursquare within the rights assured by Section 1(a) of the Order neither Veterans Administration, Wadsworth Hospital Center, Los Angeles, California, A/SLMR No. 449, 4 A/SLMR 758 (1974); nor Department of Transportation, Federal Aviation Administration, Las Vegas Control Tower, Las Vegas, Nevada, A/SLMR No. 796 (1977); cited and relied upon by Respondent, is in point.

2. Dean Falk's Telephone Call to Captain Elliott

On April 8, 1976, Doctor Marshall Falk, Dean of the Chicago Medical School called Captain Robert C. Elliott, Medical Corps, U.S. Navy and Director of Clinical Services at the Naval Center, Great Lakes, Illinois, and, in the course of his conversation, asked Capt. Elliott if he knew one of his staff doctor's wives

had participated in a demonstration, either somethimes the night before or the preceding week. Capt. Elliott knew the doctor (Lt. Commander Manhart) and the wife (Dr. Mensheha) and told Dean Falk that he "felt it was none of the Navy's business and that the Navy would not have any influence or take any action on this." In the fall, at the dedication of the Medical School's Applied Health Science Building, a member of the Chicago Medical School faculty, Capt. Elliott did not remember who but believed it may have been Dr. Schumer or Dr. Cohn, "related a concern that Dr. Falk would deny that that conversation ever existed". Dr. Cohen testified that he had no such conversation with Capt. Elliott at the dedication and, further, that he knew of no telephone conversation by Dr. Falk until the charge was filed (September 29, 1976). Dr. Cohn testified that when he learned of the Falk call, from the charge, he called Capt. Elliott in October and made an appointment with him and went to Capt. Elliott's office. Capt. Elliott testified that Dr. Cohn "was quite concerned about the possibility that Marshall Falk would deny the phone call and that it would cause embarrassment to both the V.A. and the Chicago Medical School." Dr. Cohn testified that he had told Capt. Elliott that he was aware that there was an allegation to the effect that Dr. Falk had made a phone call to him regarding Dr. Mensheha and asked him what were the circumstances regarding that phone call. Dr. Cohn testified that Capt. Elliott stated that "and about half way through Commander Elliott stated that the Dean broke off from normal conversation and said -- I am trying to quote as nearly as I possibly can. 'By the way, you know, do you know that one of your staff physicians is married to one of the physicians at the VA Hospital who is one of the more ardent activists?' Commander Elliott told me that he responded by saying yes ...". Dr. Cohn stated that he never suggested to Commander (Captain) Elliott that he should deny such phone call and did not know that Dr. Falk denied making any phone call to Captain Elliott. I fully credit Captain Elliott's testimony; but in doing so, I must say that I also found Dr. Cohn to be a wholly credible witness and am convinced that Capt. Elliott's testimony about Dr. Cohn's concern about the possibility that Marshall Falk would deny the phone call, which I fully credit, was the reasonable and rational impression of Capt. Elliott in light of the prior statement to him at the dedication and in light of Dr. Cohn's visit to his office rather than a conflict in Dr. Cohn's testimony.

In any event, the significance is that Dean Falk did make a telephone call to Capt. Elliott in the course of which he made a statement which Capt. Elliott believed was intended as a request that he exert pressure on Commander Manhart to dissuade his wife, Dr. Mensheha, from union activity. Dean Falk

was not an employee of Respondent; but when Respondent learned of the telephone call, and the record shows that by the time of the dedication Respondent had actual knowledge of the telephone call through Dr. Schumer, Chief of Surgery, and again in October, 1976, through Dr. Cohn, Acting Chief of Staff, Respondent ratified the request by its failure to repudiate it. Hamburg Shirt Corp., 156 NLRB 511 (1965).

3. Restriction on Leave Requests by Dr. Mensheha

Approximately a week after her trip to Washington, D.C. on April 12, 1976, Dr. Mensheha requested leave without pay. The request was made to Dr. Schumer who called and asked details as to the purpose of the leave, where she was going, etc. Dr. Mensheha had requested the leave to pick up ophthalmic instruments she had purchased for her own use from a doctor who was retiring and the doctor, who had stored them for her, was about to leave the state and had requested that she move them and had told her he would not be in on the weekend. Dr. Schumer further informed Dr. Mensheha that at any time in the future she wished any kind of leave she had to send him a memorandum giving all details and if more than one day of leave was requested he would send it to Personnel. Dr. Mensheha testified that the prior policy had been that the Service Chief approved leave for not more than two days and no supporting memorandum had ever been required; that Dr. Schumer's instructions to her were oral; and that Dr. Schumer never issued any memorandum to the same effect to all staff members.

4. Delorse Puder

Ms. Puder had been employed by the Hospital as a clerk-typist for nine years, and since 1972 in the ophthalmology clinic. The Position Description, originally issued in 1971 and re-issued in January, 1975, set forth considerable duties, in particular the adjusting, repairing, fitting and dispensing of eyeglasses, not normally performed by a clerk-typist. Dr. Seiller, then a consultant, in 1972 taught Ms. Puder the mechanics of fitting and adjusting glasses, some of the instructions having been given at Dr. Seiller's private office during periods of authorized leave for the purpose of such training. From 1972 until 1976, Ms. Puder had fit several hundred pairs of glasses each year without complaint or criticism by any doctor or patient. Shortly after Dr. Mensheha arrived she put in motion a more formalized training program for Ms. Puder and in November, 1974, a request for the American Association of Ophthalmology Home Study Course, Basic Course, was approved and Ms. Puder completed this course in 1975. In March, 1976, Dr. Mensheha submitted requests for Ms. Puder and Ms. Siddie, R.N., to take

the Advanced Series Course. This request was approved on March 25, 1976, but the application forms had been mislaid and new forms had to be submitted on June 15, 1976. (Res. Exh. 6). Ms. Puder completed the advance series and received her certification in September, 1976.

There is no dispute that when Dr. Schumer reviewed the position description in early 1976 he noticed that the position description for Ms. Puder contained health delivery duties even though she was designated a clerk-typist; that in February 1976, he asked Dr. Mensheha what Ms. Puder was doing and that Dr. Mensheha said that Ms. Puder was, indeed, fitting glasses, etc.; that she had been trained on the job; that it was fully in accord with her position description; and that Ms. Puder had been doing this work quite satisfactorily for a number of years. Dr. Schumer's testimony is quite significant in view of the charge of insubordination on the part of Dr. Mensheha in February, 1976. 5/

"... I said 'you can't allow this to go on. You have got to have her stop this as much as possible.' (Tr. 588)

* * * *

"Q. What was her response?

"A. Her response was that she did not -- she felt that she should go on. She needed her and felt that she should go on.

"The point is, I said, 'all right. If you need a health technician, let's go into personnel for a health technician.'

"Q. What did she say to that?

5/ In his memorandum dated July 22, 1976, to Chief, Ophthalmology Section (Dr. Mensheha) thru Chief of Staff (Dr. Cohn), Dr. Schumer stated, in part,

"1. On February 10, 1976, I verbally and in writing informed you of the problem that existed with the performance of health technician's duties by Delorse Puder ... I, as well as the Hospital Director, Assistant Hospital Director, and Chief of Staff requested you to cease this practice." (Res. Exh. 11)

"A. I think we agreed at that time that we would do that. What was not recognized, I think, is that ... When you go in for a new position, you have to establish the new position first. ... (Tr. 589) (Emphasis supplied.)

On February 11, 1976, Dr. Schumer submitted a request to the Chairman, Position Management Committee re "Redescription of Position Description # 1090, Clerk-Typist, Ophthalmology Section, Surgical Service - GS 4/1" (Res. Exh. 9). The request stated, inter alis "since the present clerk typist has had no official training as a health aide, is not officially recognized as such and is not ethically or legally authorized to directly render patient" and requested:

"a) An Outpatient Health Aide should be provided to the Ophthalmology Clinic to perform the duties described in Position Description # 1090.

"b) The Clerk-Typist ... position # 1090 should be redescribed as proposed in the enclosed Position Description for clerk-typist. ..."

On February 18, 1976, the Position Management Committee took the following action:

"i. The Committee considered a request from the Chief, Surgical Service, for classification action on the redescription of the Secretary (Steno) position to the Chief of Surgical Service.

"RECOMMEND THAT THE CHIEF, SURGICAL SERVICE, BE ASKED TO CLARIFY WHY THIS REQUEST WAS SENT TO POSITION MANAGEMENT COMMITTEE.

"j. The Committee considered request from the Chief, Surgical Service, for an additional position for an Outpatient Health Aide for the Ophthalmology Clinic.

"RECOMMEND DISAPPROVAL" (Res. Exh. 17)

The recommendations were approved by Director Kennedy.

On March 3, 1976, Dr. Schumer assigned Ms. Puder to emergency duty in the Cardiovascular - Thoracic Section and Operating Room (Res. Exh. 7). On March 4, 1976, Dr. Mensheha

filed a "Grievance" with the Hospital Director with respect to the "emergency duty" assignment of Ms. Puder (Res. Exh. 8); and on March 8, 1976, Director Kennedy met with Drs. Bogan (Chief of Staff), Schumer (Chief of Surgery) and Mensheha (Chief, Ophthalmology Section). The meeting concerned the assignment of Ms. Puder out of the Ophthalmology Clinic and the fitting of glasses, et al. by Ms. Puder. On cross-examination by Respondent, Mr. Kennedy testified:

"Q. Mr. Kennedy, in discussing that last meeting, do you recall during that meeting the subject of Miss Puder coming up again?

"A. Miss Puder?

"Q. Yes.

"A. Yes, right. I remarked, I believe, that she had been pulled out of the clinic by Dr. Schumer because he didn't really understand how busy the clinic was, and that was part of the concern of Dr. Mensheha and the agreement from Dr. Schumer that he would put her back in that clinic.

"Q. Do you recall discussing why Dr. Schumer had requested an additional position for health aide for the ophthalmology clinic?

"A. Yes. This was one of several positions that had been requested, and when the issue came up, I questioned why we needed an additional health aide down there, because it was my understanding that Mrs. Puder was doing some of that work, and this had been agreed to long before ...

"Q. What was Dr. Schumer's reply?

"A. Well, Dr. Schumer's reply at that time was, as I recall, was in favor of it, but previous to that, I don't think directly to me, but somewhere I'd heard that he had raised an issue about her not being qualified to do that kind of work, not being licensed or what have you.

"Q. Did he express a concern about her doing that kind of work during this meeting?

"A. No.

"Q. If you look at your memo again, directing your attention to Page 8, Paragraph 5. Could you refresh your recollection, please?

"A. Okay. Page 8, Paragraph 5 -- well, in the meeting he did, but at the end of the meeting, I say 'Drs. Bogen and Schumer both expressed support for this change.' That's redescribing the position description to fit all that Mrs. Puder was doing.

"Q. Did Dr. Schumer ask that she not continue this work until the position description was clear?

"A. Not that I recall." (Tr. 280-282)

Mr. Kennedy's testimony was corroborated by the testimony of Dr. Mensheha and, although Dr. Schumer at first stated that he did not recall the meeting of March 8, 1976, when shown Mr. Kennedy's memorandum stated that he remembered "that these were problems which were discussed between Bogan and I and Doctor Mensheha. Whether Mr. Kennedy was involved in these meetings I can't remember" (Tr. 601); and he admitted that when informed of the caseload in the Ophthalmology Clinic he returned Ms. Puder to the Clinic. Accordingly, I fully credit Mr. Kennedy's testimony as set forth above.

Dr. Schumer sent a position description which was a standard position description for a clerk-typist, to Dr. Mensheha for signature but, in the penultimate paragraph, stated, "If you have any revisions, or additions, please call me." (Res. Exh. 18). Dr. Mensheha did not sign Dr. Schumer's redescription but by memorandum dated March 19, 1976, submitted a position description for a Health Technician, GS-5, with secondary office duties (Res. Exh. 19). Dr. Schumer responded by memorandum dated March 22, 1976, in which he stated that Personnel had advised that the request to establish a Health Technician position must be submitted to the Position Management Committee; that the position of clerk typist will stand as set forth in the redescription forwarded March 10, 1976; instructed Dr. Mensheha, as immediate supervisor, to sign it as soon as possible; and that the cover page for the Position Description for a Health Technician had been retyped to show, *inter alia*, "Establish". By memorandum dated March 23, 1976, Dr. Mensheha responded that the reclassification was not a new position but, rather, an update and accurate description of the current position held by Ms. Puder. Dr. Mensheha further stated that her office staffing needs will increase and "An additional position of Clerk-Typist (Stenographer) is requested." (Res. Exh. 21)

On March 31, 1976, Mr. George G. Shepherd, Jr., Administrative Assistant to Chief of Staff, forwarded to Dr. Mensheha, through Dr. Schumer, a rewritten position description to "reflect the secretarial as well as limited technician duties that are now being performed by Mrs. Puder. If this ... is acceptable and accurately reflects what Mrs. Puder is doing and should be doing, please sign in the appropriate places and forward through channels to Personnel." (Res. Exh. 22). Respondent contends in its Brief that Dr. Mensheha had sent this position description to the Office of the Chief of Staff; that this document "establishes beyond doubt that Dr. Mensheha not only refused to obey an order ... but wilfully attempted to bypass him, to obtain her goal of upgrading Ms. Puder's duties by going behind his back. She did not have the courtesy to even tell Dr. Schumer that she was going to pursue this matter at a higher lever; she tried to sneak it through." (Respondent's Brief p. 11). The record does not support this assertion. First, Mr. Shepherd did not testify. Second, the "rewritten position description" does not follow the format of Dr. Mensheha's proposed position description (Res. Exhs. 19 and 21). Third, the language of Mr. Shepherd's memorandum itself, together with the attached position description which is without indication of grade, title, date and was not signed, indicates preparation by Mr. Shepherd. Fourth, the total absence of any testimony or evidence that Dr. Mensheha had any more knowledge of this document than Dr. Schumer, much less that Dr. Mensheha "wilfully attempted to bypass" Dr. Schumer. Fifth, action by Mr. Shepherd in "rewriting" the position description for Ms. Puder "to reflect the secretarial as well as limited technician duties that are now being performed by Mrs. Puder" was wholly consistent with the credited testimony of Mr. Kennedy concerning the support by the Chief of Staff (Dr. Bogan) at the March 8, 1976, meeting to redescribe the position "to fit all that Mrs. Puder was doing". Accordingly, I reject the contention of Respondent that Dr. Mensheha prepared Respondent's Exhibit 22.

On June 24, 1976, Director Quandt met with Drs. Cohn (Acting Chief of Staff), Schumer and Mensheha and Mr. Frank Gathman, Assistant Hospital Director. In the course of this meeting Ms. Puder was discussed and I find, as Ms. Quandt most credibly testified, that at that meeting Dr. Schumer stated, "I order you to have her stop" and that Dr. Mensheha responded "I will not" but because of Dr. Mensheha's interest in upward mobility, "she made a very neat statement. She said 'I will if you give her a GS 5'" (Tr. 701). While Director Quandt recognized that Dr. Mensheha had been insubordinate in that meeting, she did nothing about it. There is no question that Dr. Mensheha permitted Ms. Puder to continue to fit glasses until July 22, 1976, when Dr. Schumer issued a memorandum to Dr. Mensheha that:

"I am therefore directing that the use of this clerk-typist as health care technician be immediately discontinued." (Res. Exh. 11).

Although there is testimony that, following the June 24, 1976, meeting, Dr. Mensheha instructed Ms. Puder to stop fitting glasses, Ms. Puder's testimony on cross-examination, which I fully credit, was to the contrary. Mrs. Puder, on cross-examination testified that Dr. Mensheha, following Dr. Schumer's oral instruction, had, nevertheless, told Ms. Puder she "should continue [fitting glasses] because I was taking this course. She had rewritten my job description and she was in good hopes that this would go through. Then after she received the memo in writing, then she said no, and I showed Mrs. Siddle how to do it -- to the best of my knowledge." (Tr. 362).

Also, on July 22, 1976, Dr. Schumer submitted to Personnel a redescription of the clerk-typist job to eliminate the health care duties. (Res. Exh. 24). Dr. Bizzell wrote a memorandum to Dr. Schumer dated July 28, 1976, in which he stated he had observed Ms. Puder fitting glasses (Res. Exh. 25); however, in view of Ms. Puder's testimony on cross-examination, which I have fully credited, which is corroborated by the testimony of Dr. Mensheha, I reject Dr. Bizzell's memorandum and testimony, which I did not find convincing, that Ms. Puder fit glasses, except in course of instructing Mrs. Siddle, with either the knowledge or consent of Dr. Mensheha after July 22, 1976.

From all the evidence and testimony, I find no order or instruction by Dr. Schumer to Dr. Mensheha that Ms. Puder cease fitting glasses until June 24, 1976, in the meeting with Director Quandt. Clearly, on June 24, Dr. Schumer ordered Dr. Mensheha to instruct Ms. Puder to cease fitting glasses and Dr. Mensheha directly refused; but Respondent, through its Hospital Director took no action against Dr. Mensheha. Ms. Puder continued to fit glasses until July 22, 1976, when Dr. Schumer, in writing, directed that the use of this clerk-typist as health care technician "be immediately discontinued" and Dr. Mensheha complied fully with this directive.

Of course, the record shows that Dr. Schumer discussed the matter with Dr. Mensheha in February; that Dr. Schumer testified he told Dr. Mensheha, "you have got to stop this as much as possible"; that after Dr. Mensheha indicated that Ms. Puder's services were needed and she should go on, Dr. Schumer said "All right"; that he took the matter of a health technician to the Management Position Committee which, on February 18, 1976,

recommended disapproval of the request; that on March 8, in a meeting with the then Hospital Director, Mr. Kennedy, it was agreed that Ms. Puder's position description should be redescribed to fit all the work that Mrs. Puder was doing; that in his memorandum of March 22, 1976, Dr. Schumer, while stating that the request to establish a Health Technician position must be submitted for approval, did not indicate that any change should be made in Ms. Puder's duties pending resolution of the classification requests; and on March 25, 1976, Dr. Schumer approved the advance home study course for Ms. Puder. Dr. Schumer's bureaucratic efficiency of converting the work of one into jobs for two (See, Dr. Mensheha's memorandum of August 26, 1976, Res. Exh. 27) and/or his motive for his harsh and inequitable treatment of a long time employee of Respondent are not proper concerns in this proceeding; but I find that Respondent's assertion that the multiple disciplinary action taken against Dr. Mensheha was because of her insubordination in refusing to comply with Dr. Schumer's orders to cease permitting Ms. Puder to fit glasses (the emphasis by Drs. Schumer and Bizzell on other health care duties, while authorized by Ms. Puder's 1971-1975 position description, was not convincing. See, Dr. Schumer's memorandum of August 24, 1976; (Cf. Dr. Mensheha's memorandum of July 23, 1976), was, in part, contrary to the record and in whole highly suspect as the actual motivation for the action subsequently taken against Dr. Mensheha. Dr. Mensheha was insubordinate on June 24, 1976, as she had been on September 2, 1975,; but Respondent, with full knowledge of her refusal on June 24, 1976, to comply with Dr. Schumer's direct order, took no action whatever and Dr. Schumer's written directive of July 22, 1976, was fully complied with.

5. Dr. Mensheha Directed to Resign from Union

Director Quandt testified that there was a discussion about Dr. Mensheha's union activity with Mr. Gathman and with Dr. Cohn, Acting Chief of Staff. As a result, Director Quandt concluded that Dr. Mensheha, as Chief of the Ophthalmology Section was a part of management and should not be active as far as functioning in a steward's role. Accordingly, Director Quandt instructed Mr. Gathman to inform Dr. Mensheha through the Chief of Staff, Dr. Cohn, and Dr. Schumer that, as a part of management, she should not function as a steward. Dr. Schumer, when called by Dr. Cohn, demurred and testified most credibly that "I was having some difficulties with Oksana at that time. I didn't want to have any more." Dr. Schumer asked Dr. Cohn to send him a memorandum stating what Dr. Cohn wanted him to do. Dr. Cohn did so on July 2, 1976 (Comp. Exh. 4) and Dr. Schumer transmitted the memorandum and requested Dr. Mensheha's "resignation to the

union effective immediately" on July 6, 1976 (Comp. Exh. 3). In an undated letter, which Director Quandt testified was sent around July 20, 1976, and which Dr. Mensheha testified she received in August, 1976, Mr. Gathman, for Director Quandt, advised Dr. Mensheha:

"1. The memorandum dated July 6, 1976, from Dr. Schumer and the memorandum attached to it from Dr. Cohn are hereby rescinded. ... 6/

"2. Management is currently reviewing your status as a supervisor. Until this issue is resolved we will continue to treat you as a member of the bargaining unit. ...

"3. I appreciate the opportunity to deal with this matter informally and hope that you will agree with me to consider this resolved." (Comp. Exh. 5)

Respondent insisted at the hearing that Dr. Mensheha was not a supervisor during the relevant period of the complaint and, of course, Complainant asserts that Dr. Mensheha was not a supervisor during the relevant period of the complaint. While I stated at the hearing that I had grave reservations about her status, in view of Dr. Mensheha's testimony that she was a supervisor and that the record showed that she supervised a number of people (Tr. 245), the record does show that her responsibility had been curtailed long before she became a member of the Union, for example, blind rehabilitation was placed under Physical Medicine and Rehabilitation and the Ear, Nose and Throat Clinic was eliminated; that her authority to hire and fire, or to effectively recommend such action, was curtailed, 7/ if not eliminated; that her influence on budget recommendations had been curtailed; and that requests for supplies and equipment seldom

6/ I am aware that Director Quandt testified that she instructed Mr. Gathman to inform Dr. Mensheha through Drs. Cohn and Schumer that as a member of management she should not function as a union steward. The direction from Dr. Cohn was that she "cannot be a member of the union. Therefore, Dr. Mensheha must be directed to resign her position as a union member." (Comp. Exh. 4).

7/ That is, the power to decide. Dr. Mensheha testified she was directed to terminate Dr. Seiller; that Dr. Stilles was employed by Dr. Bizzell at the time she was Chief of Ophthalmology.

received favorable consideration without Dr. Bizzell's concurrence. Therefore, in view of Respondent's insistence that Dr. Mensheha was not a supervisor at any time relevant to this proceeding, I accept this representation by the parties that Dr. Mensheha was not a supervisor at any time relevant to this proceeding inasmuch as there is record support for this representation.

Complainant points to Mr. Kennedy's testimony (Tr. 267-269) as showing "the growing animus of management toward Dr. Mensheha's union activities" (Complainant's Brief p. 41). I have carefully considered Mr. Kennedy's testimony in this regard and do not credit it, in part, because his time sequence is contrary to the record, in part, because, as previously stated, I did not find Mr. Kennedy a credible or convincing witness, and in part because Dr. Schumer's testimony, which I found wholly credible concerning the by-laws matter, shows no union animus by Dr. Schumer in that regard. For example, Dr. Schumer testified that he attended only one meeting on the by-laws and that he agreed with some of Dr. Mensheha's suggestions.

There is a great deal of testimony, however, which does show general union animus, including incidents set forth above. Without attempting to catalogue all examples shown, the following further instances are noted. Dr. Mensheha testified that in the course of her handling the grievances of Dr. Pokral (Comp. Exh. 27) Dr. Cohn questioned her about the allegations of mismanagement of funds at the Hospital that had appeared in the newspapers and stated "Dr. Schumer thinks that you are the one who has brought the allegations to the notice of the newspapers, and he also holds you responsible for releasing them to other sources. He used the word 'presume'. He said, 'Dr. Schumer presumes that you're the one. ...'" (Tr. 100). Dr. Mensheha testified that she told Dr. Cohn she had not talked to any newspaper reporter but had discussed this with "the investigators and Congress and Representatives" (Tr. 100). It is assumed that by "Representatives", Dr. Mensheha meant other than a member of the U.S. House of Representatives (See, for example, Comp. Exhs. 1 and 2 which were delivered to Dr. Chase; and as noted above on April 12, 1976, the three Union delegates also talked to an aide of Senator Proxmire, as well as to Congressman Howard.

In the fall of 1976, Dr. Schumer stopped a nurse, Ms. Lynn Thomas, in the hallway and asked her to come into his office where another physician, Dr. Altner, was standing. Ms. Thomas testified:

"Dr. Schumer asked me if I was a union member or what connection I had with the union. I replied I was not a member and never had been a member and asked why he had asked me that. And he replied that he heard my name, the name Thomas, in a conversation. He was asking if I was a union member." (Tr. 371).

Mr. Maden Michael Djuricich, a neuro-biologist and neuro-chemist, at a union meeting had brought up a question concerning Dr. Schneider. Mr. Reeves, President of Local 2107, brought the matter to Director Quandt's attention by a letter. The Director replied that no action would be taken until the names of the people who made the complaint were disclosed. A few days later, Dr. Schneider called Dr. Saeed Gaballah, a bio-chemist and Vice President of Local 2107, to his office and accused him of writing the letter to Director Quandt. Dr. Gaballah stated that whether he had written the letter or whether some one else had, they were carrying out the provisions of the collective bargaining agreement with Respondent. Dr. Schneider responded that disciplinary action would be taken against any employee who did not go through proper channels on grievances. On August 24, 1976, Dr. Schneider issued a memorandum to all Laboratory Service Personnel (Comp. Exh. 25). A few days after the memorandum of August 24, 1976, had been issued, Mr. Djuricich came to Dr. Gaballah for union assistance, stating that Dr. Schneider had accused him of initiating the letter to Director Quandt, demanded to meet with him and threatened to discipline Mr. Djuricich if he did not come to his office without union representation. Dr. Schneider recanted and agreed to meet with Mr. Djuricich and his union representative and Dr. Gaballah met with Dr. Schneider and Mr. Djuricich as Mr. Djuricich's representative. Dr. Schneider stated that "Any complaints you have come first to him ... Then I will take it to the higher authorities." Dr. Gaballah stated that the collective bargaining agreement provided that the President of the Union may write directly to the Director about a problem that concerns more than one employee. Dr. Gaballah testified that Dr. Schneider stated:

"... all this business of the union raising problems and the publicity in the newspapers is very bad. He and Miss Quandt are determined to put a stop to that." (Tr. 311)

In early 1977, Dr. Gaballah was appointed as the Union's representative on the Hospital Research Committee and at the first session Dr. Gaballah attended, Dr. Schneider denounced Dr. Gaballah as "... a type of person I would not serve on a committee with. You have been saying lies about me and you

shouldn't be sitting here with us" and Dr. Gaballah's membership on the Committee was subsequently withdrawn and he was replaced.

The most astounding incident involved a long term psychiatric patient, Rudolph Durso, and the patient's sister-in-law, Mrs. Doris Durso. Rudolph Durso had cataracts and had been treated for a long period time by Dr. Mensheha. Mr. Durso, because of his mental disorder, was difficult to communicate with but had developed a great confidence in Dr. Mensheha and had agreed to her performing the operation for removal of the cataracts. The operation was scheduled shortly before Dr. Mensheha's terminal date. The night before the scheduled date of the operation someone at the Hospital called Mrs. Durso and told her the operation was being cancelled "because they were letting Dr. Mensheha go". Mrs. Durso called the VFW and talked to a Mr. Demar and told him, that they had had such a hard time talking Rudy into getting the operation and that they still wanted it performed as scheduled. Mr. Demar called back and told Mrs. Durso not to worry, that the operation would proceed as scheduled and that Dr. Mensheha would perform the operation. Mrs. Durso testified:

"... A few minutes later I got a telephone call from Dr. -- I am scared. I am afraid I can't remember his name.

"Q. All right. Is it Schumer?

"A. Yes. From a man who said he was Dr. Schumer and that he was angry with me for calling the VFW. He said why did I do that, why did I call them instead of him. I said he called off the operation so why should I call him when I didn't feel that I could talk to him. So I called the VFW instead and they saw to it that Rudy did get his operation as planned.

"Q. Did Dr. Mensheha operate on your brother-in-law?

"A. Yes. I got to the hospital at 7:00 Tuesday morning and she, Dr. Mensheha, came in and walked down the hall with Rudy on the gurney or whatever it is called. After the operation she came back and told me everything was all right.

"Q. Did you again see Dr. Schumer?

"A. Yes. While Dr. Mensheha was operating it was the first time I had seen him.

"Q. I am sorry?

"A. He came into the room, closed the door and -- I guess I am just nervous -- he asked me what I knew about Dr. Mensheha's problem. I said I didn't know anything except that she was going to be let go on Friday. He told me that she was a trouble-maker and that she was interfering with two other doctors who -- I'm sorry, I'm shaking so bad -- that she was making these other two doctors lose their reputations. And then he said 'Well, don't worry about it. It is really not your problem, it is our problem.'" (Tr. 377-378).

Dr. Stiles, a staff opthamologist had a patient with a corneal ulcer which had not responded to treatment. On November 11, 1976, Dr. Stiles decided that the eye should be removed or eviscerated but the patient objected and loudly yelled that he did not want his eye taken out. A telephone consent was obtained from the patient's sister and the operation, to be performed by Dr. Bizzell, was scheduled for the following day. Ms. Elizabeth Siddle, a registered nurse assigned to the eye clinic, had been instructed to scrub for the operation but, aware of the patient's violent objection to the operation and the telephone consent obtained from the patient's sister, Ms. Siddle called her supervisor, Mrs. Santorum, and asked if she could refuse to scrub for the operation. Mrs. Santorum stated that she knew of no reason why Ms. Siddle could not decline to scrub for the operation, but to be safe to call Mr. McDonald in Medical Administration. Mr. McDonald, after checking with counsel for Respondent, advised Ms. Siddle that she must scrub because the operation "was to save the eye". Ms. Siddle corrected Mr. McDonald and told him it wasn't to save the eye but, rather, to remove it. Mr. McDonald called again and told Ms. Siddle that the operation would not be performed.

On November 17, 1976, Dr. Stiles came in for his regular appointment day and asked why the surgery had not been performed and Ms. Siddle told him that she had called her supervisor who had referred her to medical administration which cancelled the surgery. Dr. Stiles was upset and said that the patient would get S.O. (sympathetic ophthalmia) and if he did he intended to tell the sister why the surgery had not been performed. Dr. Mensheha was informed of the matter when Ms. Siddle

sought medical references on the condition and Dr. Mensheha told Dr. Stiles that Ms. Siddle had mentioned the legality of the surgery but not whether the treatment was the correct one. Dr. Stiles became angry and refused to discuss the facts. Dr. Mensheha told Dr. Stiles that Ms. Siddle was not the person to discuss the mode of treatment. Dr. Stiles then told Ms. Siddle that she didn't have to scrub on his surgical cases any more. Dr. Bizzell, in his memorandum of November 19, 1976, to Director Quandt makes no identifiable reference to this matter but does state:

"6. Because of this demoralizing atmosphere, Dr. Stiles has mentioned to me the possibility of his leaving our staff. ..." (Res. Exh. 13).

Dr. Mensheha most credibly testified, however, that Director Quandt told her that "my presence in the eye clinic made the medical school people feel uncomfortable because they were afraid of discussing their misadventures in front of me in case I should take it to the papers or publicize it in some other way, and she also accused me of having gone to the library and doing research on the case that you mentioned." (Tr. 150).

G. Dr. James W. Bizzell

When Dr. Bizzell was first brought to the eye clinic, Dr. Schumer introduced him to Ms. Puder but not to Dr. Mensheha. In introducing himself to Dr. Mensheha, Dr. Mensheha testified that he identified himself as "Chief of Ophthalmology for the V.A. Hospital and Chairman of Ophthalmology for the Medical School." (Tr. 175). Dr. Mensheha told Dr. Bizzell very emphatically that "Dr. Bizzell, to the best of my understanding I am the Chief of Ophthalmology at the V.A. Hospital." (Tr. 176). Dr. Bizzell denied that he introduced himself in this manner but overall I did not find Dr. Bizzell a convincing witness and, therefore, fully credit Dr. Mensheha's testimony. With such an auspicious beginning, it is not surprising that Dr. Mensheha's attitude toward Dr. Bizzell was lacking in enthusiasm and shortly thereafter, on, or about, April 19, 1976, Dr. Bizzell made himself more obnoxious by arriving at the clinic with a desk and demanding admittance to an area designated for patient care to set up an office for himself. Dr. Mensheha, the Chief of Ophthalmology, had no office. For a staff ophthalmologist to barge in, without prior discussions with the Chief of the Section, with a desk and demand the use of space set aside for patient care predictably angered Dr. Mensheha and she refused to permit the desk to be placed in the newly remodeled examining rooms unless the rooms were reassigned as office space. Dr. Mensheha

testified that Dr. Bizzell, as Chairman of Ophthalmology for the Medical School already had an office in Building 50. I specifically do not credit either Dr. Schumer's testimony or Dr. Bizzell's testimony that Dr. Bizzell was given an office in Building 50 either after, or because of, this incident. To the contrary, I fully credit Dr. Mensheha's testimony that Dr. Bizzell had such office as Chairman of Ophthalmology for the Medical School which is fully supported by the testimony of Dr. Bizzell concerning his work for the Medical School.

Very soon after Dr. Bizzell arrived for duty, on March 1, 1976, it became apparent to Dr. Mensheha that, both with regard to personnel and supplies, Dr. Bizzell's views were given controlling weight by Dr. Schumer. For example, Dr. Bizzell instructed Dr. Mensheha to "get rid of" Dr. Seiller and Dr. Bizzell hired Dr. Stiles while Dr. Mensheha was, at least in name, the Chief of Ophthalmology. On June 7, 1976, Dr. Ezdinli wrote Dr. Schumer a memorandum recommending Dr. Mensheha's appointment as a permanent member of the Tumor Conference (Res. Exh. 28) but Dr. Schumer appointed Dr. Bizzell instead.

Dr. Bizzell's "Log of Duty" (Comp. Exh. 29) is accorded little or no probative weight for the reason that Dr. Bizzell testified that he did not prepare the log and most of the entries by his secretary were, according to Dr. Bizzell, her own creations. Nor do I credit Dr. Bizzell's memorandum of July 28, 1976 (Res. Exh. 25) that he observed Ms. Puder fitting glasses on July 23, 1976. ^{8/} This assertion was directly contradicted by the testimony of Ms. Puder and Dr. Mensheha which testimony is credited. As previously found, when Dr. Schumer's memorandum was received on July 22, 1976, Dr. Mensheha instructed

^{8/} For present purposes it has been assumed, as stated or implied by Dr. Mensheha and Ms. Puder, that Dr. Schumer's memorandum (Res. Exh. 11) was received on July 22, 1976. Dr. Mensheha responded on July 23, 1976 (Res. Exh. 12); but, in any event, the record is clear that when the written instruction was received Dr. Mensheha instructed Ms. Puder to cease fitting glasses and Ms. Puder complied. The inference by Dr. Bizzell that Dr. Mensheha permitted this to continue after receipt of Res. Exh. 11 is contrary to the record and is rejected. If I am wrong as to the date of receipt of Res. Exh. 11, then it is unquestionably true that Dr. Bizzell saw Ms. Puder fitting glasses on July 23, 1976; but the inference drawn by Dr. Schumer (Comp. Exh. 7), and intended by Dr. Bizzell (Res. Exh. 25), that Dr. Mensheha permitted Ms. Puder to fit glasses after receipt of Res. Exh. 11 is contrary to the record and is rejected.

Ms. Puder to cease the fitting of glasses and Ms. Puder testified that she complied with two exceptions: a) in the course of instructing Ms. Siddle and b) on one occasion when a patient who had come from some distance and Dr. Bizzell had, when the the circumstances were explained to him, stated "I don't see you". If Ms. Puder fit glasses on any other occasion after July 22, 1976, it is clear that she did so without the knowledge or approval of Dr. Mensheha. Dr. Bizzell, by his memorandum of July 28, 1976, knowingly participated in a scheme, used by Dr. Schumer (See, Comp. Exh. 7), to create the impression of direct insubordination by Dr. Mensheha by her refusal to obey a written order which, as noted, was false as the record clearly shows that Dr. Mensheha complied with the directions contained in Dr. Schumer's memorandum of July 22, 1976, immediately upon receipt. There is no question, as noted hereinabove, that Dr. Mensheha on June 24, 1976, had refused the direct verbal order of Dr. Schumer to direct Ms. Puder to cease the fitting of glasses, which order was given in the presence of Hospital Director Quandt who took no action. Nor is there any question that Dr. Mensheha permitted Ms. Puder to fit glasses until the written order of Dr. Schumer was received on July 22, 1976.

Careful consideration has been given to Dr. Mensheha's conduct, for example, in attempting to record conversations but, while such conduct was destructive of the development of rapport, so was the conduct of Drs. Schumer and Bizzell, for example, with respect to the desk incident, the abrupt change in position by Dr. Schumer on the up-grading of Ms. Puder, the unilateral decision by Dr. Schumer on March 3, 1976, to assign Ms. Puder out of the eye clinic, etc.

CONCLUSIONS

As early as September 2, 1975, Dr. Mensheha's conduct would have justified her termination for reasons wholly unrelated to protected activity; but Respondent took no such action. Following Dr. Mensheha's activity as a union representative, and in particular after the events of April, 1976, and her active role as a union representative thereafter, a series of repressive actions were taken by Respondent because of Dr. Mensheha's protected activity. First, was Dean Falk's telephone call to Captain Elliott on April 8, 1976; next was Dr. Schumer's restriction on Dr. Mensheha's leave requests, a restriction which was not extended to any other physician. On June 18, 1976, Dean Falk, upon the recommendation of Dr. Schumer (Comp. Exh. 17) deleted Dr. Mensheha's name

from the faculty roster of the Chicago Medical School 9/ and Respondent, through Dr. Schumer, notwithstanding her eminent professional qualification and her then status as Chief of Ophthalmology, informed Dr. Mensheha that she could no longer perform intraocular lens implant surgery because she was not then on a medical school staff, in reliance on a memorandum from Dr. Lawrence V. Foye, Jr., Deputy Chief Medical Director of Respondent's Central Office which stated, in part:

"1. Intraocular lens implant may be performed in thos Veterans Administration Hospitals with Ophthalmology Sections completely integrated with the counterpart Department or Division at an affiliated medical school." (Comp. Exh. 28).

Sometime prior to July 2, 1976, Director Quandt had a discussion with Mr. Gathman and Dr. Cohn about Dr. Mensheha's union activity and Director Quandt instructed Mr. Gathman to inform Dr. Mensheha, through Drs. Cohn and Schumer, that she should not function as a steward. Dr. Cohn's memorandum of July 2, 1976, which Dr. Schumer transmitted, as instructed, to Dr. Mensheha on July 6, 1976, requested her "resignation to the union effective immediately", Dr. Cohn's memorandum having stated "Persons who are classified in the management level cannot be members of a labor union." (Comp. Exh. 4). This order was later rescinded by Director Quandt by an undated memorandum (Comp. Exh. 5) which Dr. Mensheha testified she received in August, 1976. Director Quandt testified that the letter was sent around July 20, 1976; however, in view of Director Quandt's inability to fix a definite date, I fully credit Dr. Mensheha's testimony that she received Complainant's Exhibit 5 in August, 1976.

On June 23, 1976, during a discussion of a grievance concerning Dr. Pokral, Dr. Cohn questioned Dr. Mensheha about allegations of mismanagement of funds, such allegations having initially been presented by the union through its designated representatives, including Dr. Mensheha, to Dr. Chase, on April 12, 1976, and Dr. Cohn then stated that Dr. Schumer thinks [presumes] that you are the one who has brought the allegations to the notice of the newspapers and he also holds you responsible

9/ Dr. Mensheha testified that prior to removal of her name from the faculty roster she had been demoted from Assistant Professor to Clinical Assistant Professor (Tr. 141); however the record does not show the date of this change in status.

for releasing them to other sources", to which Dr. Mensheha replied that she had not talked to any newspaper reporter but had discussed the allegation with "the investigators and Congress and Representatives".

On June 24, 1976, Dr. Mensheha, in the presence of Director Quandt, was insubordinate and did refuse to comply with the order of Dr. Schumer that she instruct Ms. Puder to cease fitting glasses; however, Director Quandt took no action. On August 26, 1976, Dr. Schumer issued his letter of Intent To Admonish. Dr. Mensheha replied by memorandum dated August 30, 1976, and Director Quandt on September 9, 1976, admonished Dr. Mensheha because

"you disobeyed verbal and written orders issued by the Chief, Surgical Service to cease allowing your Clerk-Typist, Ms. Delorse Puder, to perform allied health duties."

Not only was the timing of this action suspicious, but most of the allegations were, on the record herein, false. Thus, Dr. Schumer testified that in February, 1976, he told Dr. Mensheha "you have got to have her stop this as much as possible" (emphasis supplied) and Dr. Schumer further testified that when Dr. Mensheha stated that she "needed her and felt that she should go on ... I said, 'All right. If you need a health technician, let's go into personnel for a health technician.'" The agreement of March 8, 1976, to upgrade Ms. Puder was wholly ignored. The record shows, contrary to Dr. Bizzell's assertion to the contrary, that Dr. Mensheha complied with the written order of Dr. Schumer of July 22, 1976, and that she did immediately order Ms. Puder to cease fitting glasses and that Ms. Puder complied, notwithstanding Dr. Mensheha's protest of July 23, 1976 (Res. Exh. 12). While Dr. Mensheha's conduct on June 24, 1976, was clearly insubordinate, no action was taken at that time and issuance of intent to admonish two months later and the Director's admonishment on September 9, 1976, concerning activity which had ceased on July 22, 1976, was highly suspicious.

On September 10, 1976, Dr. Schumer notified Dr. Mensheha that he was withholding a within-grade increase, due September 12, because her performance during the last year "has been unsatisfactory" (Comp. Exh. 12) which was sustained by the Director on September 23, 1976. The matters detailed in the Director's letter, Paragraphs I and III are factually correct; Paragraph II again refers to the Puder matter on which

the letter of Admonishment was based; and Paragraph IV concerns Dr. Bizzell except sections G and H which concern destruction of records and Dr. Mensheha's complaint with respect thereto. There is no doubt that Dr. Mensheha's conduct was less than ideal; but it is equally clear that her reaction was provoked by the equally deplorable conduct of Drs. Bizzell and Schumer. Dr. Bizzell's "log" was, by Dr. Bizzell's own admission, largely a worthless figment of his secretary's imagination. Director Quandt very aptly summed up the situation when she testified that on June 24, 1976 in the meeting with Drs. Cohn, Schumer and Mensheha, and Mr. Gathman, she

"stated that I expected to have them function as adults and to correct any problem that did exist." (Tr. 700).

Regretably, Director Quandt did not take action to carry out her admonition.

On September 13, 1976, Dr. Schumer, with the approval of Director Quandt, rescinded Dr. Mensheha's appointment as Chief of Ophthalmology, effective September 17, 1976. Dr. Mensheha was retained as a staff ophthalmologist and Dr. Bizzell was named Chief, Ophthalmology.

On November 30, 1976, Director Quandt notified Dr. Mensheha that her appointment would be terminated at the close of business December 17, 1976 (Comp. Exh. 18). Director Quandt told Dr. Mensheha that her "peers" felt threatened by her presence and had accused Dr. Mensheha of going to the library, researching, and gathering references about a case that Dr. Stiles wanted to enucleate. Although Director Quandt stated that the letter of termination originated from her, she admitted requesting Dr. Bizzell's "log", a report from Dr. Bizzell and conferring with Drs. Cohn and Schumer on various occasions. Indeed, Director Quandt stated that Dr. Schumer had pointed out that he felt it would be necessary eventually to fire her, but Director Quandt could not fix the date of this discussion.

From April, 1976, some actions by Respondent against Dr. Mensheha because of her union activity were direct, such as Dean Falk's call to Captain Elliot, Dr. Schumer's restriction on her leave requests, Dr. Cohn's questioning her about concerted activity and his statement that Dr. Schumer held her responsible for disclosing allegations of mismanagement of funds at the Hospital. Other action was more subtle, such as the Puder matter. From agreement by Drs. Bogan (then Chief of Staff), Schumer, and Mensheha and then Hospital Director Kennedy on March 8, 1976, to up-grade Ms. Puder, Dr. Schumer, after

Dr. Mensheha's union activity in April, 1976, quite abruptly departed from this agreement. The grounds for the intent to admonish, and the admonishment by Director Quandt were more contrived than real, the only clear insubordination having occurred on June 24, 1976, and Director Quandt failed to take any action whatever when it took place in her presence. Dr. Mensheha having complied with Dr. Schumer's written order of July 22, 1976, it is both strange and highly suspicious that on August 26, 1976, such belated action was directed against Dr. Mensheha for precisely the action (allowing Ms. Puder to continue to fit glasses) which had ceased more than a month earlier and for which neither Dr. Schumer nor Director Quandt had taken any action on June 24, 1976, when Dr. Mensheha refused to obey the direct verbal order of Dr. Schumer that she order Ms. Puder to cease fitting glasses.

Some factors which led to Dr. Mensheha's termination present close questions as to whether there was unlawful motivation for her termination; but whatever doubt or reservation may have existed was wholly removed by Dr. Schumer's astounding, but most revealing, conduct with Mrs. Durso. Cancellation of the operation without consultation with Mrs. Durso showed little concern for the patient and the statement that "they were letting Dr. Mensheha go" suggests a deep seated hostility toward Dr. Mensheha. Dr. Schumer's telephone call to Mrs. Durso, after the intervention of the VFW, to berate her for "by-passing" him was strange; but Dr. Schumer's final act of coming to the waiting room, while Dr. Mensheha was performing the operation on her brother-in-law, to ask Mrs. Durso "what I knew about Dr. Mensheha" and to tell Mrs. Durso that "she [Dr. Mensheha] was a troublemaker and that she was interfering with two other doctors ... that she was making these other two doctors lose their reputations" not only emphasized Dr. Schumer's deep-seated hostility toward Dr. Mensheha but made it clear that his hostility was firmly rooted in Dr. Mensheha's protected activity under the Order. From the April 12, 1976, presentation by the Union delegation, including Dr. Mensheha, of problems at the Hospital to Congressman Howard, to an aide to Senator Proxmire and to Dr. Chase, a series of actions was taken against Dr. Mensheha, beginning with Dr. Schumer's restriction on her leave requests, a restriction not imposed on any other physician, and with Dean Falk's telephone call to Captain Elliott. Dr. Schumer gave no explanation of what he meant by "she was making these other two doctors lose their reputations" but the written statements presented to Dr. Chase on April 12, 1976 had been especially critical of Dr. Bogan and Dr. Kantor (Infectious Diseases Section, Medical Service). Although Dr. Mensheha did knowingly by-pass Dr. Schumer on the Ophthalmology budget; attempted to by-pass Dr. Schumer on equipment and supplies and renewal of the sharing agreement with St. Theresa Hospital; and, on June 24, 1976, pointedly refused

to obey Dr. Schumer's direct verbal order to direct Ms. Puder to cease fitting glasses, no disciplinary action was taken at the time although Dr. Schumer wrote memoranda directing Dr. Mensheha to follow proper channels and Dr. Mensheha apologized and promised to do so. Indeed, the clearest act of insubordination on June 24, 1976, occurred in the presence of Director Quandt who took no action whatever. As noted, when Dr. Schumer issued his written instruction on July 22, 1976, Dr. Mensheha immediately complied and directed Ms. Puder to cease fitting glasses. That the notice of termination, issued November 30, 1976, effective December 17, 1976, was in part, if not wholly, motivated by Dr. Mensheha's protected union activity was made abundantly clear by Dr. Schumer's comments to Mrs. Durso in December, 1976, when Dr. Schumer termed Dr. Mensheha "a troublemaker". Moreover, the record shows a pervasive union animus throughout the Hospital including Dr. Schumer's interrogation of nurse Lynn Thomas, Dr. Schneider's questioning of Dr. Gaballah, Dr. Schneider's action against Mr. Djurecich, Dr. Schneider's comments about Dr. Gaballah's service on the Hospital Research Committee which led to Dr. Gaballah's replacement at the request of the Assistant Hospital Director. Accordingly, I conclude that Dr. Mensheha's termination was in part, if not wholly, motivated by her union activity 10/ in violation of Sections 19(a)(1) and (2) of the

10/ I am fully aware of Dr. Celedonio C. Barraneda's testimony concerning his conversations with Dr. Bogan, formerly Chief of Staff and presently Assistant Chief of Staff for Medical Education, in which Dr. Bogan told Dr. Barraneda that Dr. Mensheha was fired because "well, her union activity -- Dr. Chase fired her"; that Dr. Bogan initially said he would testify to this effect; that later Dr. Bogan told Dr. Barraneda that Dr. Mensheha was fired "Partly" because of her union activity; and, finally, that Dr. Bogan told Dr. Barraneda he would deny that Dr. Mensheha's discharge was unjustified and would deny that she was fired by Dr. Chase because of union activity.

While Dr. Barraneda was a most credible witness he frankly stated that Dr. Bogan, in their last conversation, asserted that Dr. Barraneda "misinterpreted" him. Dr. Barraneda's testimony, although hearsay, was not objected to by Respondent and, in any event, would have been admissible as an admission against interest. Nevertheless, Dr. Bogan denied to Dr. Barraneda that he had said precisely what Dr. Barraneda thought he had said. Because the direct testimony and evidence, including Dr. Schumer's statement to Mrs. Durso, clearly shows a discriminatory motive for Dr. Mensheha's discharge I have not (Continued)

Order. Veterans Administration, Biloxi Veterans Administration Center, A/SLMR No. 450, 4 A/SLMR 763 (1974); Department of the Army, U.S. Army Infantry Center, A/SLMR No. 515, 5 A/SLMR 325 (1975); see, also, U.S. Postal Service, Berwyn Post Office, Illinois, A/SLMR No. 272, 3 A/SLMR 252, 264 (1973). Indeed, Dr. Schumer's statement that Dr. Mensheha was a troublemaker was to use a term which has long been recognized as an euphemism for union supporter. The Huntington Hospital, Inc., 218 NLRB 51, 57 (1975).

Respondent, in effect, would neutralize the union animus of Dr. Schumer, and others, by contending that the decision to terminate Dr. Mensheha was made by Hospital Director Quandt as to whom no union animus was shown. The record does not entirely support the basic premise, namely, that Director Quandt was free of union animus, for it was Director Quandt who discussed Dr. Mensheha's union activity with Dr. Cohn and Mr. Gathman and instructed Mr. Gathman, through Drs. Cohn and Schumer, to order Dr. Mensheha to terminate her duties as steward (which, actually, resulted in a letter directing Dr. Mensheha to withdraw from the union entirely) and it was Director Quandt who told Dr. Mensheha on December 1, 1976, that her "peers" felt threatened by her presence, etc. But even if it were assumed that Director Quandt had no personal union animus or discriminatory motivation, the record is clear that Director Quandt's decision was based on recommendations by Dr. Schumer and by Dr. Bizzell, including Dr. Bizzell's "log", which Dr. Bizzell's testimony made clear was devoid of probative value. Certainly, Dr. Schumer was a supervisor within

Footnote 10 continued from page 38.

relied on Dr. Barraneda's testimony to establish unlawful motivation. Nevertheless, Dr. Barraneda's testimony, which was wholly unchallenged and wholly undenied, further shows unlawful motivation by Respondent in the discharge of Dr. Mensheha.

Dr. Breen's testimony that Director Quandt told her that Dr. Chase "had told her that the allegations could not be substantiated and that Dr. Chase had asked her [Director Quandt] to reprimand everybody involved in the allegation" was denied by Director Quandt who testified that Dr. Fitzgerald, Associate Deputy Chief Medical Director, directed her to take disciplinary action against four individuals found by the VA's investigation to have committed improprieties and specifically denied any action against people who instigated the investigation (Tr. 733). Accordingly, I do not credit Dr. Breen's testimony.

the meaning of the Order, his recommendation that Dr. Mehshaha be terminated was obviously within the scope of his employment, and Dr. Schumer was discriminatorily motivated in making his recommendation. Accordingly, the discriminatory motivation of Dr. Schumer is imputed to Director Quandt. Pepsi-Cola Bottling Co. v. NLRB, 312 F.2d 529 (3rd Cir. 1962. As the Court noted, in Pepsi-Cola Bottling Co., supra,

"To rule otherwise would provide a simple means for evading the Act by a division of corporate personnel functions."

Such conclusion is equally inescapable here in dealing with a discharge under the Order.

Dr. Mensheha's removal as Chief of Ophthalmology, on September 13, 1976, must, despite the discriminatory motivation for her discharge, be viewed apart from her discharge some two months later. Dr. Mensheha's conduct on September 2, 1975, had resulted in Dr. Schumer's request that the Hospital Director at that time rescind her title as Chief of the Ophthalmology Section and/or that Dr. Mehshaha be terminated for reasons wholly unrelated to any right protected by the Order. The record is clear that after September 2, 1975, relations between Dr. Schumer and Dr. Mensheha were strained and barely civil. Indeed, the die was probably cast when Dr. Mensheha declined consideration as Chief of the Department of Ophthalmology of the Medical School. Dr. Bizzell was then brought in as Chief of the Department of Ophthalmology of the Medical School and as a staff ophthalmologist. The record is clear that Dr. Schumer accorded Dr. Bizzell increasing control over the Ophthalmology Clinic. Whether Dr. Mehshaha's removal would have occurred in any event, certainly Dr. Mensheha's continued lack of cooperation as Chief of Ophthalmology with Dr. Bizzell as Chief of the Department of Ophthalmology of the Medical School, for example, by referring patients for consultation elsewhere; her open defiance of Dr. Schumer in administrative matters; and her direct insubordination to Dr. Schumer on June 24, 1976, etc. demonstrated an abject failure by Dr. Mensheha to improve relations with her Service Chief and her conduct, wholly unrelated to union activity, thoroughly compromised her functioning as Chief of Ophthalmology. Indeed, the record shows a pattern of conduct by her which could only further erode her relations, as Chief of Ophthalmology, with her Service Chief, Dr. Schumer. Dr. Schumer's statement that,

"... I think you will agree there is virtually no effective communication between you and me. There is no rapport between us on either a personal or

professional level. This is not the place to argue who is at fault, obviously we each have opposing opinions on that. I am taking this action because I believe a fully integrated Surgical Service of mutually cooperative sections is essential for quality patient care." (Comp. Exh. 6)

reflects accurately the state of their relations and his stated reason - "a fully integrated Surgical Service of mutually cooperative sections is essential for quality patient care" - neither suggests, nor is there any basis on the record to imply, discriminatory motivation because of Dr. Mensheha's union activity. Accordingly, on the record as a whole, I do not find any convincing evidence that Dr. Schumer's rescision of Dr. Mensheha's appointment as Chief of the Ophthalmology Sections of the Surgical Service was discriminatorily motivated.

Neither Dean Falk nor the Chicago Medical School is a party to this proceeding. Nevertheless, Dean Falk, in his letter of June 18, 1976, stated that he had deleted Dr. Mensheha's name from the faculty roster of the Chicago Medical School "Upon the recommendation of Dr. William Schumer, Professor and Chairman of the Department of Surgery". Unlike the rescision of Dr. Mensheha's appointment as Chief of the Ophthalmology Section, no basis or justification for Dr. Schumer's recommendation to Dean Falk was shown other than Dr. Schumer's discriminatory motivation because of Dr. Mensheha's union activity which was, of course, further emphasized by Dean Falk's own demonstrated union animus. In addition, this action, i.e., deletion of Dr. Mensheha's name from the faculty roster, was further seized upon by Respondent as the basis for imposing a limitation on Dr. Mensheha's professional activity which she was well qualified to perform. Although asserted in the complaint in Case No. 50-15408(CA), in its Brief Complainant does not contend that either the admonishment or the withholding of the within-grade increase constituted an independent violation of the Order and, under the circumstances, this issue has not been reached or decided. 11/

11/ Section 19(d) of the Order provides, in part,

"(d) Issues which can properly be raised under an appeals procedure may not be raised under this section. Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved
(Continued)

Footnote 11 continued from page 41.

party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. ..."

The Assistant Secretary, in Department of The Air Force, Offutt Air Force Base, A/SLMR No. 784 (1977), has held,

"... the term 'appeals procedure' as used in Section 19(d) of the Order is not intended to encompass nonstatutory 'appeals' procedures which do not provide for third-party review of an agency action.

See, also, Judge Dowd's analysis of 19(d) in Veterans Administration, Veterans Benefits Office, 3 A/SLMR 444, 449-453 (1973).

On the other hand, the second sentence of Section 19(d) assures an aggrieved party the right to utilize a grievance procedure or the complaint procedure but specifically prohibits raising the same issue under both procedures. The voluntary election to utilize a grievance procedure, with or without third-party review, is very different from removal of issues from the complaint procedure merely because the issue was subject to an appeals procedure. Thus, the second sentence of Section 19(d) quite clearly bars utilization of the complaint procedure where an aggrieved party has first elected a grievance procedure, not because third-party review has, or has not, been provided; but, rather, to prevent relitigation after a free choice of remedies. That third-party review is not germane to a discretionary election of remedy under the second sentence of Section 19(d) is implicit in Judge Dowd's analysis in Veterans Administration and consistent with Offutt Air Force Base, supra.

The record herein does not show the "grievance procedure" under which Dr. Mensheha filed her grievance, the parties having gone no further than establishing that "grievances" were filed and a decision issued as to each "grievance"; the record does not show that either issue was, or was not, subject to a third-party appeals procedure (see, for example, Federal Personnel Manual, Chapter 531, subchapter 4-9); and, as Complainant does not address the matter in its Brief, I specifically decline to decide the issue notwithstanding my strong predilection that consideration of these issues as independent violations of Section 19(a) of the Order is barred by Section 19(d) of the Order because Dr. Mensheha elected to utilize a grievance procedure in each instance and may not now resort to the complaint procedures of the Order.

The initial charge was filed on, or about, September 29, 1976, and Director Quandt's letter of termination issued November 30, 1976, effective December 17, 1976. The only direct indication that a violation of Section 19(a)(4) of the Order occurred stems from the fact that a charge was filed on September 29, 1976, and that Dr. Mensheha was unlawfully discharged thereafter, from which Complainant would draw the inference that Respondent disciplined or otherwise discriminated against Dr. Mensheha because a charge had been filed on her behalf. Weighing all factors, including Director Quandt's prior action to terminate Dr. Mensheha's union activity; the reliance by Director Quandt, for asserted justification for discharge, on factors such as lack of cooperation, by-passing her Service Chief, etc., which, as found, had an entirely proper relationship to her functioning as Chief of Ophthalmology but provided no justification for her termination as a staff ophthalmologist; and, of course, all factors which established unlawful and discriminatory motivation for Dr. Mensheha's termination in violation of Sections 19(a)(1) and (2) of the Order, I conclude, in agreement with Complainant, that the inference that Respondent violated Section 19(a)(4) is a proper inference. Moreover, I find that such inference is compelled by other considerations, including the timing of the termination, reliance on factors which were largely, if not wholly, unrelated to Dr. Mensheha's duties as staff ophthalmologist, union animus, Dr. Schumer's conduct with respect to the Durso matter, and Dr. Barraneda's testimony.

RECOMMENDATIONS

Having found that Respondent, Veterans Administration, North Chicago Veterans Hospital, engaged in conduct which was in violation of Sections 19(a)(1), (2), and (4) of the Executive Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of Executive Order 11491, as amended:

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, 29 C.F.R. § 203.26(b), the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Veterans Administration, North Chicago Veterans Hospital, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Executive Order.

(b) Discouraging membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment.

(c) Disciplining or otherwise discriminating against an employee because he has filed a complaint or given testimony under the Executive Order.

(d) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by Executive Order 11491, or by discriminating against its employees in regard to hiring, tenure, promotion, or other conditions of employment because of their exercise of rights assured by Executive Order 11491, as amended, or by disciplining or otherwise discriminating against an employee because he has filed a complaint or has given testimony under Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes of Executive Order 11491, as amended:

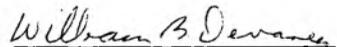
(a) Offer immediate and full reinstatement to Dr. Oksana Mensheha as staff ophthalmologist at the North Chicago Veterans Hospital without prejudice to her seniority or other rights and privileges and make her whole, consistent with applicable laws and regulations, for any loss of pay she may have suffered, by reason of its discrimination, by paying Dr. Oksana Mensheha a sum of money equal to the amount she would have earned as wages from the date of her unlawful discharge to the date of the Respondent's offer of reinstatement.

(b) Take all action, including the immediate unqualified recommendation of the Chief of Surgery of the North Chicago Veterans Hospital, to insure that Respondent unqualifiedly and affirmatively recommends that Dr. Oksana Mensheha's name be restored to the faculty roster of the Chicago Medical School; and, until her name is restored to the faculty roster of the Chicago Medical School, Respondent shall not deny permission to Dr. Oksana Mensheha to perform any surgical procedure, including, but not limited to, Intraocular Lens Implant Surgery, for which she is professionally qualified, because she is not a member of the faculty of the Chicago Medical School.

(c) Post at its facilities at the North Chicago Veterans Hospital, North Chicago, Illinois, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Hospital Director of the North Chicago Veterans Hospital and shall be

posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees and to physicians are customarily posted. The Hospital Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.


WILLIAM B. DEVANEY
Administrative Law Judge

Dated: October 26, 1977
Washington, D.C.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

We hereby notify our employees that:

WE WILL offer immediate and full reinstatement to Dr. Oksana Mensheha as staff ophthalmologist at the North Chicago Veterans Hospital without prejudice to her seniority or other rights and privileges and make her whole for any loss of pay she may have suffered, by reason of the discrimination, by paying Dr. Oksana Mensheha a sum of money equal to the amount she would have earned as wages from the date of her unlawful discharge to the date of Respondent's offer of reinstatement.

WE WILL take all action, including the immediate unqualified recommendation of the Chief of Surgery of the North Chicago Veterans Hospital, to insure that Respondent unqualifiedly and affirmatively recommends that Dr. Oksana Mensheha's name be restored to the faculty roster of the Chicago Medical School; and, until her name is restored to the faculty roster of the Chicago Medical School, WE WILL NOT deny permission to Dr. Oksana Mensheha to perform any surgical procedure, including, but not limited to, Intraocular Lens Implant Surgery, for which she is professionally qualified, because she is not a member of the faculty of the Chicago Medical School.

WE WILL NOT interfere with, restrain, or coerce Dr. Oksana Mensheha, or any other employee, in the exercise of rights assured by Executive Order 11491, as amended.

WE WILL NOT discourage membership by Dr. Oksana Mensheha, or any other employee, in a labor organization by discriminating in regard to hiring, tenure, promotion, or other conditions of employment.

WE WILL NOT discipline or otherwise discriminate against Dr. Oksana Mensheha, or any other employee, because such employee has filed a complaint, or a complaint has been filed on behalf of such employee, or the employee has given testimony under Executive Order 11491, as amended.

Appendix (cont'd)

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended, or discriminate against our employees in regard to hiring, tenure, promotions, or other conditions of employment because they have exercised rights assured by Executive Order 11491, as amended, or discipline or otherwise discriminate against our employee because they have filed a complaint, or a complaint has been filed on their behalf, or such employee has given testimony under Executive Order 11491, as amended.

Veterans Administration
North Chicago Veterans Hospital

Dated _____ By _____
Hospital Director

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 its provisions, they may communicate directly with the Assistant Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 1060, Federal Office Building, 230 South Dearborn Street, Chicago, Illinois 60604.

DEPARTMENT OF THE ARMY,
U. S. ARMY MATERIEL
DEVELOPMENT AND READINESS COMMAND
A/SLMR No. 1025

This case involved an unfair labor practice complaint filed by Local 1332, National Federation of Federal Employees (Complainant) alleging essentially that the Respondent had violated Section 19(a)(6) of the Order by failing to promptly furnish a written statement of position on a grievance, after agreeing to furnish such statement, and by denying the subsequently filed formal written grievance and refusing to process the matter to arbitration on the grounds that the formal written grievance was untimely filed.

The Administrative Law Judge found that the Respondent's conduct was not violative of Section 19(a)(6) of the Order. He concluded that the Respondent acted in good faith and attempted to cooperate with the Complainant in providing it with the statement of position relative to the grievance. He found further that, in the absence of bad faith or an intentional frustration of the grievance procedure in the negotiated agreement, the issue of whether the formal written grievance was untimely filed would be more appropriately dealt with by seeking a grievability or arbitrability determination pursuant to Section 13(d) of the Order than by utilizing the unfair labor practice provisions of the Order. Accordingly, he recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
U. S. ARMY MATERIEL
DEVELOPMENT AND READINESS COMMAND

Respondent

and

Case No. 22-07400 (CA)

LOCAL 1332, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On January 30, 1978, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-07400 (CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 25, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of

DEPARTMENT OF THE ARMY
U.S. ARMY MATERIAL DEVELOPMENT
and READINESS COMMAND

Respondent

and

LOCAL 1332, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Complainant
.....

APPEARANCES:

STEPHEN A. KLATSKY, Esquire
DARCOM, 5001 Eisenhower Avenue
Alexandria, Virginia 22333
For the Respondent

ROBERT J. ENGLEHART, Esquire
National Federation of Federal Employees
1016 Sixteenth Street, N.W.
Washington, D.C. 20036
For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on September 28, 1977 by the Acting Regional Administrator for Labor Management Services Administration for the U.S. Department of Labor, Philadelphia Region, a hearing was held in Washington, D.C.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order) by the filing of a complaint on August 8, 1976 by Local 1332, National Federation of Federal Employees (hereinafter called the Union and Local 1332 NFFE) which alleged that U.S. Army Development and Readiness Command, Department of the Army, (hereinafter called the Respondent or USA DARCOM) violated Section 19(a) (6) of the Order by failing to promptly furnish, a written statement of position with respect to a grievance after agreeing to furnish such a written statement, even after a number of requests and then by denying the subsequently filed grievance because it was filed untimely and by refusing to process the matter to arbitration. USA DARCOM denied that they violated the Order.

The hearing was held before the undersigned in Washington, D.C. Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Both parties argued orally at the hearing and submitted post-hearing briefs, which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusion and recommendations:

Findings of Fact

1. At all times material herein Local 1332 NFFE was the collective bargaining representative for units composed of USA DARCOM's Headquarter's civilian employees.

2. At all times material herein Local 1332 NFFE and Headquarters USA DARCOM were parties to a collective bargaining agreement which contained, inter alia, a Grievance Procedure in Article XI and an Arbitration provision in Article XII.

3. During January of 1976 the Union believed that Respondent was violating certain terms of the collective bargaining agreement. 1/

1/ The dispute involved interpretation of Article XX Section F of the collective bargaining agreement, and involved the "mix" of military and civilian personnel. The precise issues and merits of the alleged contract violation is irrelevant to the disposition of the subject unfair labor practice case.

4. On February 16, 1977 the Union and DARCOM representatives met to discuss the Union's allegations of breach of contract. This meeting was held, pursuant to Article XI Section C, as part of the grievance procedure. It was a very short meeting because the DARCOM representatives were prepared to discuss just the Research and Development Directorate, but the Union wished to discuss the entire headquarters staff. The meeting was adjourned with the DARCOM representatives indicating that they would have to do some research and would communicate further with the Union.

5. The DARCOM Headquarters' Civilian Personnel Officer Philip Barbre, 2/ who had made the commitment at the February 16th meeting to research the matter and communicate further with the Union, looked into this matter, checked with his various supervisors and other DARCOM officials, and then asked Mr. Beverly Fleming, Chief of Management-Employee Relations, Civilian Personnel Office, Headquarters DARCOM, to set up a meeting with the Union to discuss the alleged contract breach. Accordingly a meeting was scheduled for March 16 between the DARCOM and Union representatives.

6. On March 16, 1977, prior to the meeting described above, Mr. Barbre dictated a memorandum which was a response to Union Executive Vice President Richard R. Goodwin and which set forth DARCOM's position with respect to the issues raised by the Union concerning to the military-civilian "mix."

7. The aforescribed memorandum was typed and Mr. Barbre brought it with him to the March 16 meeting at which the Union and DARCOM representatives met. The Union representatives were Mr. Goodwin, Mr. Girard and Mr. Haden and the DARCOM representatives were Mr. Barbre and Mr. Fleming. The parties discussed the military-civilian "mix" issue and the DARCOM representatives fully explained DARCOM's position and, because the table was wide, Mr. Barbre slid across the table to Mr. Goodwin the above described memorandum. Mr. Goodwin indicated that the management position was not acceptable and he indicated he needed a written position from DARCOM to take before the Union's Executive Board so that it can decide whether to go to the next, or, formal written, step

2/ Mr. Barbre was the DARCOM official who was responsible for representing DARCOM in its day-to-day meetings with the Union.

grievance procedure. The representative also requested certain job descriptions. The meeting then adjourned.

The record testimony and evidence with respect to the above described March 16 meeting was quite contradictory, especially with respect to whether the DARCOM representatives gave Union representative Goodwin the memorandum setting forth DARCOM's position. The testimony of each of the witnesses indicated certain confusion on the part of each witness with respect to precisely what occurred at the meeting. All, however, seemed clear with respect to their respective version as to whether DARCOM gave Mr. Goodwin the memorandum setting forth DARCOM's position. I find that Mr. Goodwin did give Mr. Goodwin the memorandum because the Union representatives might not have noticed the memorandum, it might have been mixed up with Mr. Goodwin's other papers or have otherwise gone unnoticed, and because the DARCOM witnesses' testimony seemed more credible and consistent with the other established circumstances, e.g. The memorandum had been dictated and typed that day by Ms. Miranda. Further the Union's position seems to depend on the drawing of inferences that the DARCOM representatives prepared the memorandum sometime after the March 16 meeting and deliberately misdated it. The record does not sufficiently establish facts which would justify drawing such findings.

8. Subsequent to the meeting Union representative Girard called Mr. Barbre's office and left a message to have Mr. Barbre return the call. Mr. Barbre returned the call 3/ and Mr. Girard asked for a copy of the memorandum. Mr. Barbre advised Mr. Girard that Mr. Goodwin had already been given the original and copy of the memorandum. Mr. Girard replied that Mr. Goodwin had asked him to get a copy. Mr. Barbre replied he would provide the copy.

9. Mr. Barbre instructed a clerical assistant to provide a copy of the memorandum to Mr. Girard and to put it in the box in Mr. Fleming's office where the Union received its mail.

10. On March 24 Mr. Girard took an envelope, which he assumed contained the memorandum out of the Union box in Mr.

3/ There is some disparity in testimony whether Mr. Girard had to call three times before Mr. Barbre advised him to pick up the memorandum. This disparity is insignificant because in any event Mr. Girard spoke to Mr. Barbre and was advised to pick up the memorandum on March 24.

Fleming's office. This box had a number of documents and papers in it. The envelope Mr. Girard took was addressed to Mr. Goodwin. 4/ He took the envelope to Mr. Goodwin but apparently did not give it to Mr. Goodwin until sometime in April. 5/

11. Mr. Goodwin upon opening the envelope discovered it was not the copy of the memorandum, but was a different document. Instead of calling Mr. Barbre himself, he contacted Mr. Goodwin and told him to get the right document.

12. Mr. Barbre was advised that Mr. Girard had not receive the memorandum. Mr. Barbre advised Mr. Girard that Mr. Barbre was sorry that Mr. Girard had not received the memorandum, and that he would get it this time.

13. On April 21 Mr. Goodwin received the copy of the memorandum 6/ in question. There was apparently a buck slip attached signed by Mr. Barbre dated April 19.

14. By letter dated April 21, 1976 the Union filed a formal written grievance with the DARCOM, Headquarters Commander, General John R. Deane, pursuant to Section C Article XI of the collective bargaining agreement.

15. By letter dated May 5 the Union advised General Deane that because he had not responded to the grievance within 5 days the Union was revoking the Arbitration provisions set forth in Section Article XII of the agreement.

16. By letter dated May 6, 1976 and signed by General Kerwan, Chief of Staff of Headquarters DARCOM, the grievance was denied because it was filed untimely.

4/ Mr. Girard seemed somewhat confused as to whether the envelope was addressed to him or Mr. Goodwin.

5/ This April date was according to the testimony of Mr. Goodwin. Mr. Girard places the date he gave the letter to Mr. Girard as on or about March 24. I credit Mr. Goodwin on this point as his testimony seems more precise and Mr. Girard's testimony seemed quite confused.

6/ It was not clear if he received it by internal mail or whether it was picked up and delivered to him by a Union representative. It should be noted that the job descriptions that were requested at the March 16 meeting had been previously delivered with a covering memorandum dated March 26.

17. Mr. Goodwin wrote General Kerwan a letter dated May 11, 1976 in which he stated that the grievance was not untimely because, he alleged, the memorandum dated March 16, had been typed on April 19 and backdated.

18. DARCOCM apparently has refused pick an arbitrator because it takes the position the grievance was not timely filed.

19. Article XI Section C provides that the parties meet and attempt to solve grievances. If agreement can not be reached at such a meeting, the grieving party may within (5) five working days submit a formal written grievance to the other side. The other side has five days to respond to the grievance. If the matter can still not be resolved, it may be submitted to Arbitration pursuant to Article XII of the agreement.

Conclusions of Law

Based on the findings of fact set forth above, and noting the record contains no evidence to establish union animus on the part of DARCOCM, it is concluded that DARCOCM did not engage in a course of conduct or series of acts designed to undermine the Union's bargaining position or to frustrate the Union in acting in its representative capacity. Rather the record establishes that DARCOCM acted in good faith, and attempted to cooperate with the Union in dealing with the grievance concerning the military-civilian "mix" issue. At most DARCOCM can be said to have been ignorant of the fact that the Union was unaware it had received a copy of DARCOCM's March 16 memorandum 7/ and DARCOCM might not have acted as promptly as desirable in providing the Union with the requested copy of the memorandum. With respect to the latter point, however, the record establishes that the Union never advised DARCOCM that a copy of the memorandum was needed immediately and further when Mr. Barbre advised the Union representative that the Union already had a copy of the memorandum, the Union representative did not disabuse Mr. Barbre of this alleged mistake.

7/ The record does not establish that DARCOCM backdated the memorandum and does not establish that DARCOCM engaged in a course of conduct designed to deceive and mislead the Union.

In light of all of the foregoing therefore, it is concluded that DARCOCM did not engage in a course of conduct that violated Section 19(a)(6) of the Order.

Finally it is concluded that DARCOCM's refusal to process the grievance through the formal stages and to go to Arbitration, because DARCOCM contended the grievance was not filed timely, is not a violation of Section 19(a)(6).

It is concluded that, in the absence of some showing of bad faith or an intentional frustration of the grievance and arbitration procedure, interpreting the grievance and arbitration clauses of the Contract to determine whether the grievance and arbitration procedures are applicable or whether the Union is barred from following these procedures because of its untimeliness, are issues that are more appropriately dealt with and decided pursuant to Section 13(d) of the Order, by seeking a grievability and arbitrability determination, and not under the unfair labor provisions of the Order. Cf. Naval Air Research Facility, A/SLMR No. 849; and Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, A/SLMR No. 700. 8/ A grievability and arbitrability proceeding is the appropriate proceeding for determining whether the Union's grievance concerning the military civilian "mix" is grievable under the collective bargaining agreement or whether it is not grievable because it is barred because it was untimely filed.

Accordingly it is concluded that by refusing to precede through the formal steps of the grievance procedure and to arbitration DARCOCM did not violate Section 19(a)(6) of the Order.

RECOMMENDATION

It having been concluded that Respondent did not violate Section 19(a)(6) of the Order by its general course of conduct or by refusing to further process a grievance filed by

8/ It is clear that if after a finding were made pursuant to Section 13(d) of the Order that the matter is arbitrable, the activity were then to refuse to proceed to arbitration, the activity would violate Section 19(a)(6) of the Order. Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, supra.

April 25, 1978

1332.NFFE and by refusing proceed to arbitration of said grievance. I recommend that the complaint herein be dismissed in its entirety.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Date: January 30, 1978,
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

MARE ISLAND NAVAL SHIPYARD,
VALLEJO, CALIFORNIA
A/SLMR No. 1026

This case involved an unfair labor practice complaint filed by the Federal Employees Metal Trades Council, AFL-CIO (Complainant) alleging essentially that the Respondent violated Section 19(a)(1) of the Order when a General Foreman made disparaging remarks to the Complainant's steward in the presence of another employee during the course of a discussion regarding a letter of warning issued by the Foreman to the employee.

The Administrative Law Judge concluded that the Respondent's conduct was violative of Section 19(a)(1). In this regard, he found that the Foreman's admitted statement to the effect that he did not recognize the steward "as a representative of anything or anyone" indicated disdain for the Union, and served to restrain employees in the exercise of their rights under the Order.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation. Accordingly, he ordered the Respondent to cease and desist from engaging in the conduct found violative of the Order and to take certain affirmative actions.

SAC:yw

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

MARE ISLAND NAVAL SHIPYARD,
VALLEJO, CALIFORNIA

Respondent

and

Case No. 70-5749(CA)

FEDERAL EMPLOYEES METAL
TRADES COUNCIL, AFL-CIO

Complainant

DECISION AND ORDER

On February 3, 1978, Administrative Law Judge Thomas Schneider issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in an unfair labor practice and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions, I hereby adopt the Administrative Law Judge's findings 1/, conclusions and recommendation.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Mare Island Naval Shipyard, Vallejo, California, shall:

1/ In reaching my determination herein, it was considered unnecessary to pass upon the Administrative Law Judge's finding that General Foreman Montalbano's statement to Union Steward Flores "must have been in response to a statement by Mr. Flores that he was a Union representative."

1. Cease and desist from:

(a) Making disparaging remarks to representatives of the Federal Employees Metal Trades Council, AFL-CIO, in the presence of other employees.

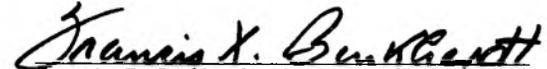
(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Post at its facility at the Mare Island Naval Shipyard, Vallejo, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Shipyard Commander, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices are customarily posted. The Shipyard Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
April 25, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT make disparaging remarks to representatives of the Federal Employees Metal Trades Council, AFL-CIO, in the presence of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

211 Main Street, Suite 600
San Francisco, California 94105



(202) 653-5092
(415) 556-0555

_____)	
In the Matter of)	
)	
MARE ISLAND NAVAL SHIPYARD)	
Respondent)	
)	
and)	CASE NO. 70-5749 (CA)
)	
FEDERAL EMPLOYEES METAL TRADES)	
COUNCIL, AFL-CIO)	
Complainant)	
_____)	

Richard C. Wells
Senior Labor Advisor
Department of the Navy
Office of Civilian Personnel
Western Field Division
525 Market Street
San Francisco, California 94102

and

Richard Johnson
Labor-Management Relations
Specialist
Mare Island Naval Shipyard
Code 160
Vallejo, California 94592
For the Respondent

John Robinson, President
Federal Employees Metal Trades
Council
Mare Island, P. O. Box 2195
Vallejo, California 94592
For the Complainant

Before: THOMAS SCHNEIDER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under Executive Order 11491, as amended, by Federal Employees' Metal Trades Council, AFL-CIO (hereinafter "the Union") against The Department of the Navy, Mare Island Naval Shipyard, Vallejo, California (hereinafter "the Activity"). The Union asserts that the Activity through one of its general foremen, Angelo Montalbano, violated section 19(a)(1) of Executive Order 11491 by certain actions discussed below.

Statement of the Case

At all material times Mr. Felix H. Flores was a union steward working at the Activity. The Union represents the employees of the Activity for purposes of collective bargaining. A few days prior to December 10, 1976, Mr. Montalbano, the general foreman of shop 72 issued a letter of warning to five employees. This letter was prompted by Mr. Montalbano's observations regarding some work deficiencies occurring the night before the letter was issued. After issuing the letter to the five individuals, he discussed its contents with each of them individually, including Mr. Marvin Martin. Mr. Martin discussed the letter with his steward, Mr. Flores; Mr. Flores suggested that Martin and he should see Mr. Montalbano. Since Flores had an appointment to see Montalbano concerning another matter at 12 midnight at the beginning of the graveyard shift on December 10, 1976, he and Martin approached the area where Montalbano was at that time.

On some points the evidence is uncontradicted: when Martin and Flores approached Montalbano, he asked Flores for a pass; Montalbano changed his mind and said that he would see Flores and Martin without a pass; there was a meeting; and there was some shouting and heated interchange between Flores and Montalbano, including Montalbano saying to Flores, "I don't recognize you as a representative of anything or anyone."

On other points, there is considerable conflict in the testimony: whether the meeting lasted less than five minutes or more than twenty minutes; whether Mr. Flores or Mr. Montalbano raised his voice first; whether or not Mr. Flores and Mr. Montalbano went over the letter in detail paragraph by paragraph, and whether Mr. Montalbano shouted words such as, "I don't give a damn about the Union" or similar expressions of disdain for the Union.

The original complaint filed May 4, 1977, alleged violations of section 19(a) (1), (2), (3), (5) and (6) of the Executive Order in that Mr. Montalbano's alleged conduct was an unfair labor practice because it failed to allow Mr. Flores, a Metal Trades Council Steward, to represent a grieved employee of his unit. The amended complaint filed September 1, 1977, alleged essentially the same conduct, but alleged a violation only of subsection (1) of section 19(a).

Findings of Fact and Conclusions

The principal issue for decision is whether the remarks of Mr. Montalbano on December 10, in the presence of Mr. Flores and Mr. Martin, indicated disdain for the Federal Employees Metal Trades Council of Vallejo and would restrain employees from exercising their rights assured by the Executive Order and thereby violated section 19(a)(1) of the Order.

I find that there was a short discussion of the letter of warning followed by an increasingly heated exchange of remarks.

Since Mr. Montalbano admitted that he told Mr. Flores "that I didn't recognize him as the representative of anything or anyone," it must have been in response to a statement by Mr. Flores that he was a Union representative. Thus, even though Mr. Montalbano may not have said, "I don't give a damn about the Union," he did say something disdainful of the Union.

In Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania, A/SLMR No. 771, it was held to be a violation of § 19(a)(1) for a management employee to call a union steward a loud mouth and a trouble maker. The remarks by Mr. Montalbano were similar in nature, and similarly constitute a violation. Mr. Montalbano testified that Mr. Flores became belligerent first. I find that whatever provocation there was by Mr. Flores was minimal. Some abusive language is common in industrial negotiations. See U. S. Small Business Administration and American Federation of Government Employees, Local 2532, A/SLMR No. 631.

Mr. Montalbano's remarks must have had some restraining effect on Mr. Martin. My impression from Mr. Martin's demeanor and testimony is that he was susceptible to being easily restrained from seeking Union help. Here it was Mr. Flores' idea to meet with the general foreman. The meeting not only failed to accomplish anything for

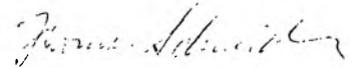
Mr. Martin, but resulted in a heated exchange which showed management disdain for the Union. Mr. Martin struck me as a person who was conscientious and who wanted to offend no one. After this incident he would be reluctant to seek Union help again.

There was a subsidiary issue adverted to during the hearing, namely whether a Mr. Willrich, who was a witness at the hearing before me, was given to understand that he would receive a shift change that he desired more quickly or easily by going directly to Mr. Montalbano without a Union representative's intervention. I find that Mr. Willrich was not at the meeting of December 10. He testified that he was not there and I believe that testimony. Since there was no evidence of any discriminatory treatment except at the meeting of December 10, I find that Mr. Willrich was not led to believe that he would get an easier resolution to his request by avoiding Union representation.

The Activity cites Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, A/SIMR No. 646, as an analogous case. There the Administrative Law Judge held that the statement "I am not talking to you" addressed to certain union representatives at a meeting was simply an attempt to keep the meeting focused on another issue. The Administrative Law Judge characterized the incident as the breakdown of communications. Although in the instant case there was a breakdown of communications, we have the additional element of Mr. Montalbano making personal disdainful remarks concerning the Union.

Recommended Order

It is recommended that Respondent be directed by the Assistant Secretary to cease and desist from conduct which indicates disdain for the Federal Employees Metal Trades Council, AFL-CIO and to post a notice of its intent in the form attached as "Exhibit A" in conspicuous places at the shipyard, including all bulletin boards where notices to employees are customarily posted. Respondent should be directed to take reasonable steps to insure that such notices remain posted for 60 days and are not altered, defaced, or covered.


THOMAS SCHNEIDER
Administrative Law Judge

Dated: February 3, 1978
San Francisco, California

TS:vag

EXHIBIT A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

The management of this activity will refrain from conduct which indicates disdain for the Federal Employees Metal Trades Council, AFL-CIO.

We will not in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights, as provided in section 19(a)(1) of Executive Order 11491.

(Agency or 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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061 Federal Building, 450 Golden Gate Avenue, San Francisco, California, 94102.

April 25, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE AND
INTERNAL REVENUE SERVICE,
SOUTH CAROLINA DISTRICT OFFICE
A/SLMR No. 1027

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Respondents violated Section 19(a)(1) and (6) of the Order by implementing a procedure for the furlough of When Actually Employed (WAE) employees in the Internal Revenue Service's South Carolina District Office without notifying the NTEU, at a time when the procedures were being negotiated at the national level.

The Administrative Law Judge concluded that neither of the Respondents violated the Order. In this regard, he found that there was a duty to bargain on the procedures and impact of the decision to furlough, to the extent that this would not unreasonably delay or otherwise negate the decision, which is a reserved management right under Section 12(b)(3) of the Order. However, he found that, absent national recognition or national consultation rights, the Respondent Internal Revenue Service had no obligation to bargain or consult with the NTEU with respect to matters concerning local management decisions. Further, he found that the Respondent South Carolina District Office had met its obligation to notify the Complainant of its decision and afforded it the opportunity to bargain over impact and implementation. However, the Complainant failed to request such bargaining, apparently based on a mistaken belief that an agreement on furlough procedures had been reached at the national level. The Administrative Law Judge further found that the Complainant had failed to meet its burden of showing any intentional misrepresentation by agency management in this regard.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation, and ordered that the complaint be dismissed.

A/SLMR No. 1027

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE AND
INTERNAL REVENUE SERVICE,
SOUTH CAROLINA DISTRICT OFFICE

Respondents

and

Case No. 40-7488(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

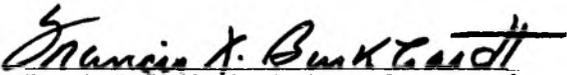
On December 15, 1977, Administrative Law Judge John H. Fenton issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-7488(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 25, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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 In the Matter of :
 :
 INTERNAL REVENUE SERVICE; :
 INTERNAL REVENUE SERVICE, :
 SOUTH CAROLINA DISTRICT OFFICE :
 :
 Respondents :
 :
 and :
 :
 NATIONAL TREASURY EMPLOYEES UNION :
 :
 Complainant :

HARRY G. MASON, Esquire
 275 Peachtree Street
 Atlanta, Georgia 30303
 For the Respondents

STEVEN P. FLIG, Esquire
 National Treasury Employees Union
 1730 K Street, N.W., Suite 1101
 Washington, D.C.
 For the Complainant

Case No. 40-7488 (CA)

Before: JOHN H. FENTON
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding arises under Executive Order 11491, as amended (hereafter referred to as the Order). A Notice of Hearing was issued by the Acting Regional Administrator of the Labor-Management Services Administration, Atlanta Region, on October 8, 1976, based on a Complaint filed July 26, 1976. The Complainant alleges that Respondents violated Sections 19(a)(1) and 19(a)(6) of the Order by implementing an interim procedure for the furlough of When Actually Employed (WAE) employees in the Internal Revenue Services' South Carolina District Office without notifying

the Complainant and at a time when these procedures were being negotiated at the national level.

A hearing was held in Columbia, South Carolina at which all parties were afforded a full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. Post-hearing briefs have been submitted and given careful consideration. Based upon the entire record in this case, including the briefs and arguments of counsel, I make the following findings of fact, conclusions of law and recommendation.

Findings of Fact

Background

The following facts are not disputed. At all times material herein, NTEU was the exclusive bargaining representative for employees in separate units located in 56 of IRS' 58 District Offices. On October 10, 1975 a meeting was held at IRS' Washington, D.C. headquarters between the Director of the IRS' Taxpayer Service Division, other IRS personnel, Robert M. Tobias, General Counsel of NTEU, and Mr. J. Russell Bowden, Executive Vice President of NTEU. One purpose of the meeting was to inform Messrs. Tobias and Bowden of the IRS' decision to supplement its permanent workforce in the Taxpayer Service Division with a cadre of temporary WAE employees.

On December 4, 1975, NTEU National President Vincent L. Connery sent proposals to Billy J. Brown, Director of IRS' Personnel Division, relating to the Taxpayer Service Representative Program. Section 5 of these proposals specifically concerned the procedures to be used in furloughing WAE employees.

On January 30, 1976, Mr. Brown sent Mr. Tobias counter-proposals regarding the furlough and recall of WAE employees in the Taxpayer Service Division. At a meeting on February 13, 1976, representatives of the IRS and NTEU discussed the proposals and counterproposals.

On March 11, 1976, Billy J. Brown and Vincent L. Connery entered into a Memorandum of Agreement which, inter alia, established procedures for determining the order in which temporary employees were to be furloughed.

At all times relevant to the negotiations in question IRS National officials were acting as agents for their

various District Offices and NTEU officials were acting as agents for the District Chapters of NTEU.

On February 23, 1976, the Internal Revenue Service's South Carolina District Office implemented a furlough procedure for that district. This action took place at a time when negotiations at the national level had yet to reach either impasse or agreement. Management furloughed seven employees on February 23, 1976 and one employee on March 4, 1976. Three of the employees who were furloughed on February 23, 1976 were recalled to duty status on February 29, 1976.

WAE employees

WAE employees were first used in the Taxpayer Service Division of the IRS' South Carolina District Office in 1974. They are trained to answer taxpayer inquiries at the Office's telephone and walk-in areas. Although the nature of their employment is strictly temporary, no set procedures have ever been formalized for determining the order in which these employees will be furloughed. The custom has been to simply furlough those with the least skills and training first. This procedure was used in 1974, when the need to furlough first arose, and again in 1975.

The decision to furlough is based on an evaluation of the overall workload and the need for assistance. At the beginning of the fiscal year, management prepares monthly and yearly schedules projecting the need for extra employees. These schedules are later reduced to weekly, daily and hourly schedules. The actual workload is then carefully monitored to determine the number of extra employees needed at any particular time.

In July 1975, a workload schedule was prepared in the South Carolina District Office for fiscal year 1976. Up until mid-February, 1976, this schedule was carried out as planned. However, on Wednesday, February 18, the Chief of the Taxpayer Service Division received a study showing "an almost sudden decline" in the volume of taxpayer inquiries and consequently in the need for additional help. Prompted by this study, she decided to begin furloughing the following Monday.

February 19 meeting

The crux of the controversy in this case centers around a February 19, 1976 meeting between Lyda Bryant, Chief of the

Taxpayer Service Division in the South Carolina District Office, and Wayne Golden, President of NTEU Chapter 55. The meeting lasted only a few minutes and was called by Ms. Bryant to inform the Union of her decision to start furloughing WAE employees.

Mr. Golden's and Ms. Bryant's testimony concerning this meeting differ in several material respects. On the one hand, Ms. Bryant testified that, at this meeting, she told Mr. Golden that the workload had declined and consequently they would not need all the WAE employees. She also remembered explaining the procedures she devised for implementing her decision viz. that volunteers would be furloughed first with the rest being determined by training test scores. Though she testified she would have been receptive to suggested alternatives to this procedure, none were forthcoming from Mr. Golden, who simply stated he felt this was a fair way to handle the problem. At this meeting, Ms. Bryant reminded Mr. Golden that this whole topic was being discussed nationally, although they had a local situation which the Union should be aware of. Finally, Ms. Bryant testified that she mentioned the timing was short, and was "almost certain" she told Mr. Golden that the furloughs would commence the following Monday.

Mr. Golden testified that, at this meeting, Ms. Bryant told him only that the peak workload had passed, the furlough of WAE's would be forthcoming, and that this had all been discussed at the national level. He did not recall her explaining any specific, final procedure to be used, although he admitted she may have mentioned something about volunteers. Believing that the furlough procedures had been agreed upon at the national level, Mr. Golden responded that he would take no exception to the implementation of management's decision, but would reserve the right to request negotiations over the impact on employees. According to Mr. Golden, he never indicated that he thought the furlough procedures were fair, nor did Ms. Bryant ever mention when the furloughs would take effect. He maintains that Ms. Bryant simply said that they would be "forthcoming."

Based on this testimony and other evidence in the record, I find that, at this meeting, Ms. Bryant informed Mr. Golden of her decision to furlough WAE employees, told him the procedures she would use to implement this decision, and mentioned enough about the timing of this decision to make it clear that the impending furloughs were imminent. I also find that there was no intentional misrepresentation by management with respect to the effective date of this decision to furlough.

Furlough notices were prepared and issued Friday, becoming effective the following Monday. On Saturday, February 20, 1976, Mr. Golden received a letter from Vincent L. Connery, NTEU's National President, explaining that the Union and management had yet to reach agreement on furlough procedures for temporary employees, although negotiations were continuing.

On Monday, February 23, 1976, Mr. Golden called IRS' local personnel office. When informed that the furlough of WAE employees had already commenced, he requested that they delay further action until agreement could be reached at the national level. Despite this request, the furloughs continued. A national agreement establishing procedures for the furlough of WAE employees was signed on March 11, 1976.

Positions of the Parties

NTEU alleges that Respondents violated Sections 19(a) (1) and 19(a) (6) of Executive Order 11491, as amended, by furloughing WAE employees pursuant to a unilaterally established procedure without notice to the Union and at a time when negotiations on the furlough of WAE employees were taking place at the national level. NTEU also alleges that Respondents deliberately misled the Union into believing that the procedures instituted for the furlough of these employees had been agreed upon at the national level.

Respondents acknowledge that the complained of furlough took place. However, they contend: (1) they were not obligated to negotiate over the impact and implementation of this action because the furlough did not involve any change in Respondents' established practice regarding WAE employees; (2) any notice requirements due the Union were fulfilled when Chapter 55 President Wayne Golden was notified of the impending furlough on February 19, 1976, and (3) the reserved management right to furlough employees under Section 12(b) (2) of the Order may not be impeded by negotiations over impact and implementation.

Discussion and Conclusions

It is well-settled that, as a general proposition, an agency and a labor organization which has been accorded exclusive recognition must meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting the working conditions of unit employees. However, it is equally well-settled that management has no

duty to bargain with respect to the exercise of those rights specifically reserved to management under Section 12(b) of the Order. 1/ Therefore, since Section 12(b) (3) gives management the right to relieve employees from duties because of lack of work or other legitimate reasons, Respondents' had no duty to bargain with respect to their decision to furlough WAE employees.

Notwithstanding this fact, however, management was required to notify the exclusive representative of its decision and provide the Union with an opportunity to meet and confer on the procedures management intends to observe in implementing this decision and on the impact on adversely affected employees. 2/

Respondents' contention that there was no duty to negotiate over the impact and implementation of its furlough decision is without merit. Respondents' maintain this obligation is obviated because there was no change in their established practice concerning WAE employees. However, the evidence indicates that a new furlough procedure was implemented in 1976, based on Ms. Bryant's assessment of Union proposals submitted just two months before. Accordingly I conclude that management's implementation of this furlough procedure constituted a sufficient change in personnel policies and practices to give rise to a duty to confer on furlough procedures and impact.

Respondents are correct in asserting that management's reserved right to furlough employees may not be impeded by negotiations over impact and implementation. However, the reservation of certain rights to management was not intended to bar all bargaining with respect to such matters; rather, bargaining on the procedures management will observe in the exercise of such rights is encouraged provided it does not

1/ See United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289 (1973).

2/ See, e.g., Department of the Interior, Bureau of Reclamation Yuma Projects Office, Yuma, Arizona, A/SLMR No. 808 (1977); Bureau of the Mint, U.S. Assay Office, San Francisco, Calif. A/SLMR No. 750 (1976); U.S. Department of Interior, Bureau of Indian Affairs, Albuquerque, N. Mexico, A/SLMR No. 341 (1974).

interfere with the exercise of the rights themselves. 3/ Accordingly; I conclude management did have an obligation to bargain on the procedures and effects of its furlough decision to the extent this would not unreasonably delay or otherwise negate the decision itself.

This obligation to negotiate on procedures and impact runs only to the employee's exclusive representative. 4/ Here, the record indicates NTEU had exclusive recognition in only 56 of 58 District Offices. Therefore, absent some form of national recognition or national consultation rights, Respondent IRS (as opposed to Respondent IRS South Carolina District Office) had no obligation to bargain or consult with NTEU with respect to matters concerning local management decisions. 5/ Accordingly, I conclude that the Internal Revenue Service did not violate Sections 19(a)(1) or 19(a)(6) of the Order by failing to bargain with NTEU over the impact and implementation of the decision to furlough WAE employees at its South Carolina District Office.

Finally, it remains to be determined whether Respondent IRS South Carolina District Office succeeded in fulfilling its obligations under the Order. Management was not required to confer with the Union on its decision to furlough WAE employees. 6/ Nevertheless, it was required to notify NTEU of its decision and provide it with an opportunity to consult and confer on the impact and implementation of this decision. 7/

It has been held that the right to engage in a dialogue with respect to matters for which there is an obligation to meet and confer becomes meaningful only when agency manage-

3/ See Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Va., FLRC No. 71A-56 (1973); Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital Chicago, Ill., FLRC No. 71A-31 (1972).

4/ See U.S. Department of Commerce, U.S. Maritime Administration, A/SLMR No. 755 (1976).

5/ See Internal Revenue Service, National Office, A/SLMR No. 846 (1977); Department of the Treasury, Internal Revenue Service, A/SLMR No. 550 (1975).

6/ See p. 6, supra.

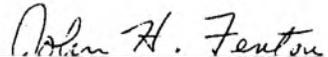
7/ Id.

ment has afforded the exclusive representative reasonable notification of the decision and an ample opportunity to explore the matter prior to the agency's taking action. 8/ Here, the record indicates that NTEU, through its Local President, was notified of management's decision to furlough on February 19, 1976. Furthermore, the evidence indicates that at this same time the Union was provided with an opportunity to request bargaining on the impact and implementation of this decision. This it failed to do. In fact, Mr. Golden specifically stated that he was not interested in negotiating on the implementation of management's decision but only wished to reserve the right to negotiate on impact. In these circumstances the Activity, having received no objections to its plan, was free to implement it.

The parties clearly misunderstood each other. However the record contains no evidence of any intentional misrepresentation by agency management. While Ms. Bryant was not certain she told Mr. Golden precisely when the furloughs would occur, the evidence indicates it was made clear that they were imminent. And even if the situation was as Mr. Golden described it, the burden was clearly on the Union to inquire as to exactly when this action would take place. In these circumstances I cannot find that the Activity failed to fulfill its obligations under the Order. Accordingly, I conclude that Respondent IRS Southern District Office has not violated Sections 19(a)(1) and 19(a)(6) of the Order in connection with the implementation of its decision to furlough WAE employees.

RECOMMENDATION

In view of the foregoing findings of fact and conclusions of law, I recommend that the complaint herein be dismissed in its entirety.


JOHN H. FENTON
Administrative Law Judge

Dated: December 15, 1977
Washington, D.C.

8/ See Federal Railroad Administration, A/SLMR No. 418 (1974).

JHF:WH:yw

April 26, 1978

A/SLMR No. 1028

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS
A/SLMR No. 1028

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3615, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when the Respondent's Chief Negotiator contacted the AFGE's Assistant Chief Steward concerning the reopening of stalled contract negotiations. The AFGE alleged that this action was an attempt to by-pass the exclusive representative and communicate directly with the employees regarding collective bargaining matters, or to undermine the status of the exclusive representative.

The Administrative Law Judge found that the chance encounter and ensuing conversation between the Respondent's Chief Negotiator and one of the Union's negotiators was neither an attempt by the Respondent to by-pass the AFGE and communicate directly with unit employees regarding collective bargaining matters nor to undermine the status of the exclusive representative. Accordingly, she recommended that the complaint be dismissed.

The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

Respondent

and

Case No. 22-07576(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3615, AFL-CIO

Complainant

DECISION AND ORDER

On January 23, 1978, 1/ Administrative Law Judge Joyce Capps issued her Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation. 2/

1/ The Recommended Decision and Order is inadvertently dated 1977.

2/ At the hearing, the Administrative Law Judge, upon motion of the Complainant, ordered that official time be granted to the Complainant's representative. No exceptions in this regard were filed by the Respondent. In the absence of exceptions, I find that the Administrative Law Judge's ruling should not be overturned. However, it should be noted that under Section 206.7(g) of the Assistant Secretary's Regulations only necessary witnesses are required to be granted official time for participation at hearings.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-07576(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 26, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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In the Matter of

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS

Respondent

Case No. 22-07576 (CA)

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 3615, AFL-CIO

Complainant
.....

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Evelyn D. Bethel, President
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For the Complainant

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For the Respondent

Before: JOYCE CAPPS
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to the provisions of Executive Order 11491, as amended (hereinafter referred to as the Order), a complaint was filed on November 1, 1976, by the American Federation of Government Employees, Local 3615, AFL-CIO (hereinafter referred to as the Union, the Local, or Complainant), against the Social Security Administration, Bureau of Hearings and Appeals (hereinafter referred to as BHA or Respondent).

It is alleged in the complaint that on July 20, 1976, Mr. Julian Brownstein, Respondent's Chief Negotiator, approached Mr. James Marshall, an Assistant Chief Steward of the Local, concerning the re-opening of contract negotiations in contravention of the ground rules for contract negotiations and/or the directives of the President of the Local that only the President and/or her designee be contacted concerning contract negotiations.

The issues for determination are whether the action of Mr. Brownstein was an attempt (1) to by-pass the exclusive representative and communicate directly with unit employees regarding collective bargaining matters, or (2) to undermine the status of the exclusive representative in violation of Secs. 19(a)(1) and (6) of the Order.

In accordance with the notice of hearing issued on February 22, 1977, by the Acting Regional Administrator for Labor-Management Services Administration, Philadelphia region, a hearing in this matter was held before me on April 18 and 19, 1977, in Washington, D. C. The excellent post-hearing briefs filed by the parties have been considered and are hereby made a part of the record.

The following occurrence and action taken is not relevant to the issues presented, but I feel some mention thereof should be made. All evidence in this case could not be presented on the first day of hearing (April 18), so all parties and attorneys were ordered to report back to court the next day (April 19). At that time Albert Carrozza, counsel for Complainant, moved that he be granted official time for that day of representation as well as for the following day. He stated that he had been required to take annual leave for his appearance on that day and he indicated his fear that he may not be permitted any type of leave the next

day without an order to present to his timekeeper. After hearing argument on the point, it appeared that fairness required the entry of an order that Mr. Carrozza be granted official time for his necessary and ordered appearance on the two days of trial. It was late in the day on April 18 when the motion was heard and no typists were available. Therefore, an order to the above effect was written and signed by me and given to Mr. Carrozza for presentation to his timekeeper. No copy was made for the file. On April 19, 1977, counsel for Respondent assured me that Mr. Carrozza would be given official time for his appearances in accordance with my order.

Based upon the entire record herein and upon my observation of the demeanor of witnesses, I make the following findings of fact, conclusions of law, and recommendations:

Findings of Fact

In July, 1975, Local 3615 became the exclusive representative of the bargaining unit consisting of approximately 750 non-professional employees Grade 1 through 13 and eight medical doctors. There commenced very shortly thereafter negotiations concerning ground rules to govern the conduct of future contract negotiations. Douglas Kershaw was chief negotiator on the union team and Julian Brownstein was chief negotiator for the management team. The ground rules were executed on October 7, 1975, and entitled, "Memorandum of Understanding Governing the Conduct of the Negotiations for a Collective Bargaining Agreement." (ALJ Exhibit 1(F)). Art. III, Para. 6, of the ground rules reads as follows:

The Chief Negotiator for each party shall be the Chief Spokesman for his party and shall speak at his discretion. Other negotiators may speak only when recognized by their Chief Negotiator.

I find that said paragraph of the ground rules was written to insure that the negotiations at the bargaining table would be conducted in an orderly fashion. It also makes it clear that only the chief negotiators had authority to bind their teams on any matter being negotiated and that only they were permitted to state the positions of their respective teams. However, it sometimes happened that during discussions at the bargaining table members of both teams would speak to the issue under discussion without obtaining prior recognition from their chief

negotiator. There is no question but that with respect to contract negotiations, including calling their teams to the negotiation table, all authority rested with the chief negotiators.

Kershaw is the national representative for AFGE and as such was actively involved in the work of 21 other locals in the District of Columbia area besides Local 3615. Understandably it was often difficult for someone to reach him directly by telephone. It was sometimes necessary for Brownstein to call Michael Cuthbertson (a member of the union negotiating team and vice-president of the local) or Evelyn Bethel (the president of the local) who would get in touch with Kershaw and convey the message that Brownstein wanted to talk with him. It was imperative that Kershaw have someone at BHA to receive and send written proposals and other materials from and to management. He designated Cuthbertson to serve in this conduit capacity in his absence to channel communications from management to him as necessary. Sometimes Cuthbertson initiated contact with Brownstein and sometimes it was the other way around. I specifically find that no one on the management team, including Brownstein, was aware of the communications procedure that Kershaw set up with his own team. ^{1/} Furthermore, it is clear that no particular line of communication from management to the union was established until August 6, 1976, in a letter from Ms. Bethel to Robert L. Trachtenberg, Director of BHA. (Claimant's Exhibit 2).

The labor relations climate was good at BHA prior to the ground rules negotiations, but by the time contract negotiations began in mid-February, 1976, relations had become strained. In late May, 1976, bilateral contact between the parties broke off and the union made a request for the services of the Federal Mediation and Conciliation Service. The parties began mediation sessions on June 2, 1976, and had additional mediation sessions on June 10 and 16, but were unable to resolve their differences. Negotiations remained at an impasse until

^{1/} E.g., Elizabeth Baker, a labor relations specialist at BHA who was a management negotiator during contract negotiations, often conversed with James Marshall in her office as well as his. She knew of no procedure or practice concerning who or in what order a particular member of the union could be contacted nor was there any prohibition against calling any particular person. She generally called Ms. Bethel first, but if she was not available she would contact Cuthbertson or Marshall.

September of 1976 when they went to the Federal Impasse Panel. The collective bargaining agreement was finally executed on December 10, 1976, and became effective on January 25, 1977. Kershaw and Brownstein served as chief negotiators throughout this entire period.

The incident described in the complaint occurred on July 20, 1976, at which time the parties were at an impasse and had not sat in negotiation for about a month. The persons involved in the incident were Marshall and Brownstein.

Marshall first became involved in Local 3615 activities the latter part of 1975 as assistant chief steward for the local. He was a member of the union team during ground rules negotiations but he was not a member of the negotiating team thereafter until June 2, 1976, when he was named by Kershaw as an associate negotiator. He was never removed from that position and no one was ever substituted in his place. He served as a negotiator at the three mediation sessions during June of 1976 and participated in negotiations when the parties went to the Federal Impasse Panel in September, 1976. On July 20, 1976, Marshall was working as a Senior Disability Analyst in BHA's Disability Branch under the supervision of Frank Smith, who was Section Chief of the Disability Branch.

Brownstein was Chief of BHA's Technical Administration Advisory Staff, Division of Appeals Operations. His work involved studies concerning the efficiency of the program administration within the Division of Appeals Operations. He had no supervisory authority whatsoever over the Disability Branch. Although he was part of management, he was in no position to influence careers and/or ratings of employees in the Disability Branch.

The two men worked in the same building -- Marshall on the third floor and Brownstein on the sixth floor. Starting in late 1975 or early 1976 up until July 20 Marshall and Brownstein had numerous informal conversations about labor-management relations in general. In these conversations there was never any mention of specific provisions of the contract being negotiated. All of these contacts were by chance when the men happened to meet in the hallway or on the street outside the building.

Marshall worked in Room 308 with nine other disability analysts. It is a room longer than it is wide. As one enters the room there are

five desks lined up each side. The employees sit at their desks facing the door. There is a chair alongside each desk near the center aisle. Marshall's desk was the third desk back from the door on the right.

There was divergent testimony concerning the July 20 incident and no useful purpose would be served by summarizing all such evidence. What follows now is my findings from the testimony that I considered to be the most credible. Shortly after 1:00 p.m. Brownstein met Marshall by chance in the hallway outside Room 308 and they began speaking generally about the stand-still of negotiations. They were observed at this time by Frank Smith who was returning to his own office. They continued the conversation as they walked from the hall into Room 308 and sat down at Marshall's desk. Brownstein repeated several times his opinion that it was important for both sides to return to the bargaining table. Marshall stated several times that he had no authority to reconvene the union negotiating team. Brownstein was well aware that only Kershaw had that authority, but he repeatedly urged Marshall to at least convey to the union authorities that he thought negotiations should resume, which Marshall finally agreed to do. As Brownstein departed he told Marshall he would get back in touch with him. The entire conversation lasted approximately 15 minutes. Both men spoke in their normal tone of voice. The conversation was neither argumentative nor hostile.

The following day Brownstein went back to Marshall's office to see if he had "checked back with his people," to which Marshall responded that the union felt there was no point in going back to the negotiating table because "we have gone as far as we can go."

Conclusions of Law

The chance encounter and ensuing conversation between management's chief negotiator and one of the union's negotiators approximately a month after contract negotiations between the parties had come to a complete halt was not an attempt by Respondent to bypass the exclusive representative and communicate directly with unit employees regarding collective bargaining matters or to undermine the status of the exclusive representative.

In arriving at the aforesaid conclusion, consideration was given to Department of the Navy, Naval Air Station, Fallon, Nevada,

A/SLMR No. 587, wherein the Federal Labor Relations Counsel noted that

the Order does not proscribe all communications with unit employees over matters relating to the collective bargaining relationship. Rather * * * only those communications which * * * amount to an attempt by agency management to bypass the exclusive representative and negotiate directly with unit employees, or which urge employees to put pressure on the representative to take a certain course of action, or which threaten or promise benefits to employees are violative of the Order. (Emphasis furnished.)

It is clear that the content, intent, and effect of the contact in the instant case cannot be equated with the violative actions set forth in the Fallon case. The encounter was not planned or contrived, but rather was impromptu. Marshall was not merely a unit employee, but was a union negotiator. Brownstein did not attempt to negotiate with Marshall, but only urged Marshall to relay a message to the union's spokesman that in his [Brownstein's] opinion it was important for both sides to resume negotiations that had been at a stand-still for almost a month. Brownstein did not urge Marshall to put pressure on the union's spokesman to take a certain course of action. More importantly, the conversation did not include any matter relating to terms and conditions of employment or any other matter that conceivably could be the subject of current or future negotiations. Contract negotiations had ceased altogether and Brownstein was merely making an effort to get the parties back to the bargaining table. The conversation was not hostile, loud, or argumentative on the part of either participant. No threats or promises of benefits were made or inferred. Brownstein's presence in Marshall's office cannot ipso facto be construed as coercive or threatening because he was in no position to either enhance or harm Marshall's career or to influence his professional ratings -- or indeed those of any employee in the Disability Branch.

Requesting a member of the union's negotiating team to relay a message to the person having authority to call the members of his team back to the bargaining table certainly cannot be construed as an attempt to undermine the exclusive representative.

April 26, 1978

The contact between Brownstein and Marshall on July 20, 1976, did not contravene any alleged line of communications protocol because no such procedure was ever established between the parties until almost three weeks later on August 6, 1976, in a letter from the president of the local to the Director of BHA. Even though it was expedient for the union's chief negotiator to set up a communications procedure among his own team members, management knew of no such procedure on July 20.

It is concluded that Respondent has not engaged in conduct violative of Sections 19(a)(1) and (6) of the Order.

Recommendation

Based upon the foregoing findings of fact and conclusions of law, it is recommended to the Assistant Secretary that the complaint herein be dismissed in its entirety.


JOYCE CAPPS
Administrative Law Judge

Dated: January 23, 1978
Washington, D. C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER AMENDING CERTIFICATION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

CHEMICAL SYSTEMS LABORATORY AND
ARMAMENT RESEARCH AND DEVELOPMENT
COMMAND, CHEMICAL SYSTEMS LABORATORY
SUPPORT, ABERDEEN PROVING GROUND, MARYLAND
A/SLMR No. 1029

This case involved a petition filed by the Activity seeking to amend an existing certification and to clarify an existing bargaining unit represented by the National Federation of Federal Employees, Local 178 (NFFE).

The NFFE was certified as the exclusive representative for a unit of all full-time General Schedule, Wage Grade, and Wage Leader employees at Edgewood Arsenal, U.S. Army Munitions Command (ARMCOM), at Aberdeen. On March 20, 1977, ARMCOM was disestablished and its work divided between two new Commands. Its research and development function was assumed by the Armament Research and Development Command (ARRADCOM) with headquarters in Dover, New Jersey, and its logistics function was assumed by the Armament Material Readiness Command (ARRCOM), headquartered in Rock Island, Illinois. As a result of this reorganization, Edgewood Arsenal was disestablished. Most of its functions were reassigned to former Edgewood Arsenal employees in the newly created Chemical Systems Laboratory (CSL) and other former employees of Edgewood Arsenal were assigned to ARRADCOM as support personnel for the CSL. Most of the former Edgewood Arsenal employees remain physically at Aberdeen. The Activity-Petitioner contends that these former employees of Edgewood Arsenal who were reassigned to ARRADCOM components at Aberdeen constitute the unit for which the NFFE was certified, and by its AC petition it seeks to change the designation of the activity on the NFFE's certification to reflect the organizational changes brought about by the reorganization. In addition, it seeks to sever from the NFFE's unit the former Edgewood Arsenal employees who physically remain at Aberdeen but who have been reassigned to ARRCOM. The Activity-Petitioner contends in this regard that employees of the new Commands have separate missions, functions and policies, and, therefore, no longer share a community of interest. The NFFE agrees that its certification should be amended to reflect changes brought about by the reorganization, but it contends that the unit for which it was certified as the exclusive representative remains appropriate.

The Assistant Secretary found that the NFFE's certified unit continued to be appropriate for the purpose of exclusive recognition after the reorganization. In this regard, he noted particularly that the reorganization did

not result in significant changes in the day-to-day terms and conditions of employment of the employees involved in that, for the most part, they continue to perform the same type of work under the same immediate supervision. Further, in view of the history of collective bargaining in the unit involved, both prior and subsequent to the reorganization, and the fact that the unit has remained generally intact following the reorganization, in the Assistant Secretary's view, to alter it in the manner sought by the Activity-Petitioner would not have the desired effect of enhancing effective dealings and efficiency of agency operations. Rather, the diminution of the scope of the existing bargaining unit and the establishment of a group of unrepresented employees, the result sought by the Activity-Petitioner herein, would tend to promote fragmentation and inhibit effective dealings and efficiency of agency operations. In this latter regard, it was noted particularly that both Commands continue to report to the same organizational command, U.S. Army Material Development and Readiness Command (DARCOM), and that the employees in the NFFE's unit continue to be serviced by the same Civilian Personnel Office.

Accordingly, the Assistant Secretary ordered that the NFFE's certification be amended to reflect the new designation of the activity involved.

A/SLMR No. 1029

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

CHEMICAL SYSTEMS LABORATORY AND
ARMAMENT RESEARCH AND DEVELOPMENT
COMMAND, CHEMICAL SYSTEMS LABORATORY
SUPPORT, ABERDEEN PROVING GROUND, MARYLAND

Activity-Petitioner

and

Case No. 22-08530(CU/AC)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 178

Labor Organization

DECISION AND ORDER AMENDING CERTIFICATION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Carol M. Rollins. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by both parties, the Assistant Secretary finds:

The National Federation of Federal Employees, Local 178, herein called NFFE, was certified in December 1970. In October 1972, the certification was amended to reflect that the NFFE is the exclusive representative for a unit of all full-time General Schedule (GS), Wage Grade (WG), and Wage Leader (WL) employees at Edgewood Arsenal, U.S. Army Munitions Command (ARMCOM), Aberdeen Proving Ground, Maryland. A three-year negotiated agreement between the parties became effective on February 10, 1976. Pending the outcome of the instant petition for clarification of unit (CU) and amendment of certification (AC), the parties have continued to apply this agreement to all the employees within its coverage.

Edgewood Arsenal was part of ARMCOM, headquartered at Rock Island, Illinois, until March 20, 1977, when ARMCOM was disestablished and its work divided between two new Commands. Its research and development function was assumed by the Armament Research and Development Command (ARRADCOM), with headquarters in Dover, New Jersey, and its logistics function was assumed by the Armament Material Readiness Command (ARRCOM), headquartered in Rock Island, Illinois. As a result of this reorganization, Edgewood Arsenal was disestablished. Most of its functions were reassigned to former Edgewood Arsenal employees in a newly created Chemical Systems Laboratory (CSL), a major component of ARRADCOM, located at Aberdeen. Other former employees of Edgewood Arsenal were assigned to ARRADCOM as support personnel for the CSL, or to an ARRCOM support group at Aberdeen for the purpose of providing logistical support for chemical items originally developed at the CSL.

By the instant AC petition, the Activity-Petitioner seeks to change the description of the activity on the NFFE's certification to reflect the organizational changes brought about by the reorganization. In addition, by the CU petition the Activity-Petitioner seeks to sever from the NFFE's unit those former Edgewood Arsenal employees who physically remain at Aberdeen but who have been reassigned to ARRCOM. In this regard, the Activity-Petitioner contends that because the former employees of the Edgewood Arsenal were reassigned to components of two separate Commands, with separate missions, functions and policies, a community of interest no longer exists between ARRADCOM and ARRCOM employees at Aberdeen. It also asserts that more effective dealings and more efficient agency operations will result from tailoring the NFFE's unit to reflect the changes resulting from the reorganization. The NFFE agrees that its certification should be amended to reflect changes brought about by the reorganization. It contends, however, that the unit for which it was certified as the exclusive representative remains appropriate as the changes resulting from the reorganization were purely administrative in nature and there has been no substantial change in the unit employees' working conditions or their work locations. In its view, the granting of the Activity-Petitioner's request would fragment its current unit, which has a history of stable and effective labor-management relations, both prior and subsequent to the reorganization.

The record reveals that most of the employees in the NFFE's existing unit continue to perform the same type of work, under the same immediate supervision, as prior to the disestablishment of Edgewood Arsenal. Thus, only some 24 of approximately 1500 employees were required to physically relocate to either ARRADCOM Headquarters at Dover, New Jersey, or to ARRCOM Headquarters at Rock Island, Illinois. As a result of the reorganization, some employees were moved to different locations within Aberdeen and are presently housed in buildings in which employees of both Commands are located. The degree of work interaction between employees of the two Commands is approximately the same as prior to the reorganization, with some employees of one Command having daily contact with employees of the other. The record reveals that the accomplishment of the mission of the ARRCOM support group at Aberdeen is facilitated by its location near the CSL, for which it provides logistical support.

The respective Commanders in Dover, New Jersey, and Rock Island, Illinois, have the authority to develop and implement personnel policies including hiring, firing, training and recruitment and to enter into negotiations with exclusive representatives for their respective employees. However, both Commanders are subject to Department of the Army and U.S. Army Material Development and Readiness Command (DARCOM) personnel and labor relations directives. There is no evidence of any significant difference in their treatment of such matters in regard to the employees currently represented by the NFFE. Further, there is no evidence that the continuing administration of the NFFE's negotiated agreement with agency management after the reorganization of March 20, 1977, has imposed any additional burdens upon the representatives of either Command than had been experienced by Edgewood Arsenal representatives prior to the reorganization. The record reveals, moreover, that both Commands are in the process of finalizing servicing agreements with the Civilian Personnel Office, Aberdeen, which, as a result of such agreements, will retain day-to-day responsibility for personnel and labor relations matters for all of the employees involved. In addition, the Aberdeen Proving Ground currently provides comptroller, financial services and legal services, as well as public affairs assistance, to both of the Commands located there.

While the employees in the NFFE's unit were in the same area of consideration for promotional considerations, and the same competitive areas for reduction in force prior to the reorganization, the employees assigned to each Command are now in separate areas of consideration and competitive areas. However, the record shows that the areas of consideration for promotional opportunities are frequently expanded in order to attract a sufficient number of qualified applicants for any given position, which, in effect, often places employees of the two Commands in the same area of consideration.

Under all of the above circumstances, I find that the NFFE's certified unit continues to be appropriate for the purpose of exclusive recognition after the reorganization. ^{1/} In this regard, noted particularly was the fact that the reorganization did not result in significant changes in the day-to-day terms and conditions of employment of the employees involved in that, for the most part, they continue to perform the same type of work under the same immediate supervision. Further, in view of the history of collective bargaining in the unit involved, both prior and subsequent to the reorganization, and the fact that the unit has remained generally intact following the reorganization, in my opinion, to alter it in the manner sought by the Activity-Petitioner would not have the desired effect of enhancing effective dealings and efficiency of agency operations. Rather, the diminution of the scope of the existing bargaining unit and the establishment of a group of unrepresented employees, the result sought by the Activity-

^{1/} See e.g., U.S. Army Missile Material Readiness Command, Redstone Arsenal, Alabama, et al., A/SLMR No. 956 (1977), and Naval Aerospace and Regional Medical Center, Pensacola, Florida et al., 6 A/SLMR 47, A/SLMR No. 603 (1976), FLRC No. 76A-18.

April 26, 1978

Petitioner herein, would, in my judgment, tend to promote fragmentation and inhibit effective dealings and efficiency of agency operations. In this latter regard, it was noted particularly that both Commands continue to report to the same organizational command, DARCOM, and that the employees in the NFFE's unit continue to be serviced by the same Civilian Personnel Office.

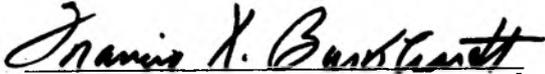
Accordingly, I shall amend the certification to reflect the new designation of the activity involved. ^{2/}

ORDER

IT IS HEREBY ORDERED that the Amended Certification of Representative issued on October 24, 1972, to the National Federation of Federal Employees, Local 178, be, and it hereby is, amended by changing the designation of the unit from "employees at Edgewood Arsenal, U.S. Army Munitions Command, Aberdeen Proving Ground, Maryland" to "employees of the U.S. Army Armament Research and Development Command (ARRADCOM) Chemical System Laboratory (CSL), the ARRADCOM support group for the CSL, and of the U.S. Army Material Readiness Command (ARRCOM) at Aberdeen Proving Ground, Maryland."

Dated, Washington, D.C.

April 26, 1978



Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
NAVY COMMISSARY STORE REGION,
NORFOLK, VIRGINIA
A/SLMR No. 1030

This case involved an unfair labor practice complaint filed by the National Association of Government Employees, Local R4-45 (Complainant) alleging the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally denying its employees their rest period provided for under the terms of the parties' negotiated agreement.

The Administrative Law Judge concluded the Respondent's memorandum, which stated its policy regarding rest periods for employees, constituted a unilateral abrogation of the parties' negotiated agreement and thereby violated Section 19(a)(1) and (6) of the Order.

Under the particular circumstances of this case, the Assistant Secretary found that the complaint in this matter was filed untimely. The Complainant herein filed two pre-complaint charges alleging, in substance, the same unfair labor practice. It failed to file its complaint within the prescribed period of 60 days subsequent to the service of the Respondent's final written decision on the Complainant's initial pre-complaint charge. In the Assistant Secretary's view, the Complainant's second pre-complaint charge could not serve to extend the prescribed period of 60 days in the Regulations for the filing of a timely complaint. Moreover, the Assistant Secretary noted that, even assuming arguendo that the complaint had been timely, a contrary result would not be required as the action of the Respondent herein reflected its good faith interpretation of the parties' negotiated agreement as distinguished from a clear, unilateral breach thereof.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

^{2/} In view of the disposition herein, further proceedings on the CU aspect of the instant petition were considered to be unwarranted.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVY COMMISSARY STORE REGION,
NORFOLK, VIRGINIA

Respondent

and

Case No. 22-07783(CA)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R4-45

Complainant

DECISION AND ORDER

On December 1, 1977, Administrative Law Judge Peter McC. Giesey issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the subject complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations, only to the extent consistent herewith.

The instant amended complaint alleges that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally denying its employees a rest period as provided for under the terms of the parties' existing negotiated agreement. 1/ In his Recommended Decision and

1/ Article IX, Section 6 of the negotiated agreement provides:

Rest periods of 15 minutes duration will be given within each 4 hours of continuous work at the discretion of the supervisor in charge. No rest period will be given until an employee has worked at least 1 hour except in case of an emergency.

Order, the Administrative Law Judge concluded that the Respondent's memorandum, dated November 12, 1976, which stated its policy regarding rest periods for employees, constituted a unilateral abrogation of the parties' negotiated agreement and thereby violated Section 19(a)(1) and (6) of the Order.

The evidence establishes that the Complainant filed an unfair labor practice charge, dated November 8, 1976, alleging that on November 6, 1976, certain employees at the Respondent's Norfolk, Virginia, store were denied their rest period provided for under the parties' negotiated agreement. The Respondent issued its final decision on the charge, dated November 30, 1976, contending that under Article IX, Section 6 of the parties' negotiated agreement rest periods are given at the discretion of management depending on workload and productivity requirements. Thereafter, on January 26, 1977, Complainant filed a second unfair labor practice charge citing, in essence, the same type of conduct by the Respondent which was asserted to be violative of the Order in its November 8, 1976, charge. In addition, the second charge alleged, as a basis for the unfair labor practice, the issuance of a memorandum by the Respondent on November 12, 1976, setting forth the latter's interpretation of Article IX, Section 6 of the parties' negotiated agreement. The Respondent replied to the second charge on February 3, 1977, referring the Complainant to the Respondent's final decision of November 30, 1976, on the original charge. Subsequently, on February 16, 1977, the instant complaint was filed alleging that the Respondent had violated the parties' negotiated agreement since November 8, 1976, by unilaterally denying employees their rest period. On March 22, 1977, the complaint was amended alleging that the Respondent had violated Article IX, Section 6 of the parties' negotiated agreement since January 26, 1977. 2/

Under the particular circumstances of this case, I find that the subject complaint was untimely filed. Thus, as noted above, the Respondent on November 30, 1976, issued its final decision on the Complainant's initial pre-complaint charge. Under the Assistant Secretary's Regulations, the Complainant then had a period of 60 days after the date of service of such final decision within which to file a complaint. 3/ However, the Complainant did not file a timely complaint based on its

2/ The record reveals that the Respondent contended at all stages of the processing of the instant complaint that it had been filed untimely. Compare Veterans Administration Hospital, Charleston, South Carolina, 1 A/SLMR 400, A/SLMR No. 87 (1971).

3/ Section 203.2(b)(2) of the Assistant Secretary's Regulations states:

If a written decision expressly designated as a final decision on the charge is served by the respondent on the charging party, that party may file a complaint immediately but in no event later than sixty (60) days from the date of such service.

initial pre-complaint charge. Rather, it filed a second charge which, in essence, reiterated the first charge. Thereafter, Complainant filed the subject complaint, timely with regard to its second pre-complaint charge, but clearly untimely with regard to its first pre-complaint charge.

In my view, a complainant may not, in effect, extend the period for the filing of a timely complaint beyond the prescribed period of 60 days by filing a second pre-complaint charge which essentially reiterates the same allegations as its first pre-complaint charge. 4/ To hold otherwise would, in my view, render the 60 days timeliness requirement of Section 203.2(b)(2) of the Assistant Secretary's Regulations a nullity. Accordingly, based on the circumstances set forth above, I find the complaint herein to be untimely filed and shall, therefore, order that it be dismissed in its entirety. 5/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-07783(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 26, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

4/ Cf. Bureau of Reclamation, Boulder Canyon Project Office, Boulder City, Nevada, 4 A/SLMR 257, A/SLMR No. 380 (1974).

5/ Even assuming arguendo that the complaint herein was timely filed, in my opinion, the Respondent's position concerning rest periods for employees reflected essentially a good faith interpretation of the parties' negotiated agreement, as distinguished from a clear, unilateral breach of such agreement. Therefore, such a matter would be a proper subject for the parties' negotiated grievance procedure rather than the unfair labor practice procedures under the Order. See Norfolk Naval Shipyard, 6 A/SLMR 486, A/SLMR No. 708 (1976), and Department of Army, Watervliet Arsenal, Watervliet, New York, 6 A/SLMR 127, A/SLMR No. 624 (1976).

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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In the Matter of

DEPARTMENT OF THE NAVY
NAVY COMMISSARY STORE REGION
NORFOLK, VIRGINIA

Respondent

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R4-45

Complainant
.....

Case No. 22-07783 (CA)

Robert M. White, Esquire
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For the Complainant

Mitchell Arkin, Esquire
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Department of the Navy
Washington, D. C. 20390
For the Respondent

Before: PETER McC. GIESEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under Executive Order 11491, as amended (hereafter, "the Order") by the labor organization representing respondent's employees in a unit appropriate for

purposes of collective bargaining. The labor organization complains that respondent violated sections 19(a)(1) and (6) of the Order */ by unilaterally denying employees a rest period which is required to be given under the terms of the collective bargaining agreement.

A hearing was held on September 1, 1977 in Norfolk, Virginia. Briefly, the record shows the following.

Statement of the Case

The facts are undisputed.

The collective bargaining agreement between the parties contains the following provision:

Rest periods of fifteen minutes duration will be given within each four hours of continuous work at the discretion of the supervisor in charge. No rest period will be given until an employee has worked at least one hour except in case of an emergency.

This provision was also contained in the collective bargaining agreement negotiated with the labor organization in 1972. In the current (1975) contract, by mutual agreement, the word "except" was substituted for "unless,".

In November, 1976, respondent disseminated the following memorandum to all supervisors and managers.

12 Nov 76

MEMORANDUM FOR ALL SUPERVISORS AND MANAGERS

Subj: Granting and denial of fifteen minute rest period; restatement of procedures for

Ref: (a) Agreement negotiated between this Command and NAGE R4-45

*/ Sec. 19. Unfair labor practices. (a) Agency management shall not-

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

1. Background. Several complaints alluding to violations of Section 6, Article IX of reference (a) have been received, primarily from the Norfolk and Oceana stores. The complaints are of the nature where a supervisor tells employees usually in an offensive manner "the break is up to me, if I don't feel like giving it, you won't get it."

2. Discussion

a. Section 6 Article IX of reference (a) provides that "Rest periods of fifteen minutes duration will be given within each four hours of continuous work at the discretion of the supervisor in charge. No rest period will be given until an employee has worked at least one hour except in case of an emergency."

b. In the past, effort was made on the part of some employees to "save the 15 minute break and move it to the lunch period." For an eight hour employee, this would mean 8 hours pay for not more than 7 1/2 hours work. Such a practice is not lawful. Just as an employer cannot require an employee to perform work or remain at the job site without his receiving pay, an employee is not entitled to draw salary or wages where the employer cannot require that employee to perform work. Such would be the case with automatic entitlement to a break.

3. Summary. The language in Section 6 of Article IX provides that a rest period will be given at the discretion of the supervisor. Thusly, under Section 6, the supervisor may grant the break or deny the break. The exercise of the supervisor's discretion must be based on work and productivity requirements. When based on these factors, the supervisor has every right and the duty to deny such a break where the denial is in the best interest of "getting the job done." However, should a supervisor deny a break spitefully, on personal whim, or as a substitute for appropriate disciplinary action, such a decision would be indefensible.

4. Action. Commissary Store Officers, and department heads will take all steps necessary to ensure that all supervisors comply with reference (a), specifically as explained in paragraph 3. For further information or discussion supervisors and managers are directed to contact the Labor/Employee Relations and Services Superintendent, Civilian Personnel Department, Building 3129, Naval Amphibious Base, Little Creek, at telephones 464-7222 and 464-7566

5. This memorandum is to receive wide dissemination. Commissary Store Officers reproduce and post immediately.

Officer in Charge

The implementation of policies set forth in the above memorandum, dated November 12, 1976, is the basis for the labor organization's complaint.

A number of supervisory employees testified that the rest period is given when the work load doesn't preclude it. Employees at one facility habitually miss their rest period on Tuesday mornings when stock is being received. On occasions when there is high absenteeism at a facility or when the pressure of a large number of shoppers precludes a rest period, according to bargaining unit members, various accommodations are made such as combining the rest period with the lunch period. These accommodations are apparently mutually satisfactory to local management and the supervised employees.

A union official who participated in negotiations which preceded the signing of the 1972 agreement in which the current article IX, section 6 appeared as article IX, section 7, testified that management had proposed that the verb "will" be modified to read "normally will". The labor organization rejected this proposal and prevailed in excluding it.

Findings of Fact and Conclusions of Law

Having considered the entire record including the testimony, exhibits and briefs of the parties and having observed the demeanor of the witnesses, I make the following

findings of fact, conclusions of law and decision and order based thereon.

The facts are as set forth above.

Respondent argues that violations of a collective bargaining agreement based upon "differing and arguable" interpretations of the agreement cannot constitute violations of the Order. I agree. Were the instant matter based upon an arguable interpretation I would recommend dismissal of the complaint. It is not.

Thus, the memorandum of November 12, 1976 signed by a staff officer, makes the point on its face. While the provision of a 15 minute "break" is labeled "not lawful" in paragraph 2.b., the denial of a 15 minute break "spitefully, on personal whim" is labeled "indefensible" in paragraph 3 of the same memorandum. I note this circumstance because I regard the entire memorandum as a testimonial to the author's ignorance of both law and logic.

Moreover, considered in light of industrial reality, with which the memorandum indicates its author is unacquainted, such an interpretation of the contract clause in question indicates that management has bargained in bad faith as far back as 1975. Thus, section 6, formerly 7, plainly states its subject matter. It is unlikely in the extreme that a representative of any collective bargaining agent would negotiate to include in an agreement a section describing a daily term and condition of employment to be afforded employees only at the absolute and unreviewable discretion of management. If the wording of this section was thought by management to contain such terms, it has failed in its effort to mislead or "sandbag" the representatives of its employees by executing an agreement containing provisions which do not mean what they plainly state. I do not believe that this sly absurdity is what management intended. Nothing on this record indicates that the management officials who negotiated and signed the collective bargaining agreement acted other than in good faith.

Similarly the testimony of employees concerning the flexibility and cooperation of supervisors and unit members in implementing the rest period contract provision evidences both good faith and good will in supervisor-employee relations. The argument that evidence of employee cooperation is evidence of a waiver of a contractual right does not lie in respondent's mouth.

The unilateral interpretation of a contract by management in such a way as to cancel or write out obligations plainly set forth therein violates section 19(a)(1) and (6) of the Order. E. g., California National Guard, A/SLMR No. 348; Norfolk Naval Shipyard, A/SLMR No. 290. The record here demonstrates that respondent has done exactly that.

Recommendation

Having found that Navy Commissary Store Region, Norfolk engaged in conduct in violation of section 19(a)(1) and (6) of the Order by unilaterally violating the terms of the collective bargaining agreement in force, I recommend that the Assistant Secretary adopt the following order:

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended and Section 203.36(b) of the Regulations, the Assistant Secretary for Labor-Management Relations hereby orders that Department of the Navy, Navy Commissary Store Region, Norfolk, Virginia, shall:

1. Cease and desist from:

(a) Unilaterally violating, whether by color or interpretation or otherwise, the collective bargaining agreement between it and National Association of Government Employees, Local R4-45.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

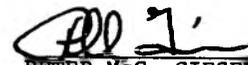
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order.

(a) Rescind the memorandum of November 12, 1976, reference N5-4:ssl 12711/4.

(b) Post at its Norfolk facilities at all places where notices to employees are usually posted, including but not limited to those places where the memorandum dated November 12, 1976, referred to supra, was posted, copies of the attached notice marked "Appendix" on forms to be furnished

by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Officer in Charge and shall be posted and maintained by him for 60 consecutive days thereafter. The Officer in Charge shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.



PETER McC. GIESEY
Administrative Law Judge

Dated: December 1, 1977
Washington, D. C.

PG/lp

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended, by unilaterally redefining the terms of the collective bargaining agreement and unilaterally instituting changes in the terms and conditions of employment based upon such redefinition.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights assured by the Executive Order.

WE WILL, upon request, meet and confer with the National Association of Government Employees, Local R4-45 as required by the Executive Order.

WE WILL and hereby do rescind the memorandum dated November 12, 1976, N5-4:ssl, 12711/4, "Granting and denial of fifteen minute rest period: restatement of procedures for."

Officer in Charge
Navy Commissary Store Region
Norfolk, Virginia

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor whose address is: Room 300 - 1371 Peachtree Street, N. E., Atlanta, Georgia 30309.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF TRANSPORTATION,
TRANSPORTATION SYSTEMS CENTER,
CAMBRIDGE, MASSACHUSETTS
A/SLMR No. 1031

This case involved an unfair labor practice complaint filed by the National Association of Government Employees, Local R1-195 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to bargain over a reduction-in-force (RIF). The Respondent contended that the Complainant was notified of the RIF action on September 3, 1976, and again on September 16, but that it made no request to bargain. It further contended that an October 6 letter to the Respondent, wherein the Complainant agreed to drop its unfair labor practice charge if the Respondent would rescind the RIF action and engage in meaningful consultation, did not constitute a request to bargain. Even assuming it did, however, the Respondent asserted that the parties met on October 13 to discuss the matter.

The Administrative Law Judge found that the Respondent timely notified the Complainant of the impending RIF action but that the Complainant made no request to negotiate on the impact or implementation of the decision. Accordingly, he recommended dismissal of the complaint.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS.

DEPARTMENT OF TRANSPORTATION,
TRANSPORTATION SYSTEMS CENTER,
CAMBRIDGE, MASSACHUSETTS

Respondent

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-195

Complainant

Case No. 31-10623(CA)

DECISION AND ORDER

On February 14, 1978, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 31-10623(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 26, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



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In the Matter of :

DEPARTMENT OF TRANSPORTATION :
TRANSPORTATION SYSTEMS CENTER :
CAMBRIDGE, MASSACHUSETTS :

Respondent :

and :

NATIONAL ASSOCIATION OF :
GOVERNMENT EMPLOYEES, LOCAL R1-195 :

Complainant :
.....

Case No. 31-10623(CA)

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For the Respondent

RICHARD G. REMMES, Esquire
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For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on November 24, 1976, under Executive Order 11491, as amended, by National Association of Government Employees Local R1-195 (hereinafter called the Union or NAGE) against the Transportation Systems Center, Cambridge, Massachusetts (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Regional Administrator for the New York Region on October 20, 1977.

The complaint alleges, in substance, that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in implementing a reduction-in-force without giving the Union timely notice and affording the Union an opportunity to request negotiations concerning the procedures to be utilized and the impact on unit personnel adversely affected.

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

Findings of Fact

On March 29, 1976, Dr. James Constantino, Director of the Transportation Systems Center in Cambridge, Massachusetts, received a memorandum from the Chief of Personnel, Department of Transportation, wherein he was informed that the authorized billets for full time employees at the Transportation Systems Center were reduced from 660 to 647. A copy of the memorandum was also sent to Mr. Vincent Early, President of National Association of Government Employees Local R1-195, the exclusive representative of the professional and non-professional employees at the Transportation Systems Center.

Thereafter, on various unspecified dates, Mr. Early held discussions with management representatives concerning the new personnel ceiling. According to Mr. Early's uncontroverted testimony, during the aforementioned discussions he was informed that Respondent was attempting to secure additional billets and that "Reduction-in-Force was a possibility, a very remote possibility."

On June 18, 1976, Dr. Constantino submitted a memorandum to the Assistant Secretary for Personnel wherein he outlined his problems both with regard to the new manpower ceiling and the "mix" of skills necessary to conduct the new programs being assigned to the Transportation Systems Center. Mr. Constantino, after discussing a hiring freeze and possible retraining efforts to acquire new skills within his existing staff, requested permission to conduct a reduction-in-force of 51 positions, and, then to increase the manpower ceiling by 31 positions. The new thirty one positions were to contain the skills necessary to conduct the new programs being assigned to the Transportation Systems Center. 1/

In response to the June 18th memorandum from Dr. Constantino, a survey team visited the Transportation Systems Center "to discuss and review TSC's project workload and related manpower requirements." On August 2, 1976, the Transportation Systems Center was briefed on the findings and conclusions of the survey team. The aforementioned findings and conclusions indicated that the Transportation Systems Center was not entitled to any additional billets and that a plan should be submitted with respect to how the Center intended to reach the new lower manpower ceiling. The new manpower ceiling was to be reached by September 30, 1976.

On September 3, 1976, Ms. Marcella Redel, the Personnel Officer at the Transportation Systems Center, met with Union President Early and informed him that a reduction-in-force was being planned and that permission for same was expected to be received shortly from Washington. Ms. Redel further informed Mr. Early that the Director would be in Washington, D.C. for discussions on September 8th and expected to have a definite answer on the reduction-in-force by then. Following his conversation with Ms. Redel, Mr. Early consulted by telephone that evening with Mr. Kenneth Lyons, National President of the National Association of Government Employees. Mr. Early and Mr. Lyons decided to take no action until they received further word from the Respondent concerning the reduction-in-force and then question why they were not consulted with respect to the decision to effect a reduction-in-force.

By memorandum dated September 10, 1976, Mr. William Heffelfinger, Assistant Secretary of Administration,

1/ A detailed 25 page analysis of Dr. Constantino's operations and proposals was attached to the June 18, 1976 memorandum.

formerly answered Director Constantino's June 18, 1976, memorandum and summarized all the intervening events and considerations concerning the impending RIF and requests for a higher manpower ceiling. The memorandum concluded with the suggestion that Director Constantino "proceed with all the preliminary planning necessary to conducting a RIF," but emphasized, however, that no actual RIF should take place prior to further consultation with, and approval from, Washington.

On September 15, 1976, at about approximately 6 p.m., one hour after the official close of Respondent's office, Assistant Secretary Heffelfinger telephoned the Director of the Transportation Systems Center and gave formal authorization for the reduction-in-force. The next morning Ms. Redel unsuccessfully attempted to contact Mr. Early by telephone. Shortly thereafter, Ms. Redel telephoned Mr. Samuel Polcari, Vice-President of Local R1-195, and informed him that the decision to conduct the reduction-in-force had been received from Washington. Ms. Redel gave Mr. Polcari a list of the positions to be abolished and informed him that letters to the affected employees would be delivered to supervisors for personal distribution to the employees at nine o'clock the next morning, September 17, 1976.

On September 17, 1976, Mr. Early, pursuant to his request, was furnished a copy of the newly completed retention register. Further, according to the record testimony of Mr. Early, Respondent supplied all data relating to the reduction-in-force which was requested by Mr. Early.

Mr. Early made no request to meet and confer with the Respondent prior to the issuance of the reduction-in-force notices to the affected employees. In fact the only request concerning bargaining made by Mr. Early or the Union occurred on October 6, 1976, when Mr. Early delivered a letter to the Director of the Transportation Systems Center and offered to "withdraw the unfair labor charge" if the Director would "agree to rescind the reduction-in-force action and engage in meaningful consultation with the Union."

According to the record, the reduction-in-force was effective on October 22, 1976.

Discussion and Conclusions

The parties are in agreement that the Respondent was not obligated to consult and confer with the Union concerning its unilateral decision to effect a reduction-in-force. The parties are in further agreement that irrespective of the rights conferred upon management by Section 11(b) of the Order to unilaterally effect a reduction-in-force, Respondent is, however, required to give the Union timely notice of its decision in this regard so that the Union may request consultation and/or bargaining with respect to the procedures management intends to observe in choosing which employees were to be subject to the reduction-in-force. The Union contends that the Respondent failed to fulfill its obligations in this latter respect and thus violated Sections 19(a)(1) and (6) of the Executive Order.

The record reveals that the Union was first made aware on March 29, 1976, of the fact that the manpower ceiling was being reduced and that various alternative plans for reaching the new lower ceiling were to be considered. A reduction-in-force was one of the plans suggested as a possible alternative, albeit a remote one. Thereafter, the Respondent began working on different plans to change the manpower ceiling and to also obtain the production skills among its staff which it believed necessary to conduct the new programs being assigned to the Transportation Systems Center. When it appeared that a hiring freeze and a retraining program among the existing staff would not solve the problems at the Transportation Systems Center, the Director, on June 18, 1976, sought permission from the Department of Transportation in Washington to effect, among other things, a reduction-in-force. ^{2/} In response to Director Constantino's June 18th memorandum a survey team visited the Transportation Systems Center for purposes of discussing and reviewing the Transportation Systems Center's projected workload and related manpower requirements. On August 2, 1976, the survey team made it clear that the Transportation Systems Center was not entitled to any additional billets and that a plan should be submitted showing how the Transportation Systems Center intended to reach the new lower manpower ceiling.

^{2/} I find it to be clear from the record that while the Director was free to recommend various alternatives, including a reduction-in-force, a reduction-in-force could not be effected by the Director of the Transportation Systems Center without prior permission from the Department of Transportation in Washington.

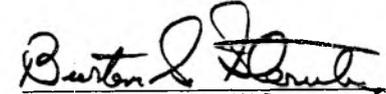
The record is silent with respect to what particular actions the Transportation Systems Center took between August 2 and September 3, 1976. However, and in any event, on September 3, 1976, Union President Early was informed by the Respondent that a reduction-in-force was being planned and that permission for same was expected to be received shortly from Washington, D.C. Mr. Early was further informed that the Director was to be in Washington, D.C. for discussions on September 8th and expected to have a definite answer on the reduction-in-force by then. Thereafter, following the exchange of various memoranda and telephone conversations between the Transportation Systems Center and Washington, formal authorization for the reduction-in-force was finally given to the Director of the Transportation Systems Center at about 6 p.m. on September 15, 1976. The next morning, September 16th, the Union was given notice that the reduction-in-force was in fact a reality. Also, on September 16th, the Union was given a list of the positions to be abolished and informed that letters to the affected employees would be delivered to supervisors for personal distribution to the employees at nine o'clock the following morning. The Union at no time requested a meeting for purposes of discussing the manner in which Respondent intended to implement its decision to effect a reduction-in-force.

Based upon the foregoing analysis and the record as a whole, I find that the Respondent did give the Union timely notice of the impending reduction-in-force. In reaching this conclusion I note, among other things, that while Respondent may have been working during the period March 29 - September 3, 1976, on a reduction-in-force as one of the alternatives to reaching the new lower manpower ceiling, any decision thereon could not be final since prior approval from Washington was always necessary. When final approval appeared to be imminent, Respondent immediately informed the Union. The Union, however, failed to take any action with respect to requesting consultation or negotiations as to the manner in which Respondent intended to implement its decision, but, opted instead, to await final decision on the matter and then inquire as to why the Union was not consulted on the decision to effect the reduction-in-force. When a final decision on the matter was announced on September 16, some fourteen days later, the Union, other than asking for certain information, again made no attempt to seek further negotiations either with respect to impact or implementation. Accordingly, I find insufficient

basis for a 19(a)(1) and (6) finding and shall recommend that the complaint be dismissed in its entirety. 3/

Recommendation

It is hereby recommended that the complaint be dismissed in its entirety.


 BURTON S. STERNBURG
 Administrative Law Judge

Dated: February 14, 1978
 Washington, D.C.

3/ See Norton Air Force Base, A/SLMR No. 261 wherein the Assistant Secretary reached an identical conclusion based upon similar facts and circumstances.

BSS:yw

April 27, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY OF LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

LAKE CENTRAL REGION,
BUREAU OF OUTDOOR RECREATION,
DEPARTMENT OF THE INTERIOR,
FEDERAL BUILDING, ANN ARBOR, MICHIGAN
A/SLMR No. 1032

This case involved a representation petition filed by the American Federation of Government Employees, AFL-CIO (AFGE) seeking an election in a unit of all employees of the Activity. The parties stipulated that the claimed unit was appropriate for the purpose of exclusive recognition. However, the Activity sought to exclude from the unit the secretaries to the two Assistant Regional Directors, the Administrative Technician, and an employee alleged to be serving as a temporary supervisor.

Noting particularly the parties' agreement with respect to the appropriate unit, the Assistant Secretary concluded that the claimed unit was appropriate for the purpose of exclusive recognition as the employees involved had a clear and identifiable community of interest and such unit will promote effective dealings and efficiency of agency operations. With respect to the eligibility questions, the Assistant Secretary found that the secretaries to the Assistant Regional Director should be included in the unit as the evidence regarding their current duties was insufficient to establish that they act in a confidential capacity to persons who formulate and effectuate management policies for the Activity in the field of labor relations. In this connection, he rejected as speculative an amendment to their position description made on the day of the hearing in this case and their designation as part of the management team made on the day preceding the hearing.

He also found that the Administrative Technician should not be excluded from the unit either as a confidential employee or as an employee engaged in Federal personnel work in other than a purely clerical capacity. In this regard, he found, with respect to the former, that the evidence concerning her current duties was insufficient to establish that she acted in a confidential capacity to a person who formulates and effectuates management policies in the field of labor relations. He rejected as speculative the same amendment to her position description and the same management team designation, as noted above with respect to the secretaries. The Assistant Secretary also found that the personnel-related activities engaged in by the employee in question were performed in a routine manner requiring little independent judgment on her part, and, therefore, were performed in a purely clerical capacity.

With respect to the final position in dispute, the Assistant Secretary concluded that the employee occupying the position of temporary task force leader was a supervisor within the meaning of Section 2(c) of the Order with respect to two part-time clerical employees who assist in the project. However, as the employee in question will return to his rank and file duties upon the completion of the project, the Assistant Secretary indicated that his eligibility should be determined by his status; i.e., he should be excluded from the unit while serving as a temporary supervisor and included in the unit when he returns to his rank and file status.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

LAKE CENTRAL REGION,
BUREAU OF OUTDOOR RECREATION,
DEPARTMENT OF THE INTERIOR,
FEDERAL BUILDING, ANN ARBOR, MICHIGAN 1/

Activity

and

Case No. 52-07336(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Gregory A. Miksa. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs submitted by the parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, AFL-CIO, herein called AFGE, seeks an election in a unit consisting of all professional and nonprofessional employees of the Activity, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees and supervisors as defined in the Order. 2/ The parties stipulated that the unit sought is

1/ The Activity's name appears as amended at the hearing.

2/ The unit appears essentially as amended at the hearing.

appropriate. However, the Activity takes the position, which the AFGE disputes, that the secretaries to the two Assistant Regional Directors, the Administrative Technician, and an employee who is alleged to be serving as a temporary supervisor, should be excluded from such unit.

The Activity is one of seven regions of the Bureau of Outdoor Recreation, Department of Interior, which is responsible for planning, technical assistance, and administration of grants-in-aid performed through the States for the protection of natural resources for public use. The Activity is under the direction of a Regional Director who has full responsibility for carrying out its mission in his Region and who has authority for most personnel actions involving positions up to and including GS-11.

At the time of the hearing in this case, the Activity employed 41 permanent full-time employees out of an authorized 47 positions. Most of these employees are classified as Outdoor Recreation Planners, with the remainder being classified as administrative and support employees. All of the Activity's employees work in the same location and are subject to the same working conditions. In addition, they are subject to the same bureau-wide and department-wide personnel policies and practices administered by the Bureau of Outdoor Recreation's Personnel Office located in Washington, D. C. In this regard, the Regional Director is assisted by an Administrative Officer who acts as his liaison with the Washington, D. C. Personnel Office.

Under the foregoing circumstances, and noting particularly the agreement of the parties as to the appropriateness of the claimed unit, I find that the unit sought is appropriate for the purpose of exclusive recognition as the employees involved share a clear and identifiable community of interest and as such unit will promote effective dealings and efficiency of agency operations.

Eligibility Issues

Secretaries to the Assistant Regional Directors

As noted above, the Activity takes the position, contrary to the AFGE, that the secretaries to the two Assistant Regional Directors should be excluded from the unit as confidential employees. 3/ In this regard, the record reveals that prior to the filing of the subject petition neither of the secretaries in question had acted in a confidential capacity with respect to persons engaged in the formulation and effectuation of management policies in the field of labor relations. 4/ Thus, neither of the Assistant Regional Directors had been involved in the processing of grievances or in

3/ The parties agreed that the secretary to the Regional Director should be excluded from the unit as a confidential employee.

4/ Cf. Virginia National Guard, Headquarters, 4th Battalion, 111th Artillery, 1 A/SLMR 332, A/SLMR No. 69 (1971).

significant personnel actions in which their secretaries were utilized in a confidential capacity. The record reflects, however, that on the day before the hearing in this matter, the secretaries in question were informed that the Assistant Regional Directors and the Administrative Officer were designated by the Regional Director as the management negotiating team and that the secretaries would be part of the "management team." In addition, on the day prior to the hearing, the secretaries were required to attend a training session regarding their designation as part of the management team, and on the day of the hearing their position descriptions were amended as follows:

Incumbent is responsible for typing/coordinating material such as grievances, evaluations, disciplinary actions including reprimands, admonishments, adverse actions, and incentive awards in order to assist the supervisor in performing his/her Employee Relations/Labor Relations responsibilities.

Under the particular circumstances of this case, I find that the evidence regarding the current duties of the secretaries in question is insufficient to establish that they presently act in a confidential capacity to persons who formulate and effectuate management policies for the Activity in the field of labor relations. In my view, their designation as part of the management team on the day before the hearing and the amendment of their position description by the Activity amounts only to speculation as to the scope of their future duties. Moreover, the evidence is insufficient to establish that their inclusion in the unit would work a hardship on the Activity with respect to the typing and coordination of labor relations matters, given the parties' agreement as to the exclusion of the Regional Director's secretary from the unit as a confidential employee.

Administrative Technician, GS-7

The Activity also took the position that the employee occupying the position of Administrative Technician, GS-7, in the Activity's Administrative Office should be excluded from the unit as a confidential employee and/or an employee engaged in Federal personnel work in other than a purely clerical capacity. In this connection, the Activity acted just prior to the hearing in this matter as in the case of the above-noted secretaries. Thus, it designated the Administrative Officer, the supervisor of the employee in question, as part of the management negotiating team on the day before the instant hearing, and on that same day requested the Administrative Technician's presence at a training session for the management team. The Activity also amended the Administrative Technician's position description on the day of the hearing, using the same language set forth above with respect to the two secretaries.

With respect to the current duties of the Administrative Technician, the record discloses that she is primarily engaged in maintaining the in-house personnel and other administrative files of the Activity and in

performing the related duties of typing administrative memoranda and personnel actions that pass through the office. In this connection, the employee in question testified that the Administrative Officer did not always use her services for sensitive personnel matters. The record reflects that in performing her duties, the incumbent essentially follows the policies set by the Administrative Officer, who would be responsible for the initiation of any personnel actions not covered by set procedures.

Based on the foregoing, I find that the evidence regarding the current duties of the employee in question is insufficient to establish that she serves in a confidential capacity to a person engaged in the formulation and effectuation of management policies in the field of labor relations. In this regard, as indicated above, I view her recent designation as part of the "management team" and the amendment to her position description to be speculative rather than probative with respect to an appraisal of her current duties. Also, the record does not establish that the employee in question is engaged in Federal personnel work in other than a purely clerical capacity. Thus, the record reveals that in maintaining the local personnel and administrative files and in typing personnel actions, the performance of her duties is clerical in nature and requires little independent judgment on her part. 5/

Temporary Task Force Leader

With respect to the final disputed employee, the Activity takes the position that John Peine, who is classified as an Outdoor Recreation Planner, GS-12, is a temporary supervisor based on his current service as a temporary task force leader. In this connection, the Activity contends that Peine should be excluded from the unit only during the period in which he serves as temporary task force leader. The record reveals that Peine has been serving as a temporary task force leader under the supervision of the Deputy Director of the Bureau of Outdoor Recreation, and will continue to do so until the completion of a nation-wide survey of the Bureau's operation. In this regard, he coordinates the activities of one employee in each region of the Bureau. The evidence establishes that in the performance of his duties as a temporary task force leader he is assisted by two part-time employees located in Ann Arbor. 6/ Peine interviewed these two employees, hired them, assigns their work, and is the person responsible for handling their grievances and evaluating their performance. The Activity indicated that Peine

5/ Cf. Overseas Private Investment Corporation, A/SLMR No. 917 (1977), U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, 4 A/SLMR 567, A/SLMR No. 428 (1974), Pennsylvania National Guard, Department of Military Affairs, 4 A/SLMR 240, 241, A/SLMR No. 376 (1974), and Department of the Navy, United States Naval Station, Adak, Alaska, 3 A/SLMR 578, 579, A/SLMR No. 321 (1973).

6/ The record reflects that these employees have no reasonable expectancy of future employment after the completion of the project involved.

is expected to complete his project by the beginning of April 1978. However, the Activity noted further that Peine's service as a temporary task force leader would not be completed until the Deputy Director of the Bureau was satisfied with the outcome of the project.

May 1, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Under these circumstances, I find that Peine is a supervisor within the meaning of Section 2(c) of the Order while serving in his present capacity, as he performs supervisory functions with respect to the part-time employees under his direction. Accordingly, he should be excluded from the unit while serving in his temporary supervisory capacity. However, when he completes the project and returns to his rank and file duties, he should be included in the unit found appropriate. ^{7/}

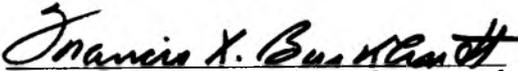
Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended:

All employees of the Lake Central Region, Bureau of Outdoor Recreation, Department of Interior, Ann Arbor, Michigan, excluding professional employees, management officials, employees engaged in Federal Personnel work in other than a purely clerical capacity, confidential employees and supervisors as defined in the Order. ^{8/}

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO.

Dated, Washington, D. C.
April 27, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

^{7/} See Department of the Interior, U.S. Government Comptroller for Guam, Trust Territory of the Pacific Islands, A/SLMR No. 1002 (1978), U.S. Department of Transportation, St. Lawrence Seaway Development Corporation, A/SLMR No. 839 (1977), and Department of Transportation, United States Coast Guard Support Center, Third District, Governors Island, New York, A/SLMR No. 785 (1977).

^{8/} While, as indicated above, the petitioned for unit included professional employees, the evidence establishes, and the parties do not dispute, that there are no professional employees within the meaning of the Order employed by the Activity. Therefore, I have excluded professional employees from the unit found appropriate.

DEPARTMENT OF THE NAVY,
PORTSMOUTH NAVAL SHIPYARD
A/SLMR No. 1033

This case involves a representation petition filed by the National Association of Government Employees, and its affiliated union the International Union of Government Employees (NAGE). The Activity and the Intervenor, the incumbent exclusive representative, the Federal Employees Metal Trades Council, AFL-CIO, asserted that the petition was filed untimely because it was filed after the Activity and the Intervenor had entered into a negotiated agreement. The NAGE contended, in this regard, that no agreement was in effect at the time its petition was filed on April 15, 1977, since the parties had agreed in their ground rules for negotiation that ratification by the Intervenor's membership was a condition precedent to any binding agreement and such ratification did not occur until May 25, 1977, after the filing date of the petition.

The Assistant Secretary found that the NAGE's petition was timely filed. In this connection, he noted that the ground rules agreed to by the Intervenor and Activity expressly provided that the Intervenor would not be bound by the provisions of the agreement until its membership had ratified the agreement. Under these circumstances, in the Assistant Secretary's view, the agreement, as initialed by the parties on April 7, 1977, did not constitute a bar as of the date of the NAGE's petition. Rather, consistent with the parties' express understanding, any agreement was not effective until membership ratification which did not occur until May 25, 1977. Accordingly, and noting the parties' agreement that there was no issue as to the appropriateness of the petitioned for unit, the Assistant Secretary directed that an election be conducted in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
PORTSMOUTH NAVAL SHIPYARD

Activity

and

Case No. 31-10903(RO)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES AND ITS AFFILIATED UNION,
THE INTERNATIONAL UNION OF GOVERNMENT
EMPLOYEES

Petitioner

and

FEDERAL EMPLOYEES METAL TRADES
COUNCIL, AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer William Koffel. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon consideration of the entire record in the subject case, including briefs filed by the Petitioner and Intervenor, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The Petitioner, the National Association of Government Employees and its affiliated Union, the International Union of Government Employees, hereinafter called NAGE, seeks an election in a unit of:

All ungraded employees including apprentices and trainees, planners and estimators, progressmen, ship schedulers, shop planners and inspectors employed at the Portsmouth Naval Shipyard, and GS /General Schedule/ Physical Science Technicians in the Radiological Monitoring Division

of the Radiological Control Office, Portsmouth Naval Shipyard, but excluding patternmakers, apprentice patternmakers and shop planner patternmakers, all other graded employees, managerial officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, professional employees, and supervisors as defined in the Order.

The Intervenor, the Federal Employees Metal Trades Council, AFL-CIO, hereinafter called MTC, currently is the exclusive representative of the employees in the petitioned for unit. The parties agreed that the appropriateness of the unit is not at issue herein.

The Activity and the MTC assert that the provisions of a negotiated agreement, which had been initialed by representatives of the MTC and the Activity, constituted, in effect, a valid negotiated agreement which serves as a bar to the instant petition. On the other hand, the NAGE contends that its petition, filed on April 15, 1977, was timely because at the time it was filed the negotiated agreement between the MTC and the Activity was not a complete agreement binding on the parties as it had not been ratified by the membership of the MTC. Therefore, it did not constitute a bar to an election.

The record reveals that on November 5, 1976, the International Union of Government Employees filed a representation petition in Case No. 31-10581(RO) seeking an election in the same unit as is sought herein. Subsequently, the withdrawal of this petition was approved by the Regional Administrator on January 11, 1977. 1/ On January 24, 1977, the then existing agreement between the Activity and the MTC expired, and thereafter the parties commenced negotiations for a new agreement. The parties executed a written agreement concerning ground rules for negotiations on January 31, 1977. Among other things, this agreement provided that the parties would not be bound by a new negotiated agreement, or any part thereof, until it had been ratified by the membership of the MTC and approved by the Activity's Office of Civilian Personnel.

Negotiations commenced on February 4, 1977, and on April 7 the parties concluded negotiations by initialing all of the articles of a complete draft of an agreement. On May 25, 1977, the agreement was ratified by the membership and, subsequently, on June 8, the Shipyard Commander and the MTC signed the formal agreement.

Under the foregoing circumstances, I find that the subject petition was filed timely. Thus, the petition was filed on April 15, 1977, subsequent to the initialing of the agreement by representatives of the Activity

1/ Pursuant to Section 202.3(d) of the Assistant Secretary's Regulations, the MTC and the Activity had a period of 90 days from the date of the Regional Administrator's approval of the withdrawal of the petition in Case No. 31-10581(RO) free from rival claim within which to consummate a new agreement.

and the MTC on April 7, but prior to the MTC membership ratification vote on May 25. As it is clear from the provisions of the negotiated ground rules executed by the parties on January 31 that the MTC would not be bound by the agreement until such agreement was ratified by its membership, I do not view the agreement, as initialed by the parties on April 7, to constitute a bar as of that date. ^{2/} Rather, consistent with the parties' express understanding, any agreement was not effective until membership ratification.

Accordingly, and noting the position of the parties herein that no issue exists as to the appropriateness of the petitioned for unit, I shall direct an election in the following unit, which I find to be appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All General Schedule Physical Science Technicians assigned to the Radiological Monitoring Division of the Radiological Control Office, and all Wage Grade employees, including apprentices and trainees, planners and estimators, progressmen, ship schedulers, shop planners and inspectors of the Portsmouth Naval Shipyard, Portsmouth, Virginia, excluding all professional employees, all other General Schedule employees, all patternmakers, apprentice patternmakers and shop planner patternmakers, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in Executive Order 11491, as amended.

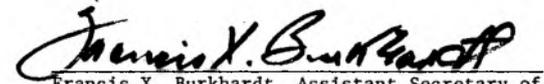
DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees of the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are all those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on furlough, including those in military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall

^{2/} The Assistant Secretary's decision in Department of the Navy, Navy Exchange, Miramar, California, 6 A/SLMR 44, A/SLMR No. 602 (1976), was considered to be factually distinguishable. In that case, it was found that an agreement initialed prior to the filing of a petition constituted a bar to the processing of such petition. However, as distinguished from the instant case, in A/SLMR No. 602 there was no membership ratification requirement as a pre-condition to a binding agreement.

vote whether they desire to be represented for the purpose of exclusive recognition by the National Association of Government Employees and its affiliated Union, the International Union of Government Employees; by the Federal Employees Metal Trades Council, AFL-CIO; or by neither.

Dated, Washington, D.C.
May 1, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

May 5, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
NEW ORLEANS DISTRICT,
NEW ORLEANS, LOUISIANA
A/SLMR No. 1034

This case arose as a result of a complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 6 alleging that the New Orleans District of the Internal Revenue Service violated Section 19(a)(1) and (6) of the Order by unilaterally denying the NTEU, contrary to past practice, the use of Activity typewriters and secretaries for the preparation of grievances and other union business "regardless of whether or not the employee utilized the facilities while on annual leave or leave without pay or before or after the normal workday or while on meal or free time."

The Administrative Law Judge found that the Respondent had violated Section 19(a)(1) and (6) by unilaterally terminating the past practice of allowing the NTEU to use Activity typewriters and the services of secretaries on a nonduty time to prepare grievances and union communications. In this regard, he noted that by allowing the use of typewriters and secretaries on nonduty time, the Activity had established a term and condition of employment which could not be unilaterally modified.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations noting the requirements set forth in Section 20 of the Order.

A/SLMR No. 1034

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
NEW ORLEANS DISTRICT,
NEW ORLEANS, LOUISIANA

Respondent

and

Case No. 64-3612(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 6

Complainant

DECISION AND ORDER

On November 14, 1977, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in this case, including the Respondent's exceptions and supporting brief, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge as modified herein.

ORDER 1/

Pursuant to Section 6 (b) of Executive Order 11491, as amended, and Section 203.26 of the Regulations, the Assistant Secretary of Labor for

1/ Section 20 of Executive Order 11491, as amended, states that the solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the nonduty hours of the employees concerned. The remedial order issued herein, therefore, is limited to only those past practices which would not
(Continued)

Labor-Management Relations hereby orders that the U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, New Orleans, Louisiana shall:

1. Cease and desist from:

(a) Unilaterally altering or changing the established past practice of allowing officers and stewards of the National Treasury Employees Union, Chapter 6, the exclusive representative of its employees, or any other exclusive representative, the use of Activity typewriters, and the nonduty-time assistance of certain Activity personnel, for the purposes of typing grievances or other union communications incident to its representational obligations, and consonant with the provisions of Section 20 of Executive Order 11491, as amended, and the regulations of appropriate authorities, without first bargaining in good faith with the National Treasury Employees Union, NTEU Chapter 6, or any other exclusive representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

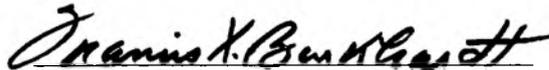
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Post at all its facilities copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Director of the New Orleans, Louisiana, District and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to all employees are customarily posted. The Director of the New Orleans District shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.

May 5, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1/ be inconsistent with Section 20. Clarification of what is permitted and prohibited by Section 20 is contained in FPM Letter 711-120 (October 14, 1976), and the policy of the Federal Labor Relations Council set forth in Matter of GAO No. B-156287, FLRC No. 75P-1, 3 FLRC 875 (1976).

- 2 -

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally alter or change the established past practice of allowing officers and stewards of the National Treasury Employees Union, Chapter 6, the exclusive representative of our employees, or any other exclusive representative, the use of Activity typewriters and the nonduty-time assistance of certain Activity personnel, for purposes of typing grievances or other union communications incident to its representational obligations, and consonant with the provisions of Section 20 of Executive Order 11491, as amended, and the regulations of appropriate authorities, without first bargaining in good faith with the National Treasury Employees Union, Chapter 6, or any other exclusive representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Activity or Agency)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
 U.S. DEPARTMENT OF THE TREASURY :
 INTERNAL REVENUE SERVICE, NEW :
 ORLEANS DISTRICT, NEW ORLEANS, :
 LOUISIANA :
 Respondent :
 and :
 NATIONAL TREASURY EMPLOYEES :
 UNION AND NTEU CHAPTER 6 :
 Complainant :

Case No. 64-3612(CA)

DAVID N. REDA, Esquire
 THOMAS L. SELF, Esquire
 Office of the Regional Counsel
 Internal Revenue Service
 Room 12D27
 1100 Commerce Street
 Dallas, Texas

For the Respondent

ROB V. ROBERTSON, Esquire
 Assistant Counsel
 National Treasury Employees Union
 300 E. Huntland Drive
 Suite 104
 Austin, Texas 78752

For the Complainant

Before: BURTON S. STERNBURG
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on March 18, 1977, under Executive Order 11491, as amended, by the National Treasury Employees Union and NTEU Chapter 6 (hereinafter called the Union or NTEU) against the Department of the Treasury, Internal Revenue Service, New Orleans District (hereinafter

called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Acting Regional Administrator for the Kansas City, Missouri, Region on June 13, 1977.

The complaint alleged, in substance, that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by unilaterally denying the Union, contrary to past practice, the use of government owned typewriters and secretaries for the preparation of grievances and other union business "regardless of whether or not the employee utilizes the facilities while on annual leave or leave without pay or before the start of the workday or after the end of the workday or while on meal break or free time".

A hearing was held in the captioned matter on July 19 and 20, 1977, in New Orleans, Louisiana. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved herein.

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

The Union is the exclusive representative of the professional and non-professional employees in Respondent's New Orleans District. At the time of the events underlying the instant complaint the parties were subject to Multi-District Agreement Number II between the NTEU and the Internal Revenue Service. Section 3 of the Multi-District Agreement sets forth the amount of "administrative time" stewards may spend on "union-employer business", i.e. grievances and other matters set forth in, and/or arising under, the Agreement.

On September 3, 1976, Mr. James Gegenheimer, Union President, met with Mr. Robert Cutts, Director of Respondent's New Orleans District to discuss some problems concerning the use of the "administrative time" provided for in Multi-District Agreement Number II. The meeting adjourned with the understanding that Mr. Gegenheimer would have a meeting with his union officers and stewards to determine exactly what type of problems the union officials and stewards were having with the managers in the New Orleans District with respect to the use of "administrative time". Several days thereafter Mr. Gegenheimer met with the various union officials and

discussed their respective problems. During the course of the meeting, union steward Vernon Vanderavoort informed Mr. Gegenheimer that around July 23, 1976, a manager had stopped a secretary from typing a grievance for him.

Following the meeting with the union officials, Mr. Gegenheimer met with Mr. William Works from Respondent's labor relations office on October 11, 1976, and presented several questions concerning the rights of the stewards and other union officials. Specifically, Mr. Gegenheimer wanted to know (1) whether the stewards could request secretaries to type grievances and other related union documents, (2) whether the union officials themselves could type the aforementioned documents and (3) whether secretaries could type the union newsletter on their free time. At the conclusion of the meeting, Mr. Works presented the Union's questions to Mr. Cutts, the Director of the New Orleans Region.

On October 19, 1976, Mr. Gegenheimer met Mr. Cutts. During the course of the meeting, which was also attended by various other union and management officials, Mr. Cutts gave his answer to the three questions propounded by Mr. Gegenheimer at the October 14, 1976 meeting. Mr. Cutts stated that union officers and stewards could not utilize Respondent's typewriters or secretaries or clerks for the purpose of typing any matter at anytime.

With respect to the practice prior to October 19, 1976, the uncontroverted testimony of various union officers and secretaries establishes that the Union had for many years utilized Respondent's typewriters and secretaries for typing grievances, union newsletters and other correspondence directed to management. These same witness further testified that secretaries on occasion had typed such union materials during their official duty hours when they had no official business to do. The aforementioned typing activities were conducted by the employees involved openly and without any attempt to conceal same from their fellow employees and the various management representatives or officials located in their respective work areas.

As to Respondent's knowledge of the typing activities of both the union officers and secretaries, Mr. Floyd Buras and Mr. Louis Koster, Group Managers and part of Respondent's supervisory team, acknowledged that they were and had been aware of the typing activities of the union representatives. Further according to Mr. Koster, it had always been IRS policy to allow the Union to use typewriters and secretaries to type grievances, etc., so long as the practice was not abused. The practice had been established years ago by Mr. Shockcor and

Mr. Usry, the two individuals who had preceded Mr. Cutts as District Directors. Lastly, according to the credited testimony of Mr. Koster, at a meeting of the management team in or around October 1976, a number of Respondent's managers or other supervisory personnel acknowledged that they had been aware of the fact that the Union had been utilizing both typewriters and secretaries to type grievances. Mr. Cutts, who had been a District Director for approximately one year, had no prior knowledge that the Union was utilizing Respondent's typewriters and secretaries for processing of grievances and other related union activities. However, upon discovering the practice, he immediately cancelled same since he was of the opinion that the use of such facilities was unrelated to working conditions or terms or conditions of employment.

In defense of its actions, Respondent submitted into evidence copies of Executive Order 11222 (Prescribing Standards of Ethical Conduct For Government Officers and Employees) and the Department of the Treasury's Minimum Standards of Conduct, 31 CFR Sec. 0.735-50.

31 CFR Sec. 0.735-50 provides:

Employees may not directly or indirectly use or allow the use of federal property of any kind for other than officially approved activities. They also have a positive responsibility to protect and conserve all Federal property including equipment and supplies, which is entrusted or issued to them.

Executive Order 11222 provies in pertinent part as follows:

Sec. 204. An employee shall not use Federal property of any kind for other than officially approved activities. He must protect and conserve all Federal property, including equipment and supplies, entrusted or issued to him.

The record establishes that the respective union representatives who engaged in the practice of using the Respondent's typewriters and/or secretaries to type union grievances etc., never formally requested permission to use same. However, on occasion the employees involved did inform their respective supervisors that they were going to do union or other unofficial typing.

DISCUSSION AND CONCLUSIONS

It is well established that Section 11(a) of the Executive Order imposes upon an agency the obligation to bargain with respect to any contemplated changes in terms and conditions of employment. It is further well established that the use of agency facilities and equipment by a union is a privilege and not a right; once granted however, such a privilege becomes, in effect, an established term and condition of employment which may not thereafter be unilaterally changed. Veterans Administration, Veterans Administration Regional Office, New York Region, A/SLMR No. 694; Internal Revenue Service, Office of the Regional Commissioner, Western Region, A/SLMR No. 473; Los Angeles Air Route Traffic Control Center, Federal Aviation Administration, A/SLMR No. 283.

In the instant case, admittedly, there was never any formal request by the Union to use the Agency's typewriters and/or secretaries to type union grievances or other communications between the Union and the Agency. Similarly, there was no formal permission given by the Agency for such activities. Notwithstanding the foregoing, I find that the record establishes that the utilization by the Union of typewriters and/or secretaries to type grievances and other union communications was permitted and in fact sanctioned by agency managers. Thus, I note the testimony of Group Managers Koster and Buras to the effect that they had been aware of the Union practice of utilizing both Agency typewriters and/or secretaries to type grievances and other union communications and that past Directors of the New Orleans District had made it clear that the Union was to be allowed such privileges.

Accordingly, having granted the Union the privilege of utilizing Agency typewriters and/or secretaries for the preparation of various union communications, grievances, etc., Respondent, in effect, established a term and condition of employment which it was not at liberty to thereafter unilaterally change.

Consistent with the foregoing, I find that when District Director Cutts announced on October 19, 1976, without any prior negotiations or consultation with the Union, that Union officers and stewards could not utilize Respondent's secretaries or typewriters for the purpose of typing any matter at anytime, Respondent engaged in conduct violative

of Section 19(a)(6) of the Executive Order. Veterans Administration, Veterans Administration Regional Office, New York Region; Internal Revenue Service, Office of the Regional Commissioner, Western Region; Los Angeles Air Route Traffic Control Center, FAA, supra.

I further find that the aforementioned unilateral conduct necessarily had a restraining influence upon unit employees and a concomitant coercive effect upon their rights assured by the Executive Order in violation Section 19(a)(1).

Contrary to the contention of the Respondent, I do not find that Section 204 of Executive Order 11222 and Section 735-50 of the Department of Treasury's Minimum Standard of Conduct make the use by the union of typewriters and/or secretaries for the preparation of grievances and other communications to management illegal. While it is true that both sections, which are cited supra in the factual portion of the instant decision, bar the use of "Federal property of any kind for other than officially approved activities," the record, however, establishes that responsible officials of the Respondent did in fact implicitly approve of the Union's activities with respect to the utilization of the typewriters and secretaries.

As to Respondent's defenses based on waiver and Section 12(b) of the Executive Order, I find both to be without merit. The mere fact that Multi-District Agreement Number II contains no provision relative to the practice does not, standing alone, support a waiver. In order to support a waiver, there must have been at least some discussion of the subject involved prior to the execution of the contract. In the instant case the record is barren of any evidence indicating any discussion prior to the execution of Multi-District Agreement Number II of the Union's practice of utilizing the Respondent's typewriters and/or secretaries for the purpose of typing grievances and other union communications. In these circumstances it cannot be said that the Union waived its rights to continue its past practice of utilizing the Respondent's typewriters and/or secretaries. cf. NASA, Kennedy Space Center, Florida, A/SLMR No. 223. The provision in the Multi-District Agreement concerning "administrative time" is unrelated to the past practice involved herein.

Lastly, Respondent takes the position that inasmuch as Section 12(b) of the Executive Order vests in Respondent the

exclusive right to direct both its employees and the use of its equipment, it was free to curtail the use of both the equipment and the secretaries by the Union without any prior consultation or negotiations. Again, had not the Respondent by its actions previously approved the Union's practice of utilizing the typewriters and secretaries as described herein, I would agree with Respondent's position. However, such is not the case. As noted above, once the privilege has been granted, it becomes a right, and as here a condition of employment, which cannot be unilaterally altered.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive 11491, as amended, and Section 203.26 of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, New Orleans, Louisiana shall:

1. Cease and desist from:

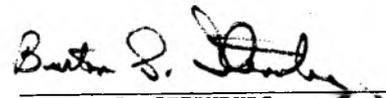
(a) Prohibiting the officers and stewards of the National Treasury Employees Union from using Agency typewriters and/or secretaries for purposes of typing grievances or other union communications as per past practice, or changing other like matters affecting the working conditions of unit employees, without first meeting and conferring with the National Treasury Employees Union, NTEU Chapter 6.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order.

(a) Post at all its facilities copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Director of the New Orleans, Louisiana, District and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to all employees are customarily posted. The Director of the New Orleans District shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.


 BURTON S. STERNBURG
 Administrative Law Judge

Dated: 14 NOV 1977
 Washington, D.C.

BSS:yw

NOTICE TO ALL EMPLOYEES

May 9, 1978

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT prohibit officers and stewards of the National Treasury Employees Union from utilizing Agency typewriters and/or secretaries for purposes of typing grievances or other union-management communications as per past practice, or change other like matters affecting working conditions of unit employees, without first meeting and conferring with the National Treasury Employees Union, NTEU Chapter No. 6.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Activity or Agency)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200 - 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
NAVAL COMMUNICATION AREA
MASTER STATION, EASTPAC, HONOLULU
A/SLMR No. 1035

This case involved an unfair labor practice complaint filed by the Service Employees' International Union, Local 556, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(6) of the Order by failing to bargain over the impact on adversely affected unit employees of its decision to use volunteer bartenders to staff a newly created Acey-Deucey Lounge. The Complainant contended that bartenders who were employed in the Enlisted Mess, OPEN, a separate lounge located in the same building, and who were members of its exclusively recognized unit, suffered a loss in tips as a result of the use of volunteer bartenders.

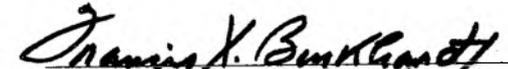
The Assistant Secretary adopted the Administrative Law Judge's conclusion that there was insufficient evidence to establish that the use of volunteer bartenders had a substantial impact on the personnel policies, practices and general working conditions of unit employees. Accordingly, he ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

IT IS HEREBY ORDERED that the complaint in Case No. 73-961(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
May 9, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

DEPARTMENT OF THE NAVY,
NAVAL COMMUNICATION AREA
MASTER STATION, EASTPAC, HONOLULU

Respondent

and

Case No. 73-961(CA)

SERVICE EMPLOYEES' INTERNATIONAL
UNION, LOCAL 556, AFL-CIO

Complainant

DECISION AND ORDER

On January 31, 1978, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendation.

In agreement with the Administrative Law Judge's conclusion, I find that, under the circumstances of this case, there was insufficient evidence to establish that the use of volunteer bartenders at the Acey-Deucey Lounge had a substantial impact on the personnel policies, practices and general working conditions of the unit employees and that, therefore, the Respondent was under no obligation to bargain in this regard.

1/ In reaching the disposition herein, it was considered unnecessary to pass upon the Administrative Law Judge's finding, on page 4 of his Recommended Decision and Order, that the Complainant had agreed that the Respondent was privileged under Sections 11(b) and 12(b) of the Order to unilaterally establish the Acey-Deucey Lounge and man it solely with volunteer bartenders.

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



DECISION AND ORDER

Statement of the Case

.....
 In the Matter of :
 :
 DEPARTMENT OF THE NAVY :
 NAVAL COMMUNICATION AREA :
 MASTER STATION EASTPAC, HONOLULU :
 :
 Respondent :
 :
 and :
 :
 SERVICE EMPLOYEES' INTERNATIONAL :
 UNION, LOCAL 556, AFL-CIO :
 :
 Complainant :

Case No. 73-961(CA)

APPEARANCES:

A. S. CALCAGNO, Esquire
 Labor Relations Advisor
 Department of the Navy
 Western Field Division
 Office of Civilian Personnel
 525 Market Street, 35th Floor
 San Francisco, California 94102

J. T. DENNEHY
 Labor Relations Advisor
 Department of the Navy
 Office of Civilian Personnel
 Pacific Field Division
 Pearl Harbor, Hawaii 96818
 For the Respondent

ERIC A. SEITZ, Esquire
 3049-B Kalihi Street
 Honolulu, Hawaii 96819
 For the Complainant

Before: BURTON S. STERNBURG
 Administrative Law Judge

Pursuant to a complaint filed on July 26, 1977, under Executive Order 11491, as amended, by Service Employees' International Union, Local 556, AFL-CIO, (hereinafter called the Complainant or Union), against the Naval Communication Area Master Station, EASTPAC Honolulu (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Regional Administrator for the San Francisco, California Region on September 16, 1977.

The Complaint alleges that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in unilaterally establishing a first and second class petty officers' bar (Acey-Deucey Lounge) manned solely by volunteer bartenders without giving prior notice to the Union of such action and allowing negotiations relative to the impact of the new policy of using volunteer bartenders on bargaining unit members currently employed as bartenders in the existing enlisted men's club. 1/

A hearing was held in the captioned matter on November 17, 1977, in Honolulu, Hawaii. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

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

The Union is the exclusive representative of the employees working in the Enlisted Men's Club. On February 23, 1977, management of the Enlisted Men's Club was transferred from the Navy Exchange to the Naval Supply Department.

Following receipt of the first month's financial statement for the Enlisted Men's Club which indicated a net loss

1/ The Complaint also alleged an independent 19(a)(1) violation predicated upon certain coercive remarks allegedly made by Respondent's supervisory personnel to unit employees. However, at the start of the hearing, Complainant's counsel orally withdrew the independent 19(a)(1) allegation from the complaint.

of some \$3,000, the new management conducted an informal investigation of the Enlisted Men's Club and determined that they were spending too much money for labor. Thereafter, following a meeting sometime in April with the Union's president, management, in order to cut expenses, reduced the hours of work of a number of the employees.

During the course of the April meeting, the Union's president suggested that the establishment of a cocktail lounge solely for the use of first and second class petty officers might attract more patrons to the Enlisted Men's Club and produce additional revenue. The mechanics of operating such a lounge, however, were not discussed at that time.

During the latter part of April 1977, the Enlisted Men's Club Advisory Board, composed solely of management representatives, unanimously passed a motion to establish an "Acey-Deucey Lounge" for the exclusive use of first and second class petty officers. It was further determined that due to a shortage of funds the Acey-Deucey Lounge was to be manned solely by volunteer bartenders. The Acey-Deucey Lounge, housed in a separate room in the same building where the existing Enlisted Men's Club was located, opened in May 1977, using volunteer bartenders.

Thereafter, following various complaints from the Union concerning the legality of using volunteer bartenders, Respondent closed the Acey-Deucey Lounge for approximately ten days to consider the situation. ^{2/} Upon concluding that the use of volunteer bartenders was not in violation of any law, the Acey-Deucey Lounge was reopened. When the Lounge was first opened a sign advertised the fact that the bartenders were not paid and that their sole remuneration consisted of tips left by the patrons. In practice, however, any tips were put into a glass behind the bar and used by patrons to pay for drinks won in bar dice games from the bartenders. When the Acey-Deucey Lounge was reopened a new sign was posted which informed the patrons that all tips would be donated to Navy Relief. As of the date of the hearing, six dollars had been collected for the Navy Relief Fund.

The volunteer bartenders were all Acey Deucey Lounge patrons who had signed a posted roster indicating that they

^{2/} The record does not reflect the manner in which the Union submitted its complaints relative to the use of volunteer bartenders.

would tend bar on a particular date. If the volunteer failed to appear as promised, the bar would only open if another patron then present in the lounge decided to volunteer. Other than paydays, the Acey-Deucey Lounge was normally open only in the evenings. According to the record testimony, only about four regular patrons of the existing Enlisted Men's Club were attracted to the Acey-Deucey Lounge. The other patrons of the Acey-Deucey Lounge were first and second class petty officers who had not frequented the Enlisted Men's Club in the past.

The paid bartenders located at the existing Enlisted Men's Club continued to work their scheduled shifts and, as in the past, continued to receive their set wages and any tips left by patrons. However, according to the testimony of bartender Martha Nepote, the tips dwindled from somewhere in the \$35 range to about \$15 per week. The record further reveals that Martha Nepote usually worked the afternoon shift at the Enlisted Men's Club.

Discussion and Conclusions

Both parties are in agreement that the Respondent was privileged under Sections 11(b) and 12(b) of the Executive Order to unilaterally establish the Acey-Deucey Lounge and man it solely with volunteer bartenders without any prior negotiations or consultation with the Union. The parties further agree that irrespective of any such privilege the Respondent was obligated to bargain over any possible impact on any employee adversely affected by Respondent's action with respect to the establishment of the Acey-Deucey Lounge.

Respondent, however, takes the position that there was no impact, and, accordingly, no obligation to bargain with the Union. In support of its position, Respondent points out that the existing bartenders, particularly Ms. Nepote, Complainant's only witness, suffered no decrease in hours of work or salary. Respondent further notes that the loss of tips should not be attributed solely to the opening of the Acey-Deucey Lounge since only four former patrons of the Enlisted Men's Club were shown to be customers of the Acey-Deucey Lounge which, as a general rule, was not open during the afternoons when Ms. Nepote usually tended bar at the Enlisted Men's Club. Lastly, according to Respondent, inasmuch as tips are not calculated as part of Ms. Nepote's wages they do not constitute a condition of employment over which Respondent has any control and over which it is

obligated to bargain.

The Union, on the other hand, appears to take the position that Respondent is obligated to bargain over the impact of its decision to use volunteer bartenders in the Acey-Deucey Lounge. According to the Union, the reduction in tips establishes the adverse impact. The Union's post-hearing brief takes the position that the loss of tips was "a consequence of the use of volunteers."

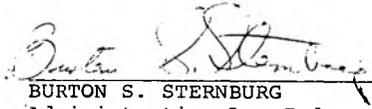
In agreement with the parties, I find that the decision to establish the Acey-Deucey Lounge and man it with volunteer bartenders is privileged under Section 12(b) of the Order. I further find that to the extent such decision substantially impacts adversely on unit personnel, Respondent is under an obligation to give timely notice to the Union, and upon request, bargain with the Union over such impact. Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56, June 29, 1973. In the absence of any substantial impact there is of course no obligation to bargain. Norfolk Naval Shipyard, A/SLMR No. 805.

Section 11(a) describes the limited areas which are subject to the bargaining obligation on the part of agencies and exclusive representatives. It is not intended to embrace every issue which is of interest to agencies and exclusive representatives and which indirectly may affect employees. Rather, Section 11(a) encompasses those matters which materially affect and have a substantial impact on, personnel policies, practices and general working conditions. Department of Defense, Air National Guard, Texas Air National Guard, Camp Mabry, Austin, Texas, A/SLMR No. 738.

In the absence of any showing that manning of the Acey-Deucey Lounge with volunteer bartenders resulted in any significant change in working conditions of the unit employees, other than loss of some tips, I find insufficient basis to conclude that the use of volunteer bartenders in the Acey-Deucey Lounge had a substantial impact on the personnel policies, practices and general working conditions of the unit employees working in the Enlisted Men's Club. Accordingly, I further find that in the circumstances here disclosed Respondent was under no obligation to bargain with the Union. Department of Defense, supra.

RECOMMENDATION

It is hereby recommended to the Assistant Secretary that the complaint be dismissed.


BURTON S. STERNBURG
Administrative Law Judge

Dated: January 31, 1978
Washington, D.C.

BSS:yw

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, QUALITY ASSURANCE
FIELD STAFF, NORTHEASTERN PROGRAM
SERVICE CENTER,
FLUSHING, NEW YORK

Respondent

and

Case No. 30-7652(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1760

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator Benjamin B. Naumoff's Order Transferring Case to the Assistant Secretary of Labor in accordance with Sections 203.5(b), 203.7(a)(4) and 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits and the Respondent's Motion to Dismiss filed in lieu of brief, 1/ the Assistant Secretary finds:

The complaint herein alleges that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to grant official time to two of the Complainant's officers who attended a meeting called by a field representative of the Assistant Secretary for Labor-Management Relations for the purpose of discussing a pending representation petition filed by the Respondent. The Respondent takes the position that as the use of official time is not a right assured by the Order, and as it was under no obligation either by law or regulation to grant official time in the circumstances of this case, its refusal to grant official time was not

1/ The Motion to Dismiss, initially filed by the Respondent on March 18, 1977, was forwarded by the Regional Administrator to the Assistant Secretary for his consideration. In view of the disposition herein, however, I find it unnecessary to pass upon the Motion, although the arguments contained therein have been duly considered.

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, QUALITY ASSURANCE
FIELD STAFF, NORTHEASTERN PROGRAM
SERVICE CENTER,
FLUSHING, NEW YORK
A/SLMR No. 1036

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1760 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to grant official time to two of its officers who attended a meeting called by a representative of the Assistant Secretary for Labor-Management Relations for the purpose of discussing a representation petition filed by the Respondent in another proceeding. The Respondent contended that it was under no obligation to grant official time in these circumstances as the use of official time was not a right assured by the Order, and there was no other law or regulation which authorized its use.

The facts as stipulated by the parties indicated that the two union officials who attended the meeting were officers of the Complainant but were not employed by the Respondent. There was no negotiated agreement in effect between the Respondent and the Complainant.

On October 18, 1976, representatives of the Respondent and the Complainant met with a field representative of the Assistant Secretary for Labor-Management Relations to discuss a representation petition previously filed by the Respondent. Requests by the Complainant's representatives for official time for their attendance at the meeting were denied.

The Assistant Secretary concluded that the Respondent's conduct in denying official time to the two officials who appeared on behalf of the Complainant at the meeting in question was not violative of Section 19(a)(1) and (6) of the Order. In this regard, he noted that it has been established that agencies are not obligated to make available on official time employees who act solely as union representatives. He also noted that the employees in question did not come within the ambit of Section 206.7(g) of the Assistant Secretary's Regulations as they were not necessary witnesses at a hearing and that there was no contractual obligation between the Respondent and the Complainant, nor evidence of a past practice, which would require the granting of official time in the circumstances of this case.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

violative of the Order. The Respondent also argues that the issue concerning the refusal to grant official time was previously raised by the Complainant which serves to bar the processing of the instant complaint. 2/

The undisputed facts, as stipulated by the parties, are as follows:

In June 1969, the Bureau of Retirement and Survivors Insurance (BRSI), a component of the Social Security Administration (SSA), granted exclusive recognition to the National Office of the American Federation of Government Employees (AFGE), AFL-CIO (National Council of Social Security Payment Center Locals) for a unit consisting of all nonsupervisory employees, including professionals, in the SSA Program Centers. A negotiated agreement entered into by the parties became effective on March 15, 1974, for a two-year period and, by its terms, was renewed for one additional year. Negotiations for a new agreement reached impasse and the parties agreed to extend their agreement pending resolution of such impasse. 3/ AFGE Local 1760, the Complainant herein, is a member of the National Council of Social Security Payment Center Locals. The two Union officials who allegedly were improperly denied official time at the meeting referred to in the instant complaint are officers of the Complainant and are employed by the BRSI.

On March 22, 1974, AFGE Local 1760 was certified as the exclusive representative in a unit of all nonsupervisory employees, excluding professionals, of the Program Review Field Staff, Bureau of Supplemental Security Income, SSA, co-located with the BRSI at the Northeastern Program Service Center, Flushing, New York. To date, the parties have not entered into a negotiated agreement covering such unit. Since early 1975, AFGE Local 1760 representatives have not been granted official time for meetings with representatives of the Respondent.

2/ The record reveals that the Complainant had previously filed an unfair labor practice charge regarding the failure to grant official time during the course of negotiations for a collective bargaining agreement. However, the pre-complaint charge was never pursued beyond that stage.

3/ This agreement, which does not cover the Respondent's employees, provides for the use of official time by representatives of the National Council of Social Security Payment Center Locals and affiliate Locals in certain situations affecting employees in the unit recognized by the BRSI. In March 1974, the Director of the BRSI issued a memorandum to the President of the AFGE National Council of Social Security Payment Center Locals concerning the use of official facilities and time, as governed by their negotiated agreement, by employees of the BRSI for servicing other components of the SSA. The memorandum indicated that, except as might otherwise be provided by existing higher level controlling regulations, the BRSI would not approve the use of its facilities or time for conducting labor-management relations activities which involved other bureaus.

On February 27, 1975, those activities previously handled by the Respondent's Office of Program Review were assigned to the newly created Office of Quality Assurance, Office of Management and Administration. AFGE Local 1760 remained the exclusive representative of the employees in the New York Office and also the employees in a Satellite Office which had been established in Boston. Subsequently, the Boston Satellite Office was re-established as a Regional Office and was removed from the administrative authority of the New York Office, whereupon the Respondent filed a representation petition, pursuant to the Assistant Secretary's Regulations, seeking to exclude the Boston employees from AFGE Local 1760's exclusively recognized unit. 4/

On October 18, 1976, following a request by a field representative of the Assistant Secretary for Labor-Management Relations, agents of both the Complainant and the Respondent met for the purpose of discussing the above-mentioned representation petition. Requests for official time by the two officials who appeared on behalf of the Complainant were denied by the Respondent, although the latter's representatives attended on official time.

FINDINGS AND CONCLUSIONS

In my view, the Respondent's conduct in denying official time status to the two officials who appeared on behalf of the Complainant at the meeting in question was not violative of Section 19(a)(1) and (6) of the Order. In determining those circumstances under which employees are entitled to official time, the Assistant Secretary has previously held that agencies are not obligated to make available on official time employees who act solely as union representatives, noting that in such capacity employees are, in effect, working for the union qua union. 5/ In reviewing the Yorktown case, cited above at footnote 5, the Federal Labor Relations Council (Council) found that there was no obligation under the Order for an agency to grant official time to union witnesses during their participation at formal unit determination hearings. However, the Council further stated that it would be consistent with the Order for the Assistant Secretary, under the authority vested in him by the provisions of Section 6(d) of the Order, to promulgate a regulation requiring that necessary witnesses be on official time for the period of their participation at formal hearings. Subsequently, the Assistant

4/ The unit was subsequently clarified by excluding the employees of the Boston Regional Office pursuant to an order of the Regional Administrator dated April 27, 1977.

5/ Department of the Navy and the U.S. Naval Weapons Station, Yorktown, Virginia, 2 A/SLMR 134, A/SLMR No. 139 (1972); 1 FLRC 489, FLRC No. 72A-20 (1973). See also United States Customs Service, Region IX, Chicago, Illinois, 3 A/SLMR 160, A/SLMR No. 257 (1973).

May 10, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Secretary promulgated regulations providing, among other things, that employees who have been determined to be necessary as witnesses at a hearing shall be granted official time only for such participation as occurs during their regular work hours. ^{6/}

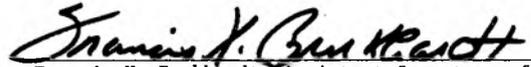
It is clear that the representatives of the Complainant involved herein were not necessary witnesses at a hearing, but rather appeared as the Complainant's representatives at a conference called by the Assistant Secretary's representative to discuss various aspects of a pending representation petition. Thus, clearly they did not come within the ambit of Section 206.7(g) of the Assistant Secretary's Regulations. Moreover, it was noted that the Complainant is not party to a negotiated agreement with the Respondent. ^{7/} Thus, the Respondent had no contractual obligation to grant official time to officials of the Complainant for the purpose of attending the conference involved herein. Nor is there any evidence that the Respondent, in the past, has ever granted official time to representatives of the Complainant for such a purpose.

Under these circumstances, I find that the Respondent was under no obligation to grant official time to the Complainant's representatives at the meeting in question, and, therefore, its refusal to do so was not violative of the Order. Accordingly, I shall order that the instant complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-7652(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
May 10, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

^{6/} Specifically, Section 206.7(g) of the Assistant Secretary's Regulations provides, in pertinent part:

Employees who have been determined to be necessary as witnesses at a hearing shall be granted official time only for such participation as occurs during their regular work hours and when they would otherwise be in a work or paid leave status. . . . (emphasis added)

^{7/} As indicated above, the Union representatives in question who attended the October 18 meeting are employed by the BRSI, not the Respondent. The BRSI and the Complainant have a negotiated agreement which, among other things, provides for official time for the Complainant's representatives, but only in the performance of representational activities affecting employees in the BRSI bargaining unit.

CONSUMER PRODUCT SAFETY COMMISSION,
PHILADELPHIA AREA OFFICE
A/SLMR No. 1037

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, Local 3705, AFL-CIO, (Petitioner) seeking to clarify whether or not the Secretary to the Director of Operations at the Activity should be excluded from its exclusively recognized unit as a confidential employee. The Petitioner contended that the Secretary to the Director of Operations was not a confidential employee in that the Director of Operations did not formulate and effectuate management policies in the field of labor relations. On the other hand, the Activity contended that the Secretary to the Director of Operations was a confidential employee.

The Assistant Secretary found that the Director of Operations, who is the Activity's designated Labor Relations Officer, is involved in the formulation and effectuation of management policies in the field of labor relations and that, as his Secretary serves him in a confidential capacity in these matters, she should be excluded from the exclusively recognized unit as a confidential employee. Accordingly, he clarified the exclusively recognized unit to exclude therefrom the Secretary to the Director of Operations.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

CONSUMER PRODUCT SAFETY COMMISSION,
PHILADELPHIA AREA OFFICE

Activity

and

Case No. 20-06252(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, Local 3705, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Joseph D. White. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

The American Federation of Government Employees, Local 3705, AFL-CIO, hereinafter called AFGE, filed a petition for clarification of unit (CU) seeking to clarify whether or not the Secretary to the Director of Operations at the Consumer Product Safety Commission's Philadelphia Area Office, hereinafter called the Activity, should be excluded from its exclusively recognized unit as a confidential employee. In this regard, the AFGE contends that the Secretary to the Director of Operations is not a confidential employee in that the Director of Operations does not formulate or effectuate management policies in the field of labor relations but only gathers information for presentation to the Activity's Area Director for his review and decision. Conversely, the Activity contends that the Secretary to the Director of Operations is a confidential employee as she serves in a confidential capacity to the Director of Operations who is the Activity's designated Labor Relations Officer and participates in the formulation and effectuation of management policies in the field of labor relations.

The mission of the Activity is to protect the public against unreasonable risks of injury associated with consumer products, assist consumers in evaluating the comparative safety of consumer products, minimize conflicting state and local regulations, and promote research and investigation into the causes and prevention of product-related

deaths, illnesses, and injuries. Organizationally, the Activity, which is headed by an Area Director, is subdivided into two Divisions, the Operations Division, in which the disputed position is located, and the Community Services Division.

The record reveals that subsequent to the filing of the AFGE's petition for an election, but prior to its certification as the exclusive representative of the Activity's employees, the Area Director designated the Director of Operations as the Activity's Labor Relations Officer who would be the responsible person for the AFGE to contact in all matters pertaining to labor relations at the Activity's facility. ^{1/} The Director of Operations has continued to serve in this capacity subsequent to the AFGE's certification. However, the Area Director has the ultimate authority and responsibility for the Activity's labor relations.

In accordance with his designation as the Activity's Labor Relations Officer, the Director of Operations met with the AFGE, prior to the representation election, on such matters as the eligibility of employees and the arrangements for the election. Thereafter, he prepared a memorandum for the Area Director detailing the above meeting, including alternative courses of action and his recommendations, which recommendations were followed. ^{2/} Subsequent to the AFGE's certification, the Director of Operations has, among other things, prepared for the Area Director's signature a letter to the AFGE concerning the disposition of an unfair labor practice charge; negotiated a memorandum of understanding on dues deductions with the AFGE which was approved by the Area Director; and prepared a memorandum on alternative courses of action and positions to be taken by management regarding the hearing on the instant CU petition. The record reveals that the Secretary to the Director of Operations has been responsible for the preparation and filing of all the above materials. It was also established that the Director of Operations will be responsible for negotiating an agreement with the AFGE and that his Secretary will be responsible for the preparation of all his reports dealing with management labor relations strategy in connection with the negotiations and for the maintenance of files and records with respect to such proceedings.

^{1/} The AFGE was subsequently certified on January 6, 1977, as the exclusive representative of all employees employed at the Activity, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Executive Order.

^{2/} Among other things, the Director of Operations recommended that his Secretary's ballot be challenged at the election and it was, in fact, the only ballot challenged by management. The record indicates that the challenge was never resolved as the ballot involved was not determinative of the results of the election.

May 11, 1978

Based on the foregoing circumstances, I find that the Director of Operations is involved in the formulation and effectuation of management policies in the field of labor relations and that, as his Secretary serves him in a confidential capacity in these matters, she should be excluded from the exclusively recognized unit as a confidential employee. ^{3/} Accordingly, I shall clarify the unit herein to exclude therefrom the Secretary to the Director of Operations.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, Local 3705, AFL-CIO, was certified as the exclusive representative on January 6, 1977, be, and it hereby is, clarified by excluding from such unit the Secretary to the Director of Operations.

Dated, Washington, D. C.
May 10, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF AGRICULTURE,
ANIMAL AND PLANT HEALTH INSPECTION SERVICE,
PLANT PROTECTION AND QUARANTINE
A/SLMR No. 1038

This case involved a petition for clarification of unit (CU) filed by the Federal Plant Quarantine Inspectors National Association seeking to clarify the status of approximately 60 employees classified as Supervisory Plant Protection and Quarantine Officers, (Tour Leader) GS-436-11. The Petitioner contends that these Supervisory Officers, currently excluded from the exclusively recognized unit, should be considered within the unit, because the basis on which they had been excluded (evaluation of employees) had been changed by Executive Order 11838 and, thus, they are not supervisors within the meaning of Section 2(c) of the Order, as amended. The Activity, on the other hand, maintains that Supervisory Officers have duties and responsibilities which identify them as supervisors under the Order.

The Assistant Secretary found that the Supervisory Officers are supervisors within the meaning of Section 2(c) of the Order inasmuch as they, as found in a prior proceeding, not only evaluate employees but also exercise independent judgment in directing employees. In addition, he noted the Supervisory Officers effectively recommend promotions and adjust employee grievances. Accordingly, he ordered that the CU petition in the instant case be dismissed.

^{3/} See Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, 1 A/SLMR No. 332, A/SLMR No. 69 (1971).

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF AGRICULTURE,
ANIMAL AND PLANT HEALTH INSPECTION SERVICE,
PLANT PROTECTION AND QUARANTINE

Activity

and

Case No. 22-08076(CU)

FEDERAL PLANT QUARANTINE INSPECTORS
NATIONAL ASSOCIATION

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Daniel Francis Sutton. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including the briefs filed by the parties, the Assistant Secretary finds:

The Petitioner, the Federal Plant Quarantine Inspectors National Association, is currently the exclusive representative of a unit of all professional Plant Quarantine and Plant Pest Control Inspectors employed in or by the Activity. 1/ In this proceeding, the Petitioner filed a petition for clarification of unit (CU) seeking to clarify the status of approximately 60 employees classified as Supervisory Plant Protection and Quarantine Officers, (Tour Leader) GS-436-11, hereinafter called Supervisory Officers, who, it contends, should be considered to be included within the bargaining unit because they are not supervisors within the meaning of Section 2(c) of the Order. The Activity, on the other hand, maintains that employees in the contested classification have duties and responsibilities which identify them as supervisors under the Order.

1/ The exclusively recognized unit consists of all professional Plant Quarantine and Plant Pest Control Inspectors employed in or by the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine Program, excluding all other employees, Supervisory Plant Quarantine Inspectors, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

The Animal and Plant Health Inspection Service (Service) of the United States Department of Agriculture was created to conduct regulatory and control programs to protect and improve animal and plant health for the benefit of man and his environment. In cooperation with state governments, the Service administers Federal laws and regulations pertaining to animal and plant health and quarantine, meat and poultry inspection, humane treatment of animals, as well as the control and eradication of pests and diseases.

The record shows that the position in dispute herein was created in the early 1950's, and that since its inception the duties and responsibilities of the employees in the contested position have not been substantially altered or changed despite a number of administrative reorganizations at the Activity. In this connection, even though the title of the contested position has undergone modification, 2/ Supervisory Officers continue to perform a variety of inspection and quarantine duties designed to prevent entry into the United States of disease causing infectious agents.

On September 1, 1964, the Petitioner was granted exclusive recognition under Executive Order 10988 for the unit involved herein. At that time the disputed position was considered part of the Petitioner's exclusively recognized unit. On April 26, 1974, pursuant to a CU petition filed by the Activity herein, the Assistant Regional Director (now called Regional Administrator) of the Labor-Management Services Administration issued his Report And Finding On Petition For Clarification Of Unit in Case No. 22-5173(CU), finding, in agreement with the position of the parties, that employees in the then entitled position of Supervisory Plant Quarantine Inspectors were supervisors within the meaning of the Order since such individuals "...use independent judgment in evaluating and directing employees with whom they work." On May 16, 1974, noting that no request for review of his Report And Finding had been filed, the Regional Administrator ordered that the existing unit be clarified to exclude such employees.

In the instant proceeding, the Petitioner notes that as a result of the amendments to Executive Order 11491, in Executive Order 11838, the evaluation of employee performance was removed as a sole basis for determining supervisory status. Under these circumstances, it contends Supervisory Officers should be included within the exclusively recognized unit as they do not perform any of the supervisory functions set forth in Section 2(c) of the current Executive Order. 3/ However, as noted

2/ The Supervisory Officers received their current designation as Supervisory Plant Protection and Quarantine Officers in July 1975.

3/ Section 2(c) provides: "'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

May 11, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

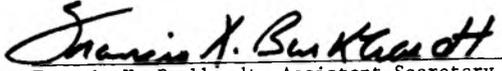
above, the Regional Administrator, in determining that employees in the disputed classification were supervisors in Case No. 22-5173(CU), found not only that the employees in the classification at issue exercise independent judgment in evaluating subordinates, but also concluded that they exercise independent judgment in directing employees. 4/ In this latter regard, the record does not contain any newly discovered or previously unavailable facts or changed circumstances that have occurred since that time; nor do the parties contend otherwise. 5/ Moreover, the record demonstrates that the Supervisory Officers make the initial recommendations for employee promotions and that these recommendations are almost always followed. Further, the evidence establishes the Supervisory Officers adjust employee grievances. 6/

Based on all of the foregoing, I find that the Supervisory Officers are supervisors within the meaning of Section 2(c) of the Order inasmuch as they exercise independent judgment in directing employees and as they effectively recommend promotions and adjust employee grievances. As employees in the classification at issue are supervisors and are properly excluded from the exclusively recognized unit, I shall dismiss the petition herein.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-08076(CU) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 11, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

- 4/ The evidence shows that Supervisory Officers continue to assign work to from 5 to 15 subordinates in a variety of settings where the Activity carries out its mission and continue to make independent judgments as to an employee's past experience, cargo expertise, export certification credentials and the interdiction rate in the assignment of jobs.
- 5/ In my view, it would not effectuate the purposes and policies of the Order to reconsider in this proceeding issues determined in a prior proceeding involving the same parties, absent some evidence of changed circumstances. Cf. Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, A/SLMR No. 870 (1977), FLRC No. 77A-122.
- 6/ Although the Supervisory Officers have authority to adjust grievances, the Petitioner contends that this responsibility does not apply to "formal grievances" and, thus, this authority should not be considered as evidence of supervisory status. However, it has been held previously that an individual who possesses the authority to independently adjust grievances, formally or informally, is a supervisor within the meaning of Section 2(c) of the Order. Cf. Mare Island Naval Shipyard, Vallejo, California, 1 FLRC 410 (1973), FLRC No. 72A-12.

-3-

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
WILLIAM P. HOBBY AIRPORT TRAFFIC
CONTROL TOWER (TRACAB),
HOUSTON, TEXAS
A/SLMR No. 1039

This case involved an unfair labor practice complaint filed by the Professional Air Traffic Controllers Organization (Complainant) alleging that the Respondent violated Section 19(a)(1), (2) and (4) of the Order by its termination of a probationary air traffic controller trainee, T. Laurence Stanley, because of his vigorous exercise of protected union rights.

In September 1975, Stanley had been assigned as a trainee controller to the Respondent's facility where he completed two (of five) training phases on November 7, 1975. Thereafter, he commenced a new and more difficult phase of his training.

On November 5, 1975, after having witnessed a mid-air collision, Stanley was asked to prepare a written statement concerning his account of the accident. A dispute arose over the contents of his statement, resulting in what Stanley considered to be harassment by the Respondent. Further, Stanley asserted that he requested, but was denied, union representation during several meetings held between himself and the Respondent's Chief concerning revisions of his statement. Stanley filed unfair labor practice charges on February 16 and March 18, 1976, and grievances under the negotiated grievance procedure on March 18 and 24, 1976. On April 29, 1976, Stanley's training supervisor recommended his termination as a probationary employee because of work deficiencies evidenced during his training and he was, in fact, terminated effective May 15, 1976.

The Administrative Law Judge found that the termination of Stanley as a probationary employee was not violative of the Order. In reaching this conclusion, she concluded that Stanley's termination was not for pretextual reasons and that, in this regard, the Complainant had failed to carry its burden of proving that the Respondent's motivation for terminating Stanley was for reasons violative of the Order, rather than for work related causes. Accordingly, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

The Assistant Secretary adopted the recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
WILLIAM P. HOBBY AIRPORT
TRAFFIC CONTROL TOWER (TRACAB),
HOUSTON, TEXAS

Respondent

and

Case No. 63-7028(CA)

PROFESSIONAL AIR TRAFFIC
CONTROLLERS ORGANIZATION (PATCO),
BEDFORD, TEXAS

Complainant

DECISION AND ORDER

On October 19, 1977, Administrative Law Judge Joan Wieder issued her Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions 1/ and

1/ On page ten of her Recommended Decision and Order, the Administrative Law Judge concluded that to find a violation of Section 19(a)(4) of the Order the Complainant must have demonstrated that the termination of Stanley was due to the fact that he had filed an unfair labor practice "complaint" or had given testimony under the Order. As there was no evidence that any complaint, other than the subject complaint, had been filed or that testimony was given under the Order in any other proceeding prior to the filing of the subject complaint, the Administrative Law Judge recommended dismissal of the Section 19(a)(4) allegation. In

(Continued)

recommendations, to the extent consistent herewith.

On page 15 of her Recommended Decision and Order, the Administrative Law Judge found that supervisor Hale did make a statement regarding Stanley's union activities as a potential interference with his progress at work. She concluded, however, that such statement was not coercive, threatening or intended to interfere with Stanley's protected rights but, rather, was more in the form of suggestion that if Stanley was to qualify as a journeyman controller he should devote more attention to training. I disagree. Thus, in my view, supervisor Hale's statement was coercive in nature in that it reasonably could have been perceived by Stanley as an indication that his protected union activity was a potential impediment to his advancement on the job. However, as the complaint herein contains no independent allegation of a Section 19(a)(1) violation with respect to this matter and as I have concluded, in agreement with the Administrative Law Judge, that the Complainant has failed to prove that Stanley's termination as a probationary employee was pretextual in nature and for other than good cause, I shall order that the complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-7028(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.

May 11, 1978



Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1/ this regard, she further concluded that only a violation of Section 19(a)(1) and (2) of the Order would be established if it were determined that the termination of Stanley was related to his filing of unfair labor practice "charges" or grievances. The Assistant Secretary has held previously that a pre-complaint charge filed in accordance with Section 203.2 of the Assistant Secretary's Regulations initiates the unfair labor practice procedures under the Order. See Department of the Treasury, IRS Chicago District, Request for Review No. 968 (1977), FLRC No. 77A-111 (1978). As the record reflects that two such unfair labor practice charges were filed on February 16 and March 18, 1976, a finding of a violation of Section 19(a)(4) of the Order would not have been precluded if it were found that Stanley's subsequent termination on May 15, 1976, had occurred as a result of his filing of these unfair labor practice charges.

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 528
San Francisco, California 94105



RECOMMENDED DECISION AND ORDER

Statement of the Case

(202) 653-5092
(415) 556-0555

In the Matter of)

DOT/FAA WILLIAM P. HOBBY AIR PORT)
TRAFFIC CONTROL TOWER (TRACAB))
HOUSTON, TEXAS)

Respondent)

and)

PROFESSIONAL AIR TRAFFIC)
CONTROLLERS ORGANIZATION (PATCO))

Complainant)

CASE NO. 63-7028(CA)

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For the Respondent

Before: JOAN WIEDER
Administrative Law Judge

This proceeding, heard in Houston, Texas, on August 24 and 25, 1977, arises under Executive Order 11491, as amended (hereinafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary for Labor-Management Relations, a Notice of Hearing was issued June 10, 1977, by the Regional Administrator, United States Department of Labor, Kansas City Region, who also issued an amended Notice of Hearing on June 17, 1977. Counsel for the parties requested a postponement, and good cause having been shown, the Chief Administrative Law Judge, United States Department of Labor, issued on July 13, 1977, an Order rescheduling the hearing.

The proceeding was initiated by the filing of a complaint on September 30, 1976, by the Professional Air Traffic Controllers organization (hereinafter referred to as the Complainant or PATCO) 1/ against William B. Hobby, Air Traffic Control Tower operated by the Federal Aviation Administration (hereinafter referred to as Hobby or the Activity).

The complaint alleged that the Activity violated sections 19(a)(1), 19(a)(2) and 19(a)(4) of the Order when they separated Mr. T. Laurence Stanley from his position as Air Traffic Control Specialist Trainee due to management's displeasure with Mr. Stanley's vigorous exercise of his protected union rights.

At the hearing both parties were afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses and to make oral argument. The opportunity to make oral argument was declined. Post-hearing briefs, received from both parties, have been given full consideration.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, I make the following conclusions and recommendations:

1/ At all times material hereto the union has been the exclusive bargaining representative of all the Activity's Air Traffic Controllers excluding supervisory and managerial employees.

Findings of Fact

The William P. Hobby Air Traffic Control Tower is organizationally a part of the Federal Aviation Administration (FAA), Department of Transportation. M. T. Lawrence Stanley was assigned to Hobby TRACAB in September of 1975 as a probationary trainee. Prior to his assignment at Hobby, Mr. Stanley was first hired by the FAA in the last weeks of January, 1968. For approximately six months Mr. Stanley received training in Denver at a "Center" position. 2/ Desiring a "tower" 3/ position, he accepted a transfer to Colorado Springs, Colorado, in the middle or late summer of 1968. Mr. Stanley stated that he had no difficulties with his training but resigned in December of 1968, to return to school.

On June 8, 1975, Mr. Stanley was reemployed by the FAA as a probationary controller trainee at Shreveport, Louisiana, which Mr. Stanley indicated is the same type of facility as maintained by the FAA at Colorado Springs, a combined tower and radar control (Tracon). It was while Mr. Stanley was at Shreveport that he joined PATCO. Mr. Stanley indicated that he went through all the training phases quickly and without difficulty. Mr. Stanley did not get any facility's certification at the positions he completed in his training--flight data, clearance delivery, ground control and local control training. He was then transferred to Hobby TRACAB, which he states is a higher level facility. It appears from inference throughout the testimony that the higher level facilities have more air traffic.

Mr. Stanley testified that upon arrival at Hobby TRACAB he started training for flight data clearance delivery and noticed there was no formal training program with full-time training officers. He felt very much on his own, no one to take him under their wing and give trainees the necessary guidance. The next step was ground control training which he completed on November 6, 1975. Mr. Stanley stated that he finished flight data clearance delivery in approximately two weeks. However, Mr. Stanley was informed

2/ Mr. Stanley defined a center as a large facility separating aircraft operating under instrument flight rules between the terminals.

3/ Mr. Stanley defined a tower position as separating out traffic going in and around airport and terminal areas.

in the middle of October that he was making slow progress in ground control training; several suggestions were made for improvement, including improving his ability to accept constructive criticism.

On October 16, 1975, in a memorandum titled: "Confirmation of Performance Discussions," Assistant Chief Frank O. Mobley stated:

I informed you that you are making slow progress on ground control. Your working speed must increase during heavy traffic periods. Your attitude toward accepting constructive criticism must be improved. You informed me that your enthusiasm to check out in the facility had greatly diminished since you checked out on the Flight Data/Clearance Delivery position.

You have used 36 hours of your allotted time of 80 hours for checkout on Ground Control. To improve your progress toward checkout on Ground Control, I recommend you concentrate on the following subjects:

1. Learn to accept constructive criticism better and don't argue with your instructors.
2. Anticipate your traffic movements and initiate control action sooner.
3. Learn to work the Ground Control position without bothering the Local controller. Listen to what the Local controller is doing.
4. Continuous surveillance of airport area.
5. Monitor and analyze ground traffic.
6. Demonstrating effective control techniques.

I informed you that I would make available to you proper training to aid you in completing your training assignments. (Emphasis added)

Mr. Stanley acknowledged receipt of the performance report on October 17, 1975. He testified that there was a marked improvement in his performance after the critique of his training progress.

Mr. Stanley considered his treatment by the supervisory staff as similar to other employees up until November 6, 1975. On November 6, 1975, the facility experienced a mid-air collision which Mr. Stanley witnessed, although he was not on duty. He was requested to write a statement by the facility chief, Mr. Mapes, who specifically requested "that he describe what he saw." After Mr. Mapes made the request, the training supervisor, Mr. Hale, instructed Mr. Stanley to be careful of the facts recited in the statement. Mr. Stanley interpreted the request as requiring a generalized statement containing less than a complete recitation of the facts, in contemplation of possible future court proceedings.

Mr. Stanley prepared the statement and testified that he included a complete recitation of the facts as he remembered them. Mr. Stanley further testified that when he gave the statement to Mr. Mapes he requested a union representative. Mr. Stanley testified that he made the request for union representation pursuant to instructions he received from a PATCO representative at Shreveport, Louisiana. The instructions are contained on the back of all PATCO membership cards to the effect that if a member is involved in an air traffic accident, he is to request assistance from a PATCO representative. Mr. Stanley claims Mr. Mapes denied the requested union aid but that he, Mr. Mapes, would provide all the necessary help. Mr. Mapes then read the statement and indicated to Mr. Stanley that he was disturbed by certain statements containing factual allegations which Mr. Mapes wanted, according to Mr. Stanley, omitted. In particular, a statement that the accident occurred one mile from the tower was a major bone of contention.

Discussions involving revising the statement occurred several times during the next week. Initially, the discussions began pleasantly but devolved into what Mr. Stanley described as argument. Mr. Stanley stated he made several requests for union representation to Mr. Mapes. Mr. Mapes, on the other hand, testified that no union assistance was requested. Although Mr. Stanley stated he requested and was denied union assistance several times, and that he contacted a union official during the week that he was involved in revising his statement about the mid-air collision, there was no testimony from any union representative that any contact was, in fact, made. This is despite the fact that Mr. Stanley testified that he did contact the union representative and, furthermore, did file an Unfair Labor Practice charge alleging that he was denied the right to representation. Under the grievance procedure the union

failed to seek review on the matter as provided in Article 7, Section 3 of the PATCO agreement. 5/

I credit the testimony of Mr. Mapes since the discussions regarding Mr. Stanley's accident report took place over a one-week period, sufficient to permit Mr. Stanley an opportunity to contact a union representative. Mr. Stanley testified that he did in fact contact a union representative; however, no representative of Complainant supported Mr. Stanley and no reason for such failure was presented. Further substantiation of this conclusion is that an Unfair Labor Practice charge was filed by Mr. Stanley based on the alleged denial by management of union representation, yet PATCO failed to proceed with the charge. This failure reflects, to some extent, Complainant's view of the merits and any other inference of the evidence. Accordingly, the alleged denial of union representation cannot be found to indicate anti-union bias by management.

Mr. Stanley attributes the changes in his treatment as controller trainee to management's dissatisfaction due to his unwillingness to readily modify his statement plus his requesting union representation prior to making any such modifications. As previously stated, Mr. Stanley indicated that one of the areas of dispute regarding the mid-air collision statement was the claim that visibility was one mile, and Mr. Mapes indicated that all that could be said accurately was that the markers over one mile from the tower were not visible while the markers within one mile from the tower were visible. This type of critique does not indicate a desire to obfuscate the facts, as alleged, or demonstrate anti-union animus. Rather, the critique and requests for modification are found to be the exercise of proper managerial functions of assuring the accuracy of a work product.

Mr. Stanley also testified that after November 6, 1975, the supervisory personnel at Hobby TRACAB harassed him and exhibited a lack of interest in training him. Mr. Stanley started the next phase of training the day after the mid-air collision. This third phase of training is at the local coordinator and local control positions, which are much more difficult than the preceding stages. In the training

5/ The PATCO agreement between a Professional Air Traffic Controllers Organization affiliated with the Marine Engineers Beneficial Association, AFL-CIO and the Federal Aviation Administration Department of Transportation, pages 11 and 12.

manual 50 hours are allocated to obtain proficiency as a local coordinator and 200 hours are given as a maximum to obtain proficiency as a local controller. The training program at these two positions is a combined effort. At the time he entered the training program Mr. Stanley stated that Mr. Mobley, an Assistant Chief, started making strong criticism of his performance and making remarks affecting his confidence, such as that Mr. Stanley should pay more attention to his job. Mr. Stanley further alleges that he suffered insults and that Mr. Mobley directed profanity at him in the first week of December, 1975. There is a further allegation that Mr. Mobley attempted to get Mr. Middlebrook, a journeyman controller who was training Mr. Stanley, to change a favorable training evaluation. Mr. Middlebrook unqualifiedly denied the allegation. It appears that Mr. Stanley misunderstood Mr. Middlebrook and Mr. Mobley's conversation which he had knowledge of third hand and therefore I credit Mr. Middlebrook's testimony. I find that Mr. Middlebrook and Mr. Mobley did discuss the evaluation but there was no attempt to induce Mr. Middlebrook to change that evaluation. I further find, as all the witnesses questioned on the point testified, that harsh, sarcastic, and ribald comments are often made in the tower, apparently as a means of alleviating tension, and are not personal attacks.

Another allegation is that the harassment Mr. Stanley experienced was exacerbated after he filed an Unfair Labor Practice charge against Messrs. Mapes and Mobley on or about February 16, 1976, regarding the alleged denial of union representation during the mid-air accident investigation. It was after the filing of that charge that Mr. Hale, the training officer, informed Mr. Stanley that up to that time, February 23, 1976, his performance was unsatisfactory and that if he did not improve within 30 days he would be terminated. Mr. Hale described approximately one-half dozen areas Mr. Stanley needed to concentrate on. The confirmation of performance discussion memorandum dated March 15, 1976, is attached hereto as Appendix 1. Generally, Mr. Stanley was informed that the discussion which was originally planned for January 23, 1976, prior to the filing of the Unfair Labor Practice charge, did not take place because Mr. Stanley became ill. It was rescheduled for the following day; however, Mr. Stanley did not return the following day and in the intervening time attended a training session at another airport. The deficiencies noted during the performance discussion indicated that Mr. Stanley was still having difficulty accepting constructive criticism, paying full attention to his duties, being able to concentrate on several aircraft or duties at the

same time, communicating with the aircraft, and setting priorities for the landing and departing aircraft so that the sequence of the planes presented a logical safe order. It is also noted that the performance discussion referred to two journeymen controllers that Mr. Stanley felt were not doing a good job but were rather waiting merely for him to make a mistake rather than training him. Mr. Stanley contrasted this with his treatment at the Houston Inter-continental airfield where "he was pampered by a particular instructor." The reference to a single instructor indicates that Mr. Stanley desires to have the attention of one instructor only, as indicated in his letter of resignation from Colorado Springs facility (infra).

Complainants contend that the adverse training reports are not demonstrative of the lack of potential of becoming a fully qualified journeyman controller, considering the stage of Mr. Stanley's training. Mr. Stanley felt the poor performance report was a reprisal for filing the February 16, 1976, Unfair Labor Practice charge. Another Unfair Labor Practice charge was filed on March 18, 1976, by Mr. Stanley alleging denial of union representation at the discussion involving the February 23, 1976, performance discussion. This charge is not under consideration in the instant proceeding. However, it is noted that this charge did not proceed past the second step of the agreed grievance procedure. Similarly, a grievance filed on March 24, 1975, charged that the training program was deficient in preparing Mr. Stanley to qualify, and this grievance also did not go past the second step of the procedure.

The Hobby TRACAB training program, (Complainant's Exhibit No. 7) under which Mr. Stanley's apprenticeship occurred, states on page two:

The length of training time allowed shall not be the sole standard for evaluation of the training progress. Training will be terminated for a specialist when employee performance or progress is unsatisfactory in upgrade training based on the following:

a. Failure to meet requirements for successful completion of required achievement checks and examinations.

b. Failure to complete a phase of training within the time limit established unless valid justification exists for time extension.

c. Definite lack of journeyman potential.

d. Failure to obtain a required certificate rating. (Emphasis supplied)

The standards were known to Mr. Stanley. The assignment to training at local control or local coordinator positions, dated November 7, 1975, contains an acknowledgment signed by Mr. Stanley, dated November 13, 1975, that he was cognizant of the emphasis placed on meeting training schedules and satisfactory progress in training and failure to meet these standards would be grounds for termination of employment (See Exhibit FAA No. 16).

The decision to terminate Mr. Stanley's employment came when he had completed 48 hours and 27 minutes training at the coordinator's position out of the total of 50 hours, and 82 hours and 18 minutes at the local controller's position out of the total 200 allocated hours.

The training supervisor, Mr. Hale, on April 29, 1976, recommended termination of Mr. Stanley during probation. The recommendation was contained in a memorandum to the Chief of Hobby TRACAB and was based on the following observations:

- a. He reacts too slowly to control situations.
- b. He applies improper sequencing procedures to arriving aircraft.
- c. He does not remember communications with departing aircraft.
- d. He does not maintain proper attention necessary to control air traffic.

Mr. Hale indicated that the reasons for the recommended dismissal had been discussed with Mr. Stanley and this statement was not controverted by Complainant. Mr. Hale attached to his recommendation of termination examples and summaries of unsatisfactory performances at the local control position. A precis of some of the training reports placed in evidence by the FAA are contained in Appendix II. The examples contained in the Appendix attached hereto are, in all probability, chosen as worst cases by Mr. Hale. However, these worst cases were not counterbalanced by a plethora of good performance reports. Therefore, the question remains as to whether the consistent deficiencies could be considered acceptable to support a finding that

the decision to terminate was not based upon anti-union animus, a deprivation or discrimination due to the exercise of guaranteed rights.

It is noted that the parties herein maintained that Mr. Stanley, in another proceeding, appealed the termination action on the basis of discrimination due to the fact that he is a white male. A hearing on the discrimination issue was held approximately two weeks prior to the hearing in the instant proceeding. It is recognized that the alternative actions taken by Mr. Stanley are fully within his rights. However, it is noted that the ground set forth in the discrimination case does present a different set of reasons for the termination of training than are represented in the instant proceeding. While the alternative actions do present different issues, the matter considered herein will be treated fully on the merits.

The dispositive question therefore is whether Mr. Stanley's termination was motivated by discriminatory considerations based upon Mr. Stanley's exercise of rights guaranteed under the Order; and is there evidence indicating anti-union animus on the part of Respondent's representatives.

Discussion and Conclusions

Section 203.14 of the Regulation imposes upon the Complainant the burden of proving the allegations of the complaint by a preponderance of the evidence. It is well established that the filing of a grievance or a charge falls within the rights generally enumerated in § 1(a) of the Order and the abridgement of these rights constitutes an Unfair Labor Practice within the meaning of § 19(a)(1). Department of Defense, Arkansas National Guard, A/SLMR No. 53; National Labor Relations Board, Region 17, Footnote 3 A/SLMR No. 295. Accordingly, should it be determined that the termination of Mr. Stanley was in any way related to his action of filing Unfair Labor Practice charges, or grievances, a violation of section 19(a)(1)(2) of the Order would be established. To demonstrate a violation of section 19(a)(4) of the Order, Complainant must have demonstrated that the termination of Mr. Stanley was due to the fact that he filed a complaint or gave testimony under the Order. Clearly there was no showing of a discrimination under section 19(a)(4) of the Order inasmuch as the evidence of record does not show that any complaint other than the complaint under instant consideration was filed under the Order or that testimony was given under the Order in any other proceeding. This failure precludes

the finding that the termination or any other discrimination was based on a filing of such a claim or giving such testimony. Additionally, the findings and conclusions discussed below preclude a determination of a violation of section 19(a)(4) of the Order.

With regard to section 19(a)(1) and (2) allegations, I do not find that Complainant has met its burden of proving by a preponderance of the evidence that Respondent violated the Order by terminating Mr. Stanley.

Under the applicable provisions of the Federal Personnel Manual, Subchapter 8, the entire purpose of the probationary period is to ascertain if an individual's actual performance on the job demonstrates the requisite fitness and capacity to acquire such fitness for permanent government service in that position. Subsection 8(3) requires that the supervisor terminate the employee as soon as it becomes apparent, after full and fair trial, that the employee's traits or capacities fail to fit him or her for satisfactory service. Mr. Stanley testified that the time he resigned "... there were no indications at any time of any apparent problems in training at Colorado Springs ..." Tr. page 22.

Inasmuch as credibility is an extremely important factor in the instant Decision, Mr. Stanley's letter of resignation is quoted in its entirety:

As you are well aware, and as my training file indicates, my progress toward qualification as a checked-out controller in this facility has been spasmodic and unpredictable, varying from periods of good (possibly excellent) performance, to periods of barely satisfactory (or unsatisfactory).

At the suggestion of Mr. P. B. Burnet, and in the light of comments and criticism he has made in his letter of confirmation of December 16, 1968, I have given lengthy thought to my status with the FAA, and even more basically, to my purpose in life, and I think I have determined our problem.

Firstly, the way in which the training program is organized, wherein the trainee is forced to operate under the varying backgrounds of no less than twenty or more controllers, and to learn, use, and accept

their own individual preferences with regard to technique in controlling traffic, in my opinion leaves much to be desired. In my own case I have been criticized on numerous occasions by one controller for using a specific technique that I had learned from another controller. In some cases, the conflicting criticism was between a controller and a supervisor. Both techniques, of course, were adequate. In the light of this fact--that both techniques are, in fact, adequate--it is difficult, sometimes very difficult, for me to reconcile the two opinions, and to ultimately accept this type of instruction. If left to my own designs, the technique I would have used myself would, in most cases, be equally as 'safe, orderly, and expeditious'. I grant that this may well be my own nature that makes this so difficult for me to accept, so much more for me, it seems, than it is for other trainees to accept. Outright errors neither I have been devoid of, but these have not occurred in my later stages of training, so much so that they should be considered completely unnatural. Keeping a trainee with one and only one instructor, all the time, may be impossible, as a practical matter. In my case, however, I considered it a necessity, in view of the fact that I did not come to this facility as a controller from another control tower in the FAA, nor do I have the experience of the other trainees. In any event, what I have stated I do not offer as an excuse, but only my opinion of part of the problem.

Of the varied interests I have, not the least of which is flying, I consider air traffic control a very interesting occupation. However, I have decided that it is not my most basic interest and concern in life, and I have decided to begin preparing myself for entrance into medical school on a full-time basis, beginning in the coming spring semester, January, 1969.

Accordingly, it is my intention to resign my appointment with the FAA, as of December 28, 1969. (Emphasis supplied)

Complainant's contention is that a full and fair trial was not given Mr. Stanley. Mr. Stanley had almost

an entire year's probationary period to demonstrate his fitness for employment as a journeyman air traffic controller. As early as 1968, when he terminated his initial employment with the FAA, Mr. Stanley referred to "comments and criticisms during his training period"; Mr. Stanley admitted, his progress toward qualification as a journeyman controller at the Colorado Springs airport control tower had been "spasmodic and unpredictable." He further addressed himself to difficulties with the training method employed by the FAA. He indicated a desire to be trained by only one instructor. The assignment of one controller to the training of a probationary employee, or any other trainee, is contrary to the PATCO agreement with the FAA. Article 53 of the agreement, section 2 requires that all on-the-job training instructor's assignments be rotated on an equitable basis among the qualified controllers selected to perform the work. Section 4 of the same Article requires all personnel to continue to perform on-the-job training as assigned. Section 5 of the same Article requires the employer to consider the journeyman controller's performance in providing on-the-job training when assessing his performance to determine whether it is deserving special recognition of an award.

The PATCO agreement itself recognizes the importance of on-the-job training and the need for the different journeyman controllers to provide such training to develop able controllers. Mr. Stanley in his December 17, 1968, letter indicated he had difficulty in accepting that method of instruction--in fact more difficulty, it appeared to him, than the other trainees. Complainant has failed to prove that the difficulties experienced in 1968, a period of time when no allegation of discrimination or anti-union animus is alleged or indicated, was any different than the difficulties experienced by Mr. Stanley at Hobby TRACAB.

That Mr. Stanley's problems were continuing as in 1968, was clearly demonstrated in the memorandum dated March 15, 1976, FAA Exhibit No. 6, see also Appendix I attached hereto, where he informed Mr. Hale that Mr. Buddy Carr while conducting a training program at Houston Intercontinental Tower "pampered me." This phrase clearly demonstrates his stated need for individual training by one person.

Another indication that Mr. Stanley's difficulties preceded the November 6, 1975, incident was the previously detailed October 16, 1975, performance report which informed him of deficiencies which were repeatedly mentioned in subsequent training reports such as slow anticipation and slow initiation of control actions.

Mr. Stanley was terminated, not after the filing of the first charge nor the difficulty described with the report of the mid-air collision, but immediately prior to termination of his probationary period. Mr. Stanley had repeated unfavorable performance reports. It is recognized that two journeyman controllers were of the opinion that Mr. Stanley did possess the potential to be a good controller. However, there was no showing that Mr. Stanley did not get a full and fair trial. He was assigned to a variety of journeymen controllers, many of whom found Mr. Stanley had very serious deficiencies. The Complainant did introduce some favorable performance reports but they were during light traffic periods. One witness testified that some evaluations were more favorable than Mr. Stanley's performance warranted, to build confidence. The precis of training reports contained in Appendix II demonstrates that Mr. Stanley had extreme difficulty in handling heavy traffic situations. When the traffic was heavy he constantly got behind and had to be caught up by his instructors, continuously had difficulty in sequencing the aircraft, dividing his attention, had difficulty in establishing priorities and keeping constant track of all the traffic. Mr. Stanley also continued to have difficulty accepting constructive criticism, to the point of letting the traffic go to argue the point. He was considered a danger by at least one supervisor.

The only witness specifically testifying on the point stated that some of the specific talents needed to become a controller are: the ability to remember many numbers; common sense; the ability to do a half a dozen things simultaneously with ease or efficiency; and, the ability to react and make quick decisions. The evidence of record fails to persuasively demonstrate that Mr. Stanley possessed these attributes or had the ability to develop these talents.

Complainant failed to demonstrate that, at that stage of his training, Mr. Stanley was progressing satisfactorily and had demonstrated the potential of becoming facility rated. Complainant did indicate that many individuals were given more time to qualify, but there was no showing that those individuals were similarly in a probationary status or that their demonstrated potential at the same point in their training was similar. Consequently, the record will not support a finding that the Activity's conclusion of Mr. Stanley's lack of potential was just a mere pretext. The difference in treatment which would be accorded a temporary and probationary employee as distinguished from a career-conditional employee does not constitute discrimination within the meaning of section 10(e) of the Act. See FLRC No. 73A-6 (June 21, 1974).

That Mr. Stanley is currently working as an air traffic controller under contract at a government facility operated by the Department of Defense is not probative of his ability to qualify at Hobby TRACAB. It was clearly shown that Hobby TRACAB has a much heavier traffic flow, a situation in which Mr. Stanley demonstrated difficulty. Understandably, a heavy traffic situation is much more difficult for a controller than a light traffic situation. It is undisputed that the Chief Controller at Ellington Air Force Base also failed to qualify at Hobby, albeit, after many more hours in training than Mr. Stanley. Ellington has about one-fourth the traffic of Hobby.

I did find that Mr. Hale did make a statement regarding Mr. Stanley's union activities as a potential interference with his progress at work. However, I cannot find that Mr. Hale's statement regarding the union activities of Mr. Stanley is coercive, threatening or intended to interfere with Mr. Stanley's protected rights. Complainant has failed to show an unlawful interference since there was no threat of reprisal. It appears that Mr. Hale's statement was more in the form of suggestion that more attention is needed to training if Mr. Stanley was to qualify as a journeyman controller. Mr. Hale, from the evidence of record, appears to have a sarcastic sense of humor which was well recognized at the facility.

Mr. Stanley did not testify that he felt constrained in the exercise of his right guaranteed under the Order nor did his subsequent actions indicate that Mr. Hale's statement had such an impact. The statement was more in the nature of a prophecy that if Mr. Stanley did not devote more attention to his training to improve his performance, he would not qualify. Nor was there any evidence that indicated that Mr. Hale's statement had any impact upon other employees. Accordingly, Mr. Hale's statement is not considered a threat of reprisal or force or promise of benefit or indication of anti-union animus.

Mr. Hale failed to include in his recommendation of termination during Mr. Stanley's probationary period the often repeated inability to accept constructive criticism. This failure does not cast suspicion upon the stated grounds for the termination of employment since the matters listed were the principal subjects of the constructive criticism contained in the training reports, and the lack of the necessary improvement demonstrated the inability to accept the criticism. Furthermore, there was no requirement adduced that each and every possible basis for the recommendation be included. The ultimate decision rested

in Mr. Mapes, who also consulted supervisors in addition to Mr. Hale, as well as several of Mr. Stanley's other instructors. Based upon these discussions, a review of the training reports and the actual monitoring of his performance, Mr. Mapes concluded that Mr. Stanley did not have the potential to check out at Hobby as a qualified controller. Therefore, even assuming arguendo, that Mr. Hale was less than fair, an assumption the record will not support, Mr. Hale's recommendation was not shown to be the controlling factor in the decision.

The Complainant has not clearly shown that the motivation for the termination of Mr. Stanley's employment was for reasons in violation of the Executive Order and not for the reason that he failed to demonstrate the potential of obtaining the position of a journeyman controller. Mr. Stanley received repeated evaluations indicating slow progress and difficulty in heavy traffic situations as well as the above-listed deficiencies. At most, the Complainant has demonstrated a mere suspicion that the employer discriminatorily discharged Mr. Stanley, which cannot be considered a violation. If Complainant could have demonstrated that there was a differential in treatment of similar employees, then perhaps discrimination could be inferred. However, Complainant's failure to demonstrate that the employees mentioned in the testimony as receiving dissimilar treatment were probationary employees or were proceeding in their training programs at a similar pace to Mr. Stanley prevents any inference from being made herein. The evidence will not support the finding that the discharge was a mere pretext for animosity toward the union. Nor have any of the Activity's action been shown as intended to discourage either membership in PATCO or the exercise of rights guaranteed the members of PATCO.

In conclusion, the Activity has the guaranteed right and obligation to terminate probationary employees for good cause. The Complainant has failed to carry its burden of proving that the employer's motivation was other than for good cause for: the termination occurred just prior to the expiration of the probationary period; there was no showing that the action was contrary to established procedures; that Mr. Stanley did receive numerous warnings that his progress was slow and he was fully informed as to the reasons for his termination; and finally, he was terminated well after filing his first charge.

I find that there was no violation of section 19(a)(1). The evidence as a whole clearly establishes a long standing pattern of slow progression in training and dissatisfaction

since 1968 with the FAA's training methods. The record is replete with poor training reports and there was no persuasive showing that such reports were normal considering the employee's stage in training. Further, there was no showing that Mr. Stanley received disparate treatment. The Regulations require that, prior to the termination of the probationary employee's probationary period, his potential be evaluated, and if found lacking, the activity is to deny career tenure. Based on these facts, it cannot be found that Mr. Stanley's separation was discriminatory or in any other manner violative of the Executive Order.

I further find that there was no violation of section 19(a)(2) of the Order inasmuch as no anti-union animus was shown nor will the record support a finding that Mr. Stanley would have been retained but for his filing of Unfair Labor Practice charges and grievances. The training reports, performance evaluation memoranda, Mr. Stanley's 1968 resignation letter and other evidence of record adequately explain the Activity's decision to terminate immediately prior to the termination of the probationary period. Mr. Boyce Tate, the supervisor for three months prior to Mr. Stanley's termination, stated that he knew of no controller with a similar number of training hours that constantly made the same mistakes, like Stanley, that subsequently checked out as a qualified controller. No evidence to the contrary was presented. Hence, the Activity's determination of lack of potential warranting termination was not persuasively refuted.

Accordingly, in all the circumstances, I reject the Complainant's contention with regard to the alleged Unfair Labor Practices.

Recommendation

Upon the basis of the foregoing findings and conclusion, I hereby recommend that the complaint against Respondent be dismissed in its entirety.



JOAN WIEDER
Administrative Law Judge

Dated: October 19, 1977
San Francisco, California

JW:vag

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Date: March 15, 1976

Houston (Hobby) TRACAB
8902 Paul B. Koonce Dr.
Houston, TX 77061

In Reply
Refer To: HOU TRACAB

Subject: Confirmation of Performance Discussion

To: ATCS T. Laurence Stanley

This is to confirm the discussion with you on February 23, 1976, concerning your performance for the period ending January 23, 1976. I reminded you that this performance discussion was planned for January 23, 1976, at which time you became sick and it was rescheduled for the following day, January 24, 1976. You were sick this day, also. You had been previously assigned to Intercontinental Tower for 3 weeks Nonradar and Radar training beginning January 26, 1976. I informed you this performance discussion was therefore delayed until February 23, 1976, and that it was for the period ending January 23, 1976.

I informed you that your rate of progress on Local Control position was unsatisfactory. To improve your progress toward checkout on Local Control, I recommended you concentrate on the following areas:

1. Attitude toward constructive criticism.
2. Inattention to duties.
3. Division of attention.
4. Phraseology.
5. Priorities.

I informed you that if your rate of progress remained unsatisfactory the next 30-day period, your training could be terminated.

You informed me that you felt some of the people training you were not interested in your progress, but were only waiting for you to make a mistake. You made reference to an occurrence of this with ATCS Charles Fleming and another

time that ATCS Douglass Turner recommended you be withdrawn from training. I informed you that I had confidence in their control and training ability, and felt they were doing a good job.

You informed me that Mr. Buddy Carr, EPDS, Intercontinental Tower, when conducting Nonradar and Radar training, had shown an interest by, "pampering me." You stated that you now have an attitude change and will try to improve your rate of progress.

GARY C. HALE
SATCS, Assistant Chief

Receipt Acknowledged: I do not necessarily agree with all of the above statements.

T. Laurence Stanley

3-16-76

APPENDIX 2

A few examples from the training reports, in all probability chosen as "worst cases," by Mr. Hale.

TRAINING REPORT OF 2-20-76 Instructor Chestnut:

Establish visual contact with your traffic as soon as possible. You are not looking around the area near enough. You have ten window - Look out all of them. N24Q on short final Runway 17 - a previous Cherokee missed Taxiway F and was taxiing very slow down the runway when N24Q was on 1/8 mile final. Chestnut had to send him around.

TRAINING REPORT OF 2-21-76 Instructor McCubbin:

Look out the windows more. You had a Cherokee landing on Runway 3 that was supposed to land on Runway 30. You didn't see him until he was on a half-mile final, then you didn't know who he was.

TRAINING REPORT OF 2-22-76 Instructor McCubbin:

You have a UHF frequency. Also, both times the guard helicopter on approach to Runway 3 called, McCubbin had to tell you about it. Dusty 88 on approach to Runway 3 had traffic crossing in front of him. You did not issue it. A Bonanza south of the field had traffic on radar. You were really worried about it. If you would have looked out the window you could have seen it was no factor. The Cessna was well above the Bonanza.

TRAINING REPORT OF 2-19-76 Instructor Nunnery:

The local coordinator pointed out S0934 to you several times on visual approach to Runway 12. There was no way he would fit with N006 and N1HT. I had to prompt you to take any action at all and to call traffic. It was a very dangerous situation. You will get in a lot of trouble giving VFR's the instrument runway. When you approve Runway 21 for an aircraft that can't hold short of Runway 12, you must sequence just like with Runway 17 and 12.

If you can teach yourself to listen to what is going on around you it will solve a lot of problems. Don't get so involved with one aircraft and let everything else get out of hand. This happened with S0934, N1HT, and N006.

TRAINING REPORT OF 2-22-76 Instructor Nunnery:

You cleared N77R to land without knowing where he was. You cleared N62X for takeoff at Runway 30 at Taxiway L and N096 at Runway 35 at Taxiway S at the same time. You told N16S to standby and never went back to him. You did not write down your departures and therefore forgot most of them. Did not look at IFR departure strips therefore rolled N55H as a VRF departure.

TRAINING REPORT OF 2-27-76 Instructor Chestnut:

You cleared N049 for takeoff thinking he was at Runway 17 and Taxiway F; he was on Runway 21 at Taxiway F and was rolling before you caught it. N090 was rolling on Runway 12 at that time. N1LS, left t/c Runway 12, N362 left t/c Runway 17, SWA17 straight in Runway 12. You failed to issue any sequence until N362 was on base and SWA17 was on 3 1/2 mile final. During this immediate period you had 6 aircraft including the above and no sequence. You had N06R call you approximately 8 north and gave him straight in Runway 17. Ahead of him was a Citation on Runway 12, a Twin Cessna on Runway 17, and a Grumman American on Runway 17. You failed to issue a sequence to N06R or to take any action until it was necessary to 360 N06R. Then you approved a right base for Runway 17 on N2611 a mile NW in front of N06R. Chestnut took the position at that.

TRAINING REPORT OF 3-10-76

The instructor commented that Mr. Stanley was terrible at setting priorities, and that he failed to act immediately upon receipt of instructions, asking questions, after the instructions were given rather than waiting until there was a lull in the traffic or other more propitious time. FAA Exhibit No. 19

TRAINING REPORT OF 3-11-76 Instructor McCubbin:

Three times McCubbin had to bring to your attention that someone was calling you on frequency 118.7. This is one of your frequencies.

You need to look out the window more. N46R departed on Runway 17 requested a right turn. You approved it. You had N901 on low approach to Runway 3, 1 mile SW. McCubbin had to take the frequency and tell N46Q to continue south-bound until he saw his traffic.

You had 4 airplanes on VOR 12 approach and N80A on approach to Runway 3 circle to land. N80A requested Runway 12, you approved it. By approving Runway 12 for N80A you created a problem. McCubbin had to take over and straighten the traffic flow out.

TRAINING REPORT OF 3-12-76 Instructor McCubbin:

You were having too many departure delays. Aircraft delayed: N3E, N36T, SWA 18, N500MR, N4WE, N29S, XAAPD, N59B, N61M, N90B. There were more but I can't remember them. You assigned N90B Runway 21. An I-3 approach was in use. You changed N90B to Runway 30 after I asked you about it. N90B was still 5 east when two departures were ready to go on Runway 12. McCubbin took the frequency and changed N90B to Runway 35.

N38T was making touch and go's on Runway 3. Not once did you sequence him with other traffic. Everytime McCubbin had to sequence him. N17Y departed Runway 35 with a right turn heading 180. N76MD called ready on Runway 3. You cleared N76MD for takeoff with a left turn heading 020. McCubbin had to take the frequency and cancel N76MD's takeoff clearance. You had N90B on short final Runway 35 and N61M holding in position on Runway 35. You forgot about him. McCubbin had to clear N61M for takeoff.

The instructor also informed Mr. Stanley that he "loses his cool when it starts getting busy." (FAA Ex. No. 25) The instructor told Mr. Stanley he did not have a picture of the traffic for most of the training period.

4 mi. north and not sequenced.

TRAINING REPORT OF 3-13-76 Instructor Nunnery:

N37N and N09L were unduly delayed. Several departures were forgotten because you couldn't call them when they called. You put N61X on a short approach, when it wasn't necessary, behind a Southwest Airlines B737 on Runway 3 and caused him to go around.

Mr. McCubbin wrote on the training report "You are very slow in making (sic) decisions (sic) I fell (sic) out it is because you are not sure of what you are doing. You have got to be able to make decisions (sic) and make them right. If you can't, your (sic) in the wrong field (sic) know what needs to be done and do it. I (McCubbin) am doing too much of the work for you in your stage of training.

On April 1, 1976, Mr. McCubbin again criticized Mr. Stanley about being slow in making decision for not looking out the windows enough, slow in responding to aircraft, delaying departures unnecessarily and inept sequencing of incoming traffic (FAA Ex. No. 23).

TRAINING REPORT OF 3-25-76 Instructor Chestnut:

You were issuing traffic on N65X as over the tower on downwind. N65X was actually on a mile final to Runway 17. At this time you also had traffic on a 1 mile final to Runway 12 and should have known N5X's position.

On a number of occasions you issued a sequence unnecessarily to aircraft that were separated by 5 miles or more yet failed to sequence traffic that were obviously conflicting. Reference N65X and N421BD; N65X and a King Air on final to Runway 12. N65X had to make a 360, N709 given a 360. These resulted not from pilot error but from no sequence being issued soon enough to be useful or not issued at all.

You had 3 aircraft report over the Dome within 1 minute of each other and you failed to issue traffic.

You delayed many departures because you failed to utilize anticipated separation or due to incorrect priorities. I28W held at Runway 17 and after N28W and were at the same location as N28W.

N709 could have been cleared for takeoff on Runway 17 twice but was held. When finally put into position, N38Q was cleared ahead of him. N709 was held in position for

N473 on a 1 1/2 mile final to Runway 12. N100JB, a westbound IFR departure, was held for departure on Runway 12. N100JB, a westbound IFR departure, was held for departure on Runway 12 yet he could have rolled on two occasions on Runway 17. N311 called ready at Runway at Taxiway F. You told him to hold short. No one had departed ahead of him and there was no one on final to Runway 12 at that time. N2BA was delayed at Runway 17 at Taxiway F. I believe you forgot him. See also FAA Ex. No. 2.

TRAINING REPORT OF 3-22-76

The instructor noted failure to watch the traffic once it is cleared for takeoff, late sequencing hesitance in making sequencing decisions and once the decision is made, failure to change sequence once it is ascertained that the established sequence will not work (FAA Ex. No. 8).

TRAINING REPORT OF 3-31-76 Instructor Nunnery:

The local coordinator had to make every pointout several times because you weren't listening. You told N25R to make a straight out reference SWA36 departing Runway 30. N25R to make a straight out reference SWA36 departing Runway 30. N25R turned into SWA36's departure path and asked for a frequency change and you approved it. N8BL, N92C, and a Cessna off Runway 35 were all 2 miles NW without traffic being called.

TRAINING REPORT OF 3-31-76 Instructor Tate:

Do what your instructor tells you to do when they tell you something. Don't say "Wait a minute" and go on to something else. Numerous aircraft were delayed because you would answer an aircraft calling you inbound for a landing instead of getting the departures out. N400CC, N535, N81E, and many more were delayed because you either forgot them or did not use the right priorities.

TRAINING REPORT OF 4-8-76 Instructor McCubbin:

SWA140 was ready for departure on Runway 21, northbound. You had a Cessna on approach to Runway 3 that was 5 miles

out and a Cessna on a mile final to Runway 17. You had time to get SWA140 out. You could have used visual separation on SWA140 and the Cessna on approach to Runway 13. The Cessna on Final to Runway 17 was no factor. N79MA was on a visual approach to Runway 12. He was too high and had to re-enter the traffic pattern. You should have told approach control about it. You cleared ATW102 for takeoff on Runway 12 and N36Q low approach to Runway 3. McCubbin told you to correct the situation. You didn't do anything. McCubbin had to take the frequency and straighten it out.

TRAINING REPORT OF 4-10-76 Instructor Turner:

SWA 113 and N60SL were unnecessarily delayed because of inadequate planning of departures and arrivals.

TRAINING REPORT OF 4-11-76 Instructor Thompson:

N1330G 3 mi. north on right base Runway 17, N87G missed approach from Runway 12 Heading 360 degrees was 2 mi. N. No traffic issued. The passed within 1 mi. N86PB 3 NW right base Rnwy 17 traffic 1 o'clock less than a mile westbound. Traffic never issued.

TRAINING REPORT OF 4-14-76

The instructor noted a failure to keep track of all the traffic, a failure to look out the window, and the report ended the request to "THINK." (FAA Exhibit No. 9)

TRAINING REPORT OF 4-15-76 Instructor McCubbin:

N93K on final for Runway 12 and N816 on left base to Runway 12. N816 was turning in too close to N93K. McCubbin had to turn N816 back out. N47H on short final to Runway 17 and N30 out in position Runway 17. McCubbin had to tell N47H to enter base for Runway 12.

The instructor also criticized Mr. Stanley's manner of communicating with aircraft which was, from the evidence of record, a frequent criticism (FAA Exhibit No. 24, see also FAA Exhibit Nos. 9, 10, 19, 20, 21, 23, 25 and 26).

TRAINING REPORT OF 4-21-76

The instructor criticized Mr. Stanley for not looking out the window "near [often] enough," difficulty in scheduling departures, difficulty in sequencing traffic and establishing reasonable traffic priorities (FAA Exhibit No. 22).

TRAINING REPORT OF 4-23-76

The instructor indicated that Mr. Stanley got so far behind that the instructor had to take the frequency, Mr. Stanley had difficulty sequencing and was slow. The report did note that Mr. Stanley was doing a good job at the beginning of the training period but once he fell behind he was unable to catch up. (FAA Exhibit No. 10)

May 11, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS
A/SLMR No. 1040

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3615, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to negotiate in good faith during contract negotiations by reopening issues on which agreement had been reached and by unilaterally making changes on the typewritten form of the contract.

The Administrative Law Judge found that the Respondent had not violated Section 19(a)(1) and (6) of the Order. Under all the circumstances, he concluded that the reopening of points that had been previously agreed upon did not reflect an intent to subvert or sabotage negotiations and that the alleged changes in the final typewritten draft of the contract, as compared to the signed-off draft, did not clearly demonstrate bad faith.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed.

A/SLMR No. 1040

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS

Respondent

and

Case No. 22-7526(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3615, AFL-CIO

Complainant

DECISION AND ORDER

On February 3, 1978, Administrative Law Judge Robert J. Feldman issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Respondent filed an answer to the Complainant's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. 1/ The rulings are hereby affirmed. 2/ Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the

1/ Among other things, the Complainant excepted to the Administrative Law Judge's failure, in his Recommended Decision and Order, to refer to the absence of Robert Trachtenberg whose appearance as a witness had been approved by the Regional Administrator pursuant to Section 206.7 of the Assistant Secretary's Regulations. However, it is noted that at the hearing in this matter the Administrative Law Judge took cognizance of Mr. Trachtenberg's failure to appear and stated that he would weigh the evidence consistent with his obligation under Section 206.7(e) of the Regulations where a party fails to comply with a Request for Appearance of Witnesses.

2/ In my view, the Administrative Law Judge improperly received evidence on, and considered, allegations in the complaint which had been previously dismissed by the Regional Administrator, which dismissal had not been appealed. However, in view of my decision herein to dismiss the instant complaint in its entirety, I find that the Administrative Law Judge's action did not constitute prejudicial error. Cf. National Archives and Records Service, A/SLMR No. 965 (1978), and Norfolk Naval Shipyard, 6 A/SLMR 486, A/SLMR No. 708 (1976).

entire record in the subject case, including the exceptions and supporting brief filed by the Complainant and the Respondent's answer to the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 3/

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-7526(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 11, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

In the Matter of :

SOCIAL SECURITY ADMINISTRATION :
BUREAU OF HEARINGS AND APPEALS :
Respondent :

and : Case No. 22-7526(CA)

AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, LOCAL 3615 :
Complainant :

Edwin C. Satter, Esq.
6421 Eppard Street
Falls Church, Virginia
For the Respondent

Albert B. Carrozza, Esq.
Evelyn D. Bethel, President
Local 3615, American Federation
of Government Employees (AFGE)
BHA, P.O. Box 147
Arlington, Virginia 22210
For the Complainant

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is an unfair labor practice proceeding in which a formal hearing of record was held pursuant to Executive Order 11491, as amended (hereinafter referred to as "the Order") and 29 CFR Part 203.

Statement of the Case

The complaint as filed charged Respondent with violations of Sections 19(a)(1), (2) and (6) of the Order. It is alleged that Respondent, its Director, Executive Director, and Chief Negotiator delayed and stalled during contract negotiations,

3/ In agreeing with the Administrative Law Judge's recommendation, I find that the Complainant presented insufficient evidence to prove that such changes as were alleged to have been made by the Respondent in the final typewritten draft of the negotiated agreement were of a substantive nature.

thereby causing Complainant's negotiating team not only to exhaust the allotted 240 hours of official time, but to take extensive annual leave and/or leave without pay in their attempt to reach an agreement on the contract. It is further alleged that Respondent and the above specified officials thereof "have negotiated in bad faith and have continuously negotiated in a manner contrary to the spirit and intent of Executive Order 11491, as amended." The above allegations are followed by a lengthy statement of purported instances and circumstances evidencing the general accusation of bad faith.

Upon motion of the Respondent and after investigation, portions of the complaint were dismissed by the Acting Regional Administrator, whose letter dated January 26, 1977 is incorporated herein by reference. Referring to a number of the specific instances of alleged violations included in the basis of the complaint and finding them unwarranted, the Acting Regional Administrator dismissed the complaint "with respect to the allegation of dilatory and evasive tactics, and failure to attempt a satisfactory resolution of the charge". He further dismissed the 19(a)(2) allegation, since a reasonable basis therefor had not been established. It does not appear that any appeal from the partial dismissal was taken to the Assistant Secretary pursuant to Section 203.8(c) of the Regulations.

In his letter accompanying the Notice of Hearing herein, the Acting Regional Administrator defined the issues raised by the complaint as follows:

Did the Activity engage in bad faith bargaining, thereby violating Sections 19(a)(1) and (6) of the Order, by re-opening points on which agreement had been reached and by unilaterally making changes on the type-written form of the contract?

The proof at the hearing, however, was not focused upon the narrow issues framed above. In accordance with the standard LMSA invitation to all parties to go beyond the stated question and "develop any other evidence which they feel may be relevant to the allegations contained in the complaint", the proof adduced by both sides was directed to the fundamental issue of whether in any aspect of the contract negotiations, Respondent had failed to bargain in good faith. In fact, much of the evidence introduced by Complainant without objection from counsel for the Respondent pertained to the allegation of dilatory and evasive tactics that had been the subject of the prehearing partial dismissal, and a stipulation was entered into by both parties as to

the aggregate amount of annual leave or leave without pay necessarily taken by Complaint's negotiating team by reason of the protracted negotiations. In their post-hearing briefs, counsel do not limit their arguments to the narrow issue of re-opening agreed points and unilateral changes as indications of bad faith. Nor does the Respondent contend that there is any prejudicial variance between the pleading and the proof. Consequently, with due regard to the action taken by the Acting Regional Administrator, the question presented for determination is whether, within the scope of the undismissed allegations of the complaint, the Respondent failed to bargain in good faith.

Findings of Fact

I deem it neither necessary nor appropriate to make factual findings with respect to the dismissed allegations of dilatory and evasive tactics, to wit, allegations of undue delay in beginning negotiations, of insistence on needless clarification of union proposals, of failure to provide counterproposals before the sessions at which they were to be discussed, and of refusal to negotiate "off-the-clock". Suffice it to say that the evidence adduced at the hearing does not show that the Acting Regional Administrator's partial dismissal of the complaint was unwarranted.

Since July, 1975, Complainant has been the exclusive representative of the professional and non-professional employees in the units. The proof discloses the following chronology of events in the course of contract negotiations:

- October 7, 1975: Parties agree to ground rules for collective bargaining.
- Late November, 1975: Union submits contract proposals to Respondent.
- February 19, 1976: Negotiations commence for collective bargaining agreement.
- May 19, 1976: Respondent discontinues check-off of union dues as of June 5th expiration.
- June 1, 1976: Parties commence mediation before Federal Mediation and Conciliation Service.
- July 2, 1976: Union issues unfair labor practice charge against Respondent.

July 20, 1976: Five proposed articles are sub-
submitted to the Federal Service
Impasses Panel.

October 4, 1976: Union files the unfair labor
practice complaint herein.

December 2, 1976: Disputed articles are resolved by
the Impasses Panel.

December 10, 1976: Collective bargaining agreement
is signed.

January 25, 1977: Collective bargaining agreement.
is effective.

From time to time during the course of negotiations, each of the parties re-opened discussions on points that had been previously agreed upon. Although some minor changes resulted, neither party unilaterally reneged on its agreement with respect to a material issue.

In two instances, Respondent's final type-written version of the agreement contained minor changes in language not previously agreed to (A third change in the word-order of a sentence was purely grammatical and of no significance). In the Article on Position Description, an agreed substitution of "grievance" for "appeal" was omitted. In the Article on Equal Employment Opportunity, an agreed substitution of "recommended" for "suggested" was omitted.

Respondent's Chief Negotiator was authorized to perform his duties in that capacity. He was empowered to voice the views of Respondent, to take positions in its behalf, and to commit it to binding obligations. Though he conferred frequently with certain officials, he was not replaced or superseded during the course of negotiations nor relieved of any of his authority.

By reason of the extended negotiations, members of the union negotiating team had exhausted the aggregate leave time allotted to them (240 hours) long before negotiations were completed. They were thus obliged to use a total of 150 hours of annual leave or leave without pay in order to finish the performance of their assigned duties. Respondent has declined to restore such leave or to make any adjustment for their lost time. Members of the Respondent's negotiating team were on official time throughout the negotiations and none of them has been obliged to take any annual leave or leave without pay in order to discharge his duties.

In the course of mediation, Respondent's chief negotiator agreed to three articles as a "package" and declined to accept Union's agreement to one of those articles without the other two.

Conclusions of Law

Reference to the chronology of events might provide a reasonable basis for viewing the issuance of the unfair labor practice charge and the filing of the complaint herein as premature. It might even be argued that the charge of failing to negotiate in good faith was rendered moot by the subsequent negotiation and ultimate execution of the collective bargaining agreement. Certainly, it cannot be gainsaid that when negotiations ripened into mutual agreement, there is strong evidence that despite any earlier hostility or distrust, both parties eventually bargained in good faith. Determination of the issues herein, however, need not rest solely upon the inference drawn from final agreement.

Good faith is a subjective concept. It is an attitude, a state of mind, the existence of which is not perceived by the senses nor established by the laws of physics or mathematics. Barring a voluntary confession or an inadvertent admission, its absence can only be demonstrated by circumstantial evidence. The burden of proving failure to negotiate in good faith is a heavy one, and conduct that may be fairly characterized as "hard bargaining" does not per se sustain that burden. Department of the Air Force, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 623. It is not enough to show, for instance, that an opposing negotiator is argumentative and captious, or that an adverse witness is uncooperative and largely amnesic except for a convenient area of total recall pertaining to defamatory comments on the character of a local union officer purportedly made by a Federal mediator. To demonstrate lack of good faith, it is necessary to show a pattern of dealing characterized to some extent by an element of duplicity or pretense, from which it might be reasonably inferred that the accused party intended to avoid or abort or preclude genuine bargaining.

The facts found above do not, in my view, support any such conclusion. The re-opening of points that had been previously agreed upon is not an extraordinary happening in the give-and-take of contract negotiations. While it impedes progress, and if carried to extremes, can be obstructive, the character and extent of the re-opening shown here does not reflect any intent to subvert or sabotage negotiations. Similarly, the minor discrepancies in two articles of the final version of the contract as compared with the signed-off draft do not even clearly establish any intentional unilateral change. For all that appears in the record, the addition, deletion or substitution of words may well have been inadvertent, and in any event, do not demonstrate bad faith.

The notice of termination of the dues check-off agreement in accordance with its terms and the refusal to further extend it were not in violation of any provisions of the Order and did not constitute an attempt to avoid bargaining. See U.S. Department of Commerce, U.S. Merchant Marine Academy, Kings Point, New York, A/SLMR No. 620. That a chief negotiator confers regularly with a higher echelon executive or with a policy committee is not proof of lack of authority. The tactic of proposing agreement to a "package" of several items may not be desirable under all circumstances, but might be effective at times in concluding an agreement and does not of itself give rise to a necessary inference of lack of good faith. In short, Complainant has not sustained its burden of proof as to the alleged failure on the part of Respondent to negotiate in good faith.

It must be observed that this proceeding was not brought for the purpose of enforcing provisions of the Order in vacuo. Complainant frankly sought to use the unfair labor practice procedure as a vehicle for obtaining some compensation for the "lost time" in excess of the hours allotted for negotiation under the provisions of Section 20. Although the proof falls short of demonstrating a purposeful design on the part of Respondent to compel the Union negotiating team to take annual leave or leave without pay, Respondent should avoid taking advantage of the inequity inherent in disparate amounts of official time for negotiation available under the circumstances to the respective parties. In the context of maintaining constructive and cooperative relationships between labor organizations and management officials, a basic concept of fair dealing ought to induce both parties to resolve the controversy without the necessity of prolonged, costly and heated adjudication proceedings under the unfair labor practice provisions of the Order. It is not inappropriate in that regard to recall a pertinent statement of the Federal Labor Relations Council:

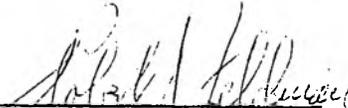
Moreover, in addition to our conclusion that the conduct of the activity in the circumstances herein did not constitute a violation of the Order, it is also the opinion of the Council that litigation of this case is itself inconsistent with the purposes of the Order. ... In the opinion of the Council, litigation of this sort does not effectuate the long-term establishment of collective bargaining in the Federal program. ... Thus, it does not serve the purposes of the Order when the parties use the sanctions provided therein as the first, and not the last, resort for the settlement of their disputes.

Vandenberg Air Force Base, 4392d Aerospace Group, Vandenberg Air Force Base, California, FLRC No. 74A-77.

Upon the entire record, I find no violation of Section 19(a) (1) or (6) of the Order.

RECOMMENDATION

In view of the foregoing, I recommend that the complaint be dismissed in its entirety.


ROBERT J. FELDMAN
 Administrative Law Judge

Dated: February 3, 1978
 Washington, D.C.

RJF/mml

May 12, 1978

A/SLMR No. 1041

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES COURT
OF MILITARY APPEALS,
WASHINGTON, D. C.
A/SLMR No. 1041

UNITED STATES COURT
OF MILITARY APPEALS,
WASHINGTON, D. C.

Activity

and

Case No. 22-07952(RO)

This case involved a representation petition filed by the American Federation of Government Employees, Local 2, AFL-CIO, (AFGE) seeking to represent a unit of all General Schedule employees of the United States Court of Military Appeals, Washington, D. C. The sole issue presented at the hearing was whether the Activity is an "agency" within the meaning of Section 2(a), and therefore subject to the jurisdiction of the Order. The Activity contended that it is an independent tribunal established by the Congress to oversee the military justice system and that it is independent of the Department of Defense, the executive department to which it conceded it is administratively attached. Because of the nature of the statute under which it was created, the Activity asserted that it is part of the legislative branch of the Federal Government.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Ralph R. Smith. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Assistant Secretary indicated that, for the purposes of this decision, it was not considered necessary to decide whether the Activity is part of the Department of Defense. Rather, the determination of jurisdiction was based solely on the question whether the Activity is an agency within the executive branch and thus subject to the jurisdiction of the Order. The Assistant Secretary noted that the Activity has been viewed as part of the executive branch by the courts, as it is part of the specialized military justice system, and it is well established that the entire military establishment is subject to the control of the civilian Commander-in-Chief and the civilian department heads under him.

Upon the entire record in this case, including briefs filed by both parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, Local 2, AFL-CIO, herein called AFGE, seeks an election in a unit of all General Schedule employees of the United States Court of Military Appeals, Washington, D. C., excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, temporary employees with no reasonable expectation of continuing employment, and supervisors as defined in the Order.

At the hearing, the parties stipulated that the unit sought by the AFGE is appropriate. 1/ Therefore, the hearing dealt solely with the issue of

Under all the circumstances, the Assistant Secretary concluded that the Activity is an "agency" within the meaning of Section 2(a) of the Executive Order and that the Order applies to its employees. In his judgment, the finding that the Activity is an "agency" within the meaning of Section 2(a) of the Order for purposes of collective bargaining in no way conflicts with the Congressional concern that the Activity be independent in its adjudicatory role.

Accordingly, the Assistant Secretary directed that an election be conducted in the unit found appropriate.

1/ The Hearing Officer stated on the record that he had been authorized by the Regional Administrator to enter the latter's approval of the unit, as stipulated, on the record.

whether the Activity is an "agency" within the meaning of Section 2(a), 2/ and therefore subject to the jurisdiction of the Order. 3/ In this regard, the Activity contends that it is an independent tribunal established by the Congress to oversee the military justice system, and that it is independent of the Department of Defense, the executive department to which it concedes it is administratively attached. Because of the nature of the statute under which it was created, the Activity asserts that it is part of the legislative branch of the Federal Government. On the other hand, the AFGE contends that the Activity is subject to the jurisdiction of the Order as it is part of neither the judicial nor the legislative branch of the Federal Government, and that there is substantive evidence that the Activity is in the executive branch. Moreover, it contends that the Activity's role in the court-martial system demonstrates that it is part of the executive branch because the court-martial function has always been recognized as a role of the executive branch.

The Activity was established under the Uniform Code of Military Justice 4/ pursuant to Congress' Article I constitutional authority 5/ "to make rules for the Government and Regulation of the Land and Naval Forces," and serves as the final appellate tribunal within the court-martial system. As an Article I court, the Activity's judges are not covered by Article III constitutional protections which apply to regular Federal judges, who hold their offices during good behavior, and whose compensation may not be diminished during their term. Thus, the Activity's three civilian judges are appointed for 15 year terms by the President with the advice and consent of the Senate, and they may be removed by the President, upon notice and hearing, for neglect of duty and malfeasance in office or for mental or physical disability. Further, certain sentences of the Activity can be imposed only with the approval of the President or the civilian department heads under him, a limitation to which judges of Article III courts are not subject.

The statute which established the Activity specifies that it is to be located in the Department of Defense "for administrative purposes only." In this connection, its appropriation is an item in the Defense Department's

2/ Section 2(a) defines an "agency" as "an executive department, a Government corporation, and an independent establishment as defined in section 104 of title 5, United States Code, except the General Accounting Office."

3/ It is noted that Section 3(a) of the Order states that the "Order applies to all employees and agencies in the executive branch," with certain exceptions not relevant here.

4/ Uniform Code of Military Justice, 10 U.S.C. 867 (1968), § 67(a)(1).

5/ Generally, Federal courts are established pursuant to Article III of the Constitution, which provides for the establishment of the judicial branch of the Federal Government. The United States Tax Court is another example of an "Article I" court.

budget, and it receives personnel, training and payroll services from the Department. Further, the Activity applies the regulations of the Federal Personnel System to its employees, who participate in the Civil Service Retirement System. The legislative history of the amended statute creating the Activity indicates Congressional concern that the Activity not be viewed as "an instrumentality of the executive branch or...an administrative agency within the Department of Defense." S. Rep. No. 806, 90th Congress, 1st Sess. (1967), 113 Cong. Rec. 33910-11.

For the purposes of this decision, it was not considered necessary to decide whether the Activity is part of the Department of Defense. Rather, the determination of jurisdiction herein is based solely on the question whether the Activity is an agency within the executive branch and, thus, subject to the jurisdiction of the Order. In this regard, it should be noted that the United States Supreme Court (which reviews decisions of the Activity only regarding constitutional issues) has tended to treat the Activity as part of the executive branch, even subsequent to the amendment of the statute whose legislative history is quoted above. Thus, in 1972, the Supreme Court noted that, "While we have stated in the past that special deference is due the military decision making process..., this is so neither because of comity nor the sanctity of the Executive Branch..." Paris v. Davidson, 405 U.S. 34, 51 (1972) (Douglas, J., concurring). The Supreme Court has noted also that "a court-martial is not yet an independent system of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved." 6/

As an element of this specialized military justice system, the Activity is subject to the control of the executive branch, it being well established that the entire military establishment is subject to the control of the civilian Commander-in-Chief and the civilian department heads under him. 7/ In my opinion, the Congressional concern, indicated in the legislative history of the amended statute by which the Activity was created, that the Activity not be viewed "as an instrumentality of the executive branch or...an administrative agency within the Department of Defense," must be considered within this context. Thus, it is clear that Congress sought to reinforce its statutory intent that the Activity is a court, albeit an Article I court, so as to protect its judicial independence within the scope of the Court's authority pursuant to the Uniform Code of Military Justice. 8/

Under the foregoing circumstances, I conclude that the Activity is an "agency" within Section 2(a) of the Executive Order and that the Order applies to its employees. As noted above, the record indicates that the Activity is an integral part of the military's court-martial system which is subject to

6/ O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

7/ See Parker v. Levy, 417 U.S. 733, 751 (1974).

8/ H.R. Rep. No. 1480, 90th Cong., 2nd Sess. 2, reprinted in U.S. Code Cong. and Ad. News 2053.

May 12, 1978

the authority of the executive branch. In my judgment, a finding that the Activity is an "agency" within the meaning of Section 2(a) of the Order for purposes of collective bargaining in no way conflicts with the Congressional concern that the Activity be independent in its adjudicatory role.

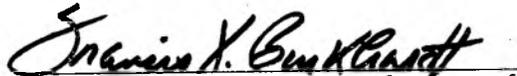
Having found that the U.S. Court of Military Appeals comes within the definition of "agency" set forth in Section 2(a) of the Order, I shall order an election among the following employees, who I find constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All General Schedule employees of the United States Court of Military Appeals, Washington, D. C., excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, temporary employees with no reasonable expectation of continuing employment, and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 2, AFL-CIO.

Dated, Washington, D. C.
May 12, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE
AND IRS CHICAGO DISTRICT
A/SLMR No. 1042

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and NTEU Chapter 10 (Complainants) alleging that the Respondents violated Section 19(a)(1) and (2) of the Order when they required the Complainants' representative, Gerald Jambrosek, who was employed as an attorney by the Respondent Activity, to fill out a request for outside employment form concerning his designation as "counsel." The Complainants contended that such requirement represented an implied threat and, therefore, interference with the Complainants' internal affairs, because the form of the request for permission implied that the Respondents could have refused permission. The Complainants further contended that, under the circumstances, as Jambrosek had received prior approval for his designation, the requirement constituted improper intimidation.

The Administrative Law Judge concluded that the Section 19(a)(2) allegation should be dismissed noting that there was no evidence of disparate treatment. He further concluded that the Section 19(a)(1) allegation should be dismissed as the Complainants had not sustained their burden of proof in showing improper interference with Jambrosek's rights under the Order. The Administrative Law Judge noted, in this regard, that Section 1(b) of the Order limits the right to participation in the management of a labor organization when such activity would result in a conflict or apparent conflict of interest. He noted further that the Respondents' regulations restricted outside employment, and that such regulations are particularly stringent with respect to attorneys. Therefore, he found that the Respondents had a right to inquire into Jambrosek's outside employment. Moreover, he noted that the Respondents subsequently approved Jambrosek's request.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation and ordered that the complaint be dismissed.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE
AND IRS CHICAGO DISTRICT

Respondents

and

Case No. 50-15447(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 10

Complainants

DECISION AND ORDER

On February 7, 1978, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainants filed exceptions with respect to the Administrative Law Judge's recommended dismissal of the Section 19(a)(1) allegation and the Respondents filed an answering brief to the Complainants' exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the entire record in the subject case, including the exceptions filed by the Complainants and the answering brief to the exceptions filed by the Respondents, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-15447(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 12, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

In the Matter of

DEPARTMENT OF THE TREASURY :
INTERNAL REVENUE SERVICE and :
IRS CHICAGO DISTRICT :
Respondents :

and

Case No. 50-15447(CA)

NATIONAL TREASURY EMPLOYEES :
UNION and NTEU CHAPTER 10 :
Complainants :

Appearances:

William E. Persina, Esq.
Associate General Counsel
National Treasury Employees Union
1730 K Street, N.W., Suite 1101
Washington, D.C. 20006
For the Complainants

Thomas J. O'Rourke, Esq.
Staff Assistant
Office of Regional Counsel
Internal Revenue Service
22nd Floor, South
219 South Dearborn Street
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For the Respondents

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated April 20, 1977 and filed April 22, 1977 alleging a violation of Sections 19(a)(1) and (2) of the Executive Order. The violation was alleged to consist of requiring an employee of the Chicago District, employed

as an attorney, who was also a paid employee of Chapter 10, serving as an officer, steward, and "local counsel" to Chapter 10, to file a Form 7995 "Outside Employment or Business Request", with the Respondents. This was alleged to constitute an interference with the internal affairs of Chapter 10, to impose a threat that such request could be denied and the employee directed to discontinue such outside employment, and to have a "chilling effect" on the employee assisting the union. An amended complaint, without substantial change, was filed May 23, 1977. The Respondents filed a response to the complaint contending that it had merely sought to ascertain whether the employee's function as union counsel was incompatible with his duties as an attorney for the Respondents and thus did not constitute a violation of the Executive Order.

On July 7, 1977 the Regional Administrator issued a Notice of Hearing to be held September 15, 1977 in Chicago, Illinois. A hearing was held on that day in that City. Both parties were represented by counsel. They presented witnesses who were examined and cross-examined, and offered exhibits which were received in evidence. Both parties made closing arguments and filed briefs.

Facts

Chapter 10 of the National Treasury Employees Union at all relevant times was the certified exclusive representative of a unit of employees in the Chicago District of the Internal Revenue Service and has been such representative for many years. Mr. Gerald Jambrosek also at all relevant times has been an Estate and Gift Tax Attorney (GS-13) in the Chicago District. He is a member of the unit represented by Chapter 10.

Mr. Jambrosek helped organize Chapter 10. Later he was given the title "counsel" to Chapter 10. Then he became a union steward while retaining his title as counsel, and then became also a vice president of the Chapter, having all three titles at the same time. For a time his work for the union was not compensated monetarily.

The Union had one or two paid staff members. It decided to increase the number of its paid staff members, and Jambrosek applied for one of the paid positions. He was hired shortly before or after January 1, 1975. He was not hired for any particular position, but simply was compensated instead of being uncompensated for his union work. No portion of his salary was allocated to his duties as counsel, steward, or vice-president. His duties and work for the union remained the same as they were

before he was compensated but increased somewhat in volume. There were about a half dozen paid staff employees of Chapter 10 who were also IRS employees. Jambrosek was the only one who had the title "counsel".

The Internal Revenue Service has a Handbook of Employee Responsibilities and Conduct prescribing rules of conduct for its employees, known as the Rules of Conduct. Section 222.5 provides that except as provided in later sections, no employee may engage in outside employment, with or without compensation, without first obtaining written permission from the appropriate approving officials. The IRS had a prescribed form, "Outside Employment or Business Request", Form 7995, for requesting such permission. Section 222.5 provided also:

"... approval will not be granted where the outside employment or business activity ... might reasonably result in a conflict of interest, or an apparent conflict of interest, with official duties and responsibilities."

Section 235 of the Rules of Conduct sets forth a number of general principles. Among them is the principle that an outside activity that is permissible for the occupant of one position may not be permissible for the occupant of another position of a different kind or level. It continues that therefore it must be determined that (Section 235(2)(a)):

"The outside activity would not place the employee in a situation where there may be a possible conflict, or the appearance of a conflict, between his private interest and his official duties and responsibilities."

Section 236.2(2) set forth as an example of Activities Which Do Not Require Approval, the following:

"Membership and services (including holding of office) in Federal employee organizations and recognized Federal employee unions. However, occupants of certain positions are prohibited from holding office in recognized employee organizations. If there is any doubt as to the propriety of accepting an office, the matter should be promptly referred to the servicing Personnel Office for decision."

Section 237.2 of the Handbook contains numerous Specific Prohibitions and Restrictions. The very first specific prohibition, in Section 237.2(1)(a), provides:

"No outside legal employment or practice is generally permitted. However, upon written application, exceptions to this proscription may be approved for qualified employees to represent or advise the indigent, subject to the following conditions: ...

2. The employee must not receive any compensation of his services. ..."

Jambrosek's Group Manager was Jordan Berger who was also a close personal friend of Jambrosek. Shortly after Jambrosek became a paid staff member of Chapter 10, Berger came to Jambrosek, in February 1975, with a grievance that had been presented by the Union on which the Union had designated Jambrosek as Union representative to receive a copy of the reply, referring to him as "counsel". Berger suggested that Jambrosek might have some problems with his designation as counsel because of the IRS Rules of Conduct, and Jambrosek might be required to obtain permission to be designated as counsel.

Jambrosek considered Berger a good friend, and wanted to relieve his friend of any anxiety he might feel over the matter. Jambrosek suggested that he would submit a Form 7995, Outside Employment or Business Request, to the District Director and inquire whether there was any problem about his being designated counsel of the union. On February 12, 1975 Jambrosek wrote such a memorandum to the District Director, Charles Miriani. 1/ On February 20, 1975 District Director Miriani replied that there was no problem with the designation of Jambrosek as Counsel for NTEU Chapter 10. 2/

The District Director's response was reviewed and approved by John Swan, the Personnel Officer of the Respondents. At the time Swan knew Jambrosek's duties as counsel only very generally.

About a year later (about the beginning of 1976), Swan decided to review semi-annually requests that had been granted for outside employment. In April 1976 he reviewed the prior approval of Jambrosek's employment by the Complainant as Counsel, and was troubled by the possibility of a potential conflict or apparent conflict of interest and the possibility of a violation of the Rules of Conduct prohibiting outside legal employment

1/ Exh. J-2.
2/ Exh. J-3.

except uncompensated representation of indigents (with certain limitations). He referred the question to the IRS Regional Office which referred it to the Chief Counsel of IRS. The Assistant Director of the General Legal Services Division in the Chief Counsel's office responded to the Director of the Personnel Division in the national office that more information was necessary to determine whether there was a violation of the Rules of Conduct or the conflict of interest statutes; specifically, was Jambrosek being compensated for acting as Union Counsel, did he perform services other than those of a steward, and if he did what were those other services? 3/ This response was forwarded to the Regional Office which forwarded it to Swan.

Swan sought the requested information from the President of Chapter 10 and from Jambrosek and received incomplete responses. He sent the incomplete information to the Regional and national offices. The Regional Office then directed Swan to obtain a Form 7995, an Outside Employment or Business Request. Swan asked Jambrosek for a Form 7995. Jambrosek was indignant and pointed out that such a request should come from his supervisor. His supervisor, Sharon Clark who had succeeded to Berger's position, asked Jambrosek to submit a Form 7995 and Jambrosek replied that he was not required to do so. Clark then formally instructed Jambrosek to do so, and he complied on February 11, 1977. 4/ The Form, which set forth Jambrosek's duties as counsel, was forwarded to the Regional and national offices and approved. Jambrosek's Group Manager so notified him on July 7, 1977. 5/ In the meantime, in April 1977, the complaint in this case had been filed.

None of the other compensated staff members of Chapter 10 who were employees of the Respondent were required to submit a Form 7995. None of them were designated as counsel.

Positions of the Parties

The Complainant expressly does not contend that the Respondents are without right to make inquiries of a union representative concerning potential conflicts of interest. 6/ Its position basically is that the Respondents' insistence on the submission of a Form 7995, an Outside Employment or Business Request, with respect to Jambrosek's employment by the Complainant, implies a right to deny the Request at any time and thus has or may

3/ Exh. R-3.
4/ Exh. J-8, J-9.
5/ Exh. J-10.
6/ Brief, p. 6; Tr. 165-66, 171.

have a chilling effect on his activities on behalf of the Complainant in violation of his right assured by Section 1(a) of the Executive Order "freely and without fear of penalty or reprisal" to assist a labor organization and therefore violates Section 19(a)(1) of the Executive Order. It contends also that since Jambrosek was the only paid staff member required to file a Form 7995 it was discriminatory in violation of Section 19(a)(2).

The Respondents contend that they simply were exercising their right to obtain information necessary to determine whether Jambrosek's activities as Counsel for Chapter 10 placed him in a conflict or apparent conflict of interest situation or was otherwise illegal or in violation of the IRS Rules of Conduct for its employees.

Discussion and Conclusions

The Respondents' inquiries and insistence on the furnishing of information all pertained to Jambrosek's designation and activities as Union Counsel. None of the other paid staff members were so designated. Assuming the other elements of a 19(a)(2) violation were present, there was no discrimination; no one else similarly situated was treated differently because there was no one else similarly situated. There was thus no violation of Section 19(a)(2).

Nor was there a violation of Section 19(a)(1).

Section 1(b) of the Executive Order limits the right to participate in the management of a labor organization or to act as the representative of a labor organization when to do so would result in a conflict or apparent conflict of interest or otherwise be incompatible with the official duties of the employee. In addition the IRS has long had regulations restricting permissible outside employment; such restrictions were more stringent with respect to attorneys than with other employees. The Respondents thus had the right to inquire into Jambrosek's activities as Union Counsel.

The Complainant does not challenge the Respondents' right to inquire. It challenges only their right to insist on the inquiry being in the form of a submission of a Form 7995. It bases such challenge on such form being a Request which, it says, implies that the Request could be denied or disapproved at any time for any reason, thus constituting a Damoclean sword inhibiting or tending to inhibit Jambrosek's activities as Union Counsel.

But the Respondents at no time took the position or implied that it could rescind its approval or refuse to give its approval at any time for any reason. It took the position

that it could do so if the outside employment contravened its Rules of Conduct. In this case it gave its approval. If it had denied approval for any reason not consonant with Executive Order 11491 as amended, perhaps an unfair labor practice proceeding would lie. But that is not this case.

The Complainant argues that to the extent the IRS Rules of Conduct prohibit conduct authorized by the Executive Order, they are superseded by the Executive Order. Perhaps so, and perhaps IRS would agree with such contention. ^{7/} But it is conduct, not thoughts, that may constitute a violation of Section 19(a) of the Executive Order. Our present function is to decide concrete cases, not hypothetical questions.

The Complainant's contention that it is improper to require an employee to request permission to engage in conduct authorized by the Executive Order is without substance. Under certain conditions acting as counsel for the Complainant could be improper, and the Complainant concedes that the Respondents could properly inquire for information about it. It objects that the form of the inquiry is by Form 7995, denominated as a "request", a form in use to obtain the information since long before Executive Order 11491. Such contention would glorify form over substance, a practice not to be encouraged.

RECOMMENDATION

The complaint should be dismissed.


MILTON KRAMER
Administrative Law Judge

Dated: February 7, 1978
Washington, D.C.

^{7/} It is observed that if Jambrosek's activities as Union Counsel constituted "legal employment or practice" it would appear to contravene Section 237.2 of the Rules of Conduct, yet it was approved.

May 12, 1978

A/SLMR No. 1043

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE AIR FORCE,
HQ 2750th AIR BASE WING,
WRIGHT-PATTERSON AIR FORCE BASE, OHIO
A/SLMR No. 1043

This case involved an unfair labor practice complaint filed by Local 1138, American Federation of Government Employees, AFL-CIO (Complainant) alleging, in essence, that the Respondent violated Section 19(a)(1) and (2) of the Order when a supervisor told a union official that he had not been promoted because he "hassled" management as a union official.

At the hearing on the Section 19(a)(1) allegation, the Complainant declined to present evidence in support of its allegation, asserting that it was not possible to get a fair and impartial hearing because of the constraints imposed by the Regulations of the Assistant Secretary. The Complainant's request for postponement of the hearing on the basis that it was not possible to get a fair hearing was denied.

In view of the Complainant's refusal to proceed, the Administrative Law Judge closed the hearing. Noting that the Complainant was given the opportunity to call witnesses but refused to do so, and that the one exhibit received failed to establish the allegation of the complaint, the Administrative Law Judge recommended that the complaint be dismissed for failure of prosecution and/or for failure to prove the allegation of the complaint by a preponderance of the evidence.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions, and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
HQ 2750th AIR BASE WING,
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

Respondent

and

Case No. 53-09517(CA)

LOCAL 1138, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

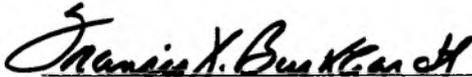
On February 17, 1978, Administrative Law Judge William B. Devaney issued his Recommended Decision in the above-entitled proceeding, recommending that the complaint be dismissed in its entirety based upon the Complainant's failure of prosecution and/or its failure to prove the allegation of the complaint by a preponderance of the evidence. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 53-09517(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 12, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



In the Matter of :

DEPARTMENT OF THE AIR FORCE :
HQ 2750th AIR BASE WING :
WRIGHT-PATTERSON AIR FORCE :
BASE, OHIO :

Respondent :

Case No. 53-09517(CA)

and :

LOCAL 1138, AMERICAN FEDERATION :
OF GOVERNMENT EMPLOYEES, AFL-CIO :
Complainant :

Mr. Constantine Dell'Aria
National Representative
American Federation of Government
Employees, AFL-CIO
99 Marco Lane
Centerville, Ohio 45459
For the Complainant

Fred Hustad, Esquire
Attorney - Advisor
Office of the Staff Judge Advocate
HQ 2750th Air Base Wing
Wright-Patterson Air Force Base, Ohio 45433
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

This is a proceeding under Executive Order 11491, as amended (hereinafter also referred to as the "Order") which was instituted by a charge filed on, or about, June 8, 1976, a complaint, undated, which was filed on January 3, 1977 (Asst. Sec. Exh. 1) and a First Amended Complaint, also undated, filed on January 13, 1977 (Asst. Sec. Exh. 1-A). Both the Complaint and First Amended

Complaint alleged a violation of Sections 19(a)(1) and (2) of the Order with respect to John W. Swartz. On March 30, 1977, the Regional Administrator granted Respondent's Motion to Dismiss the 19(a)(2) allegation set forth in the Complaint and stated his intention to issue a Notice of Hearing on the 19(a)(1) allegation of the Complaint (Asst. Sec. Exh. 2). Complainant appealed the Regional Administrator's dismissal of the 19(a)(2) allegation and on October 20, 1977, the Assistant Secretary denied Complainant's request for review and returned the case to the Regional Administrator who was directed, absent settlement, to issue Notice of Hearing on the 19(a)(1) allegation of the Complaint (Asst. Sec. Exh. 3).

The Regional Administrator issued a Notice of Hearing on the 19(a)(1) allegation on October 31, 1977, for a hearing to be held on December 15, 1977, which was subsequently rescheduled for February 2, 1978, pursuant to which a hearing was duly held before the undersigned on February 2, 1978, at Wright-Patterson Air Force Base, Ohio. All parties were represented and were afforded full opportunity to be heard; however, as more fully stated herein after, Complainant refused to present any evidence or testimony beyond calling the complaining party, Mr. John W. Swartz, who, after being sworn, stated that he did not want to continue with the hearing because, "The Labor Department rules I feel very strongly do not provide or are so constraining in scope of this hearing that they do not allow me to get a fair and impartial hearing." (Tr. 46); whereas, in fact, the undersigned had made clear that in addition to the three witnesses the Regional Administrator had directed Respondent to make available at the hearing, and who were present in the Courtroom or immediately available on call to testify, the appearance of Messrs. Heath, Cox and Abraham would also be ordered if the testimony of the other witnesses indicated any materiality of their testimony, that if it appeared from the testimony and evidence that the testimony of Messrs. Thompson and Parker, neither of whom is now stationed at Wright-Patterson Air Force Base, were material, a request for post-hearing depositions or interrogatories would be considered, and that if the testimony demonstrated that the testimony of other witnesses whom it had been determined, on the basis of Mr. Dell' Aria's representations at the hearing, their testimony was not material or relevant, were, contrary to this preliminary determination, shown to be material and relevant a request for their appearance would also be entertained. Nevertheless, although given every opportunity to present evidence and testimony and although repeatedly encouraged to do so, Complainant refused to proceed. Respondent renew its Motion to Dismiss, *inter alia*, on untimeliness of the Complaint, deficiency of the Complaint, etc.; however, under

the circumstances, it is unnecessary to consider any of Respondent's contentions set forth in its Motion to Dismiss and, accordingly, Respondent's Motion to Dismiss has not been and will not be further considered.

Findings and Discussion

In his opening statement, Mr. Dell' Aria stated:

"We are entereng a formal protest into the record that the regulation prescribed by the Labor Department is unconstitutional on grounds that it does not afford the appellat a fair and equitable hearing. One basis is that we are not permitted to call witnesses whose testimony is germane to the issue."
(Tr. 23)

At this point the undersigned interrupted Mr. Dell' Aria and informed him, in part, that he (Mr. Dell' Aria) was "... making an allegation that I considered scurrilous to say the least. ... No one has prohibited you from calling anybody. If there is any question about it, I want to make it clear you have a right to call anybody as a witness that you please and if somebody isn't here and it is necessary and their testimony is material, and you can convince me that their testimony is material, I will certainly give you leave to take post-hearing depositions. ..." (Tr. 23).

Mr. Dell' Aria was advised that subpoenas would be supplied upon request; but Complainant was not interested either in subpoenas or in witnesses appearing voluntarily. Rather, Complainant asserted that it was entitled to have all 13 of the witnesses for whom it submitted a request for appearance of witnesses to the Assistant Regional Administrator but the Assistant Regional Administrator had granted the request for only three, as he had found that the relevance and materiality of the testimony of the other 10 witnesses requested to the issues to be litigated had not been demonstrated. Complainant asserted that the requirement that it make any disclosure to the Department of Labor of the testimony of its witnesses was improper. The undersigned again informed Complainant that requests for the appearance of witnesses pursuant to § 206.7 of the Regulations applied only to employee witnesses on official time, that any person could be called as a witness who appeared voluntarily, and/or that subpoenas would be provided upon request; but that an agency would be required to permit an employee witness to participate on official time only if it appeared that the testimony appeared to be necessary and material.

The undersigned further advised Complainant that, pursuant to Section 203.16 of the Regulations, the Administrative Law Judge has authority to grant requests for appearance of witnesses if it appears, on the basis of testimony and evidence at the hearing, that the testimony of additional witnesses is necessary, material and relevant. Complainant's request for witnesses, on official time, was further reviewed. On the basis of Complainant's representations, the undersigned informed the parties that:

"... there is a probability that Mr. Heath, Mr. Cox, perhaps Mr. Abraham [all of whom were still stationed at Wright-Patterson] would have testimony that is material and if this seems to be borne out as we take the testimony of the other witnesses, it certainly is my intention and I will advise both parties ... that I will order the production of Heath, Cox and Abraham." (Tr. 37)

Mr. Raymond C. Thompson is now stationed in Saudi Arabia. Complainant offered as its Exhibit 3 a statement by Mr. Thompson which was received without objection (Tr. 19); ^{1/} nevertheless, Complainant insisted that, notwithstanding that it had offered Mr. Thompson's statement, which was received in evidence without objection, Mr. Thompson's statement was not "satisfactory". Mr. E. Maslar is now stationed at Warner Robbins Air Force Base, Lincoln, Georgia, and Mr. Johnny Parker is now in Battle Creek, Michigan. It was represented by Mr. Dell' Aria that Mr. Parker had been present at a meeting which appeared to be the focal point of the allegations involved in this proceeding and as to Mr. Parker, I stated;

"... if Mr. Parker was present at that meeting and if it appears that his testimony is necessary we will certainly make arrangements to take his testimony in some manner by post-hearing deposition, if need be." (Tr. 38)

^{1/} Complainant's Exhibits 1, 2, 4 and 5 were rejected for the reason that these proffered Exhibits concerned purported statements by witnesses who were present to testify, or purported summaries of investigations, and Respondent had objected, *inter alia*, because the statements had not been made under oath or subject to cross-examination and the very purpose of the hearing was to determine, on the basis of record herein the allegations of the Complaint. Complainant was fully advised that any witness could be cross-examined on the basis of any prior inconsistent statement.

Although I stated that it appeared doubtful from the representations made that Mr. Maslar's testimony would be material and without knowing what Complainant's justification for Mr. Thompson's testimony would be, I did not rule out the taking of the testimony of either, or both, if it should appear from the testimony of witnesses present that their testimony was material and relevant. On the basis of the representations made by Mr. Dell' Aria, I stated that it was obvious to me that the testimony of Wenger, Miller, Mathai and Krause would not be material; however, it was made clear that, if the testimony showed that other witnesses were necessary, Complainant could renew its request for the appearance of additional witnesses.

Complainant called Mr. Swartz who, after being sworn, stated, as set forth above, that he did not want to continue with the hearing. I again informed Mr. Dell' Aria and Mr. Swartz, inter alia, that:

"You are free to call witnesses for Mr. Swartz who will testify to facts to show that unfair labor practice has or has not occurred. You have already been given leave by the Regional Administrator to have three witnesses that you requested to be present. I have told you that if the testimony of the witnesses indicate the materiality of their testimony that I will order the appearance of Messrs. Heath, Cox and Abraham. That I will, further, keep an open mind on the testimony of Thompson and Parker, and even as to the witnesses that I have indicated I do not feel to be material, if it is shown on the basis of the record that that preliminary ruling is incorrect, it is certainly subject to reversal, so I want you to understand that, Mr. Dell' Aria, and you Mr. Swartz, that any allegation you are being denied [by] any procedure of the Department of Labor a fair and complete opportunity to develop your case is totally without basis.

"Now if you want to proceed on that basis, I want the record to clearly show that there have been no limitations on your presenting the evidence and testimony in support of the unfair labor practice.

"If the Complainant, Mr. Swartz doesn't wish to proceed, and if the Union doesn't wish to proceed, it will have to be their decision.

You have every opportunity to present whatever you wish to be presented and it will be carefully considered. I don't know what the evidence or testimony will show. I make no representation that -- have any idea what the evidence will show in this case, but you certainly have the right and the opportunity to present whatever you wish." (Tr. 47-48)

Mr. Dell' Aria's request for postponement of the hearing, because Complainant contended "... the law itself, and the rules and regulations of the government in this hearing" prevent a fair hearing, was denied. Mr. Dell' Aria stated:

"... with the permission not only of Mr. Swartz but as a Union representative of the American Federation of Government Employees, we will not continue this hearing ..." (Tr. 48)

Despite further opportunity and invitation to proceed (Tr. 49-51, 51-52, 53), Complainant refused to proceed and, accordingly, the hearing was closed (Tr. 54).

Section 203.15 of the Regulations provides that:

"A complainant in asserting a violation of the order shall have the burden of proving the allegations of the complaint by a preponderance of the evidence."

Complainant, although given every opportunity to call witnesses and to present evidence and testimony at the hearing, refused to present any evidence or testimony, beyond the offer of five exhibits, four of which were rejected and one, Complainant's Exhibit 3 was received without objection. The one Exhibit received does not establish any allegation of the complaint. Complainant's contention that the Rules and Regulations of the Assistant Secretary deprive it of a fair hearing is wholly without basis and is rejected. Indeed, as set forth above, Complainant was afforded every right to present the testimony of any necessary witness whose testimony would be material and relevant to the issues involved. Nevertheless, Complainant, and the Complaining party, Mr. Swartz, refused to go forward. Accordingly, as Complainant has wholly failed to prove the allegation of the complaint, I recommend that the complaint be dismissed: a) for failure of prosecution; and/or b) for failure to prove the allegation of the complaint by a preponderance of the evidence.

RECOMMENDATION

That the complaint be dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: FEB 17 1978
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION ON ARBITRABILITY
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE AIR FORCE,
NEWARK AIR FORCE STATION,
AEROSPACE GUIDANCE AND METROLOGY CENTER,
NEWARK, OHIO
A/SLMR No. 1044

This case involved an Application for Decision on Grievability or Arbitrability filed by the American Federation of Government Employees, AFL-CIO, Local 2221, challenging a determination by the Activity that three requests for arbitration submitted simultaneously by the Applicant were untimely filed pursuant to the parties' negotiated agreement.

The Administrative Law Judge found that the dispute as to whether the requests for arbitration herein were timely filed centered around a disagreement as to the meaning of a section of the parties' negotiated agreement which required such requests to be "submitted" within 30 calendar days after the "issuance" of the Activity's final decision in these matters. He concluded that an arbitrator may properly decide, as a threshold question, whether the requests for arbitration were timely filed within the meaning of the parties' negotiated agreement.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered the Activity to take the appropriate action to implement his finding.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
NEWARK AIR FORCE STATION,
AEROSPACE GUIDANCE AND METROLOGY CENTER,
NEWARK, OHIO

Pursuant to Section 6(a)(5) of Executive Order 11491, as amended, and Section 205.12(a) of the Regulations, it is hereby ordered that the Department of the Air Force, Newark Air Force Station, Aerospace Guidance and Metrology Center, Newark, Ohio, shall notify the Assistant Secretary of Labor for Labor-Management Relations, in writing, within 30 days from the date of this order as to what steps have been taken to comply with the above finding.

Dated, Washington, D. C.
May 16, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

Activity

and

Case Nos. 53-09734(GA), 09748(GA)
and 09749(GA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2221

Applicant

DECISION ON ARBITRABILITY

On February 22, 1978, Administrative Law Judge Milton Kramer issued his Recommended Decision on Arbitrability in the above-entitled proceeding, finding that the grievances herein are arbitrable under the parties' negotiated agreement. No exceptions were filed to the Administrative Law Judge's Recommended Decision on Arbitrability.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision on Arbitrability and the entire record in the subject cases, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

FINDING

IT IS HEREBY FOUND that the grievances in Case Nos. 53-09734(GA), 09748(GA) and 09749(GA) are subject to the arbitration procedure set forth in the parties' negotiated agreement.

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
 Suite 700-1111 20th Street, N.W.
 Washington, D.C. 20036



.....
 In the Matter of :
 DEPARTMENT OF THE AIR FORCE :
 NEWARK AIR FORCE STATION :
 AEROSPACE GUIDANCE AND :
 METROLOGY CENTER :
 NEWARK, OHIO :
 Agency/Activity :
 and :
 LOCAL 2221, AMERICAN FEDERATION :
 OF GOVERNMENT EMPLOYEES, AFL-CIO :
 Applicant :

Cases Nos. 53-09734 (GA)
 53-09748 (GA)
 53-09749 (GA)

Appearances:

Robert J. Novak, President
 AFGE Local 2221
 Newark Air Force Station, AGMC
 Newark, Ohio 43055
 For the Applicant

Gary J. Rosnick, Captain, USAF
 Staff Judge Advocate
 HQ Aerospace Guidance and
 Metrology Center
 Newark Air Force Station
 Newark, Ohio 43055
 For the Activity

Before: MILTON KRAMER
 Administrative Law Judge

RECOMMENDED DECISION ON ARBITRABILITY
Statement of the Case

These cases, consolidated for the purpose of hearing, arise under Executive Order 11491, as amended. They were initiated by the Applicant's filing of Applications for Decision of Grievability or Arbitrability dated May 9, 1977, May 13, 1977, and May 13, 1977, respectively. The applications state in

Section 4C thereof that the unresolved question is an issue of procedural arbitrability: whether the Union's written request to invoke arbitration of these grievances was timely under Article 19, Section A of the parties' collective bargaining agreement. The Activity subsequently filed extensive responses to these Applications, contending that the grievances were not arbitrable due to the Union's failure to comply with the negotiated time limitations.

Pursuant to an Order Rescheduling Hearing issued by the Labor-Management Services Administration on October 7, 1977, a hearing on these applications was held on November 29, 1977, in Newark, Ohio. All parties were represented and afforded full opportunity to adduce evidence and make oral argument. Post-trial briefs were filed on January 23, 1978, pursuant to an extension of time granted at the hearing.

Facts

The Applicant is the exclusive recognized representative for a unit of employees employed by the Activity. Included in the Unit were the grievants in question in this proceeding. In Case No. 53-09734(GA), a grievance was filed on December 5, 1975 by employee Raymond Lockwood. The Activity's final written rejection of this grievance was dated March 11, 1977 and an Application for Decision on Grievability and Arbitrability was filed with the Assistant Secretary on May 9, 1977. In Cases Nos. 53-09748(GA) and 53-09749(GA), grievances were filed by employees David Lacey and Arnold Smith on August 4, 1976 and May 21, 1976, respectively. Final written rejections of these grievances were dated March 11, 1977 and Applications for Decision on Grievability or Arbitrability were filed on May 13, 1977. ^{1/}

The Activity and Applicant are parties to a local agreement covering approximately 2,100 unit employees at the Newark Air Force Station. ^{2/} This agreement became effective June 5, 1975 and was in effect at all times material hereto.

Article 18 of the agreement covers "Grievance Procedure" for grievances arising from the interpretation or application of the agreement. This Article sets out four steps of grievance review, with the grievance ultimately being submitted to a joint Union-Management Grievance Committee for settlement. Article 19 provides for "Arbitration" of unsettled grievances processed under the negotiated procedure in Article 18.

^{1/} Exhs. AS 1, 10 and 20.
^{2/} Joint Exhibit No. 1.

By letter dated February 28, 1977 and hand delivered March 7, 1977, the Applicant wrote to the Station's Commander alleging that all previous levels of grievance review had been exhausted and invoking arbitration of the grievances pursuant to Article 19 of the local agreement. By letters of March 11, 1977 the Activity's Labor Relations Officer denied these invocations as not timely filed under Article 19, Section A. The Applicant subsequently filed the Applications for arbitrability determination giving rise to this proceeding.

There is considerable additional evidence in the record. However, in view of my analysis of the facts and the law governing the basic issue in this case, I deem such evidence irrelevant to the proper determination of these applications.

Discussion and Conclusion

The Activity contends that the Applicant's requests for arbitration of the grievances herein were untimely under Article 19, Section A of the local agreement and that the Assistant Secretary has jurisdiction to make this determination under Section 13(d) of Executive Order 11491. The Applicant contends that the requests were timely filed but, in any event, this determination is more properly before an arbitrator since it involves an interpretation and application of the language in the agreement, specifically Article 19, Section A, to determine whether the requests were timely. For the reasons set forth hereafter, I conclude that the subject grievances are arbitrable under Article 19 of the negotiated agreement and that the question of the timeliness of the Applicant's arbitration requests involves an interpretation and application of the agreement, and therefore must be resolved by an arbitrator as a threshold matter before he can address the merits of the grievances herein.

The Assistant Secretary's authority to decide arbitrability disputes stems from Sections 6(a)(5) and 13(d) of the Executive Order, as amended. Section 6(a)(5) confers the authority to "decide questions as to whether a grievance is subject to ... arbitration under an agreement as provided in Section 13(d) of this Order." Section 13(d) provides that "questions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, may by agreement of the parties be submitted to arbitration or may be referred to the Assistant Secretary for decision."

The Activity's interpretations of the Assistant Secretary's authority under these two Sections is supported by the Federal

Labor Relations Council's decision in Department of the Navy, Naval Ammunition Depot, Crane, Indiana. 3/ That case involved a dispute as to whether probationary employees had a right to process grievances through the negotiated grievance procedure, or whether they were excluded from doing so under the terms of the negotiated agreement. In referring this matter to the negotiated procedure, the Assistant Secretary concluded that "where the matters in dispute involve the interpretation and application of certain provisions of the parties' negotiated agreement, and the agreement provides means by which such dispute may be resolved, it will effectuate the purposes of the Order to direct the parties to resolve their dispute through their negotiated grievance procedure." Thus, the Assistant Secretary held that the issue as to whether the employee's termination is covered by the terms of the negotiated agreement, as well as the issue as to whether the Activity violated this agreement, in that particular instance, should be resolved through the negotiated grievance procedure.

The Council disagreed. In setting aside the Assistant Secretary's decision, the Council stated:

In any dispute referred to the Assistant Secretary concerning whether a grievance is on a matter subject to the negotiated grievance procedure, the Assistant Secretary must decide whether the dispute is or is not subject to the negotiated grievance procedure, just as an arbitrator would if the question were referred to him. In making such a determination, the Assistant Secretary must consider relevant provisions of the Order, including section 13, and relevant provisions of the negotiated agreement, including those provisions which describe the scope and coverage of the negotiated grievance procedure, as well as any substantive provisions of the agreement which are being grieved. [Council decision at 4.]

The Council stated further:

[W]here such a "grievability" or "arbitrability" dispute is referred to the Assistant Secretary, either by operation of the Order or by voluntary agreement of the parties, he must resolve that

3/ FLRC No. 74A-19 (Feb. 7, 1975).

dispute; he may not pass it on to an arbitrator for resolution. [Council decision at 5.]

That decision instructs the Assistant Secretary to interpret substantive provisions of the negotiated agreement "just as an arbitrator would" in deciding grievability or arbitrability questions.

The scope of the Assistant Secretary's authority under Sections 6(a)(5) and 13(d) of the Order was subsequently re-examined in the Council's recent decision in Community Services Administration. 4/ In that case, the Assistant Secretary was presented with the question of whether the position of Employee Development Specialist was a "policy" position and thereby specifically excluded from the parties' negotiated grievance procedure under Amendment 11 of the agreement. The Assistant Secretary concluded that the position did involve the formulation of Agency-wide training policy, and therefore was specifically excluded from Amendment 11 of the negotiated agreement.

In setting aside the Assistant Secretary's decision, the Council noted that Section 13(d) of the Order does not require the Assistant Secretary to interpret and apply provisions of the negotiated agreement. Indeed, such action is inconsistent with the purposes and policies of the Order. In clarifying its apparently contrary holding in Crane, the Council stated:

In deciding whether a dispute is or is not subject to a particular negotiated grievance procedure, it is the responsibility of the Assistant Secretary to consider those "provisions which describe the scope and coverage of the negotiated grievance procedure," i.e., the general scope of such procedure as well as any specific exclusions therein. That is, he must decide, just as an arbitrator would decide at the outset in the Federal sector ... whether the grievance involves a dispute which the parties intended to be resolved through their negotiated grievance procedure. The Assistant Secretary's consideration of "substantive provisions of the agreement being grieved" would be for the limited purpose of determining whether the grievance involves a claim which on its face is covered by the

4/ FLRC No. 76A-149 (Aug. 17, 1977).

contract, i.e., involves a matter which arguably concerns the meaning of application of the substantive provision(s) being grieved and which the parties intended to be resolved under the negotiated grievance procedure. The Council's statement in Crane that the Assistant Secretary must decide whether or not a dispute is subject to the negotiated grievance procedure "just as an arbitrator would if the question were referred to him," while perhaps ambiguous, was not intended and should not be construed to mean that the Assistant Secretary may interpret the substantive provisions of an agreement in resolving a grievability or arbitrability question as an arbitrator would in deciding the merits of a grievance. Instead, the Council's statement was intended to indicate that the Assistant Secretary must decide a question of grievability or arbitrability under a negotiated grievance procedure where such question is referred to him, just as an arbitrator would be required to decide the question of grievability or arbitrability where the parties bilaterally agree to refer such threshold issue to the arbitrator pursuant to section 13(d) of the Order. [Council decision at 5-6 (footnotes omitted; emphasis in original).]

Having determined that the dispute in question was one involving the interpretation and application of the agreement (i.e., whether the position of Employment Development Specialist was a "policy" position within the meaning of Amendment 11), the Council concluded that the grievance was on a matter within the scope of the negotiated grievance procedure and therefore should have been referred to an arbitrator.

Likewise, the issue in the three cases in question here involves a dispute over the interpretation and application of the terms of the negotiated agreement. Article 19, Section A of this agreement states:

If the Employer and the Union fail to settle any grievance processed under the negotiated grievance procedure, such grievance, upon written request by either party within 30 calendar days after the issuance of the Employer's or Union's final decision, may be submitted to arbitration.

May 16, 1978

Section G of this Article gives the arbitrator power to consider matters dealing with the interpretation or application of the agreement.

The Activity contends that the Union's request to invoke arbitration was untimely under Section A of Article 19; the Union disagrees. The dispute centers on when the 30 day time limit in this section begins to run, which in turn involves an interpretation of the word "issuance" as applied to the facts and circumstances of this case. Consistent with the Council's holding in Community Services Administration, I conclude that the instant dispute is one involving an interpretation and application of a provision of the parties' negotiated agreement, and consequently should be referred to an arbitrator for resolution.

It remains only to be determined whether the subject grievances are matters which the parties determined should be resolved by resort to arbitration. Article 19 states that the parties may submit to arbitration any unsettled grievance which has been processed under the negotiated grievance procedure. It is uncontested that the grievances in question have been processed through the negotiated grievance procedure: all previous levels of grievance review have been exhausted. Under the scheme of the parties' negotiated agreement, there remains only to submit the grievances to arbitration under Article 19. Accordingly, I conclude that all the grievances in question are arbitrable under Article 19 of the local agreement, and pursuant to this Article the arbitrator must decide, as a threshold question, whether these grievances were timely filed within the meaning of Article 19, Section A.

RECOMMENDATION

Accordingly, it is recommended that the grievances in Cases Nos. 53-09734(GA), 53-09748(GA), and 53-09749(GA) be found to be subject to binding arbitration under Article 19 of the parties' negotiated agreement.



MILTON KRAMER
Administrative Law Judge

Dated: February 22, 1978
Washington, D.C.

MK/mm1

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO
AND FIREARMS
A/SLMR No. 1045

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and NTEU Chapter 88 (Complainant) alleging that the Respondent had violated Section 19(a)(1) and (6) of the Order by failing to bargain on the impact and implementation of various employees' reassignments, and by denying the Complainant's request for various staffing information. The Respondent contended that it was under no obligation to bargain because the parties' negotiated agreement provided procedures for solving staffing imbalances. Moreover, it contended that through its meeting with the Complainant and the exchange of correspondence on the September 1976, reassignments it had, in fact, bargained with the Complainant to the extent it was required to under the Order. It further contended that it had no obligation to furnish the requested information and that since such information had been the subject of a grievance, Section 19(d) of the Order precluded the matter from being raised under the unfair labor practice procedures of the Order.

The Administrative Law Judge found that the parties' negotiated agreement did not constitute a waiver of the Respondent's obligation to bargain on the procedures used in the implementation of the employees' reassignments and on the impact of the reassignments on adversely affected employees and, further, that the Respondent had failed to fulfill its bargaining obligation in violation of Section 19(a)(1) and (6) of the Order. He found also that, under the particular circumstances, Section 19(d) did not preclude consideration of whether the Respondent's refusal to furnish certain information was violative of the Order; that the information requested by the Complainant was necessary and relevant in order for it to perform its duty as the exclusive representative of the affected employees; and that, accordingly, the Respondent's failure to furnish the requested information violated Section 19(a)(1) and (6) of the Order.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO
AND FIREARMS

Respondent

and

Case No. 53-09582(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 88

Complainant

DECISION AND ORDER

On December 28, 1977, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order, and the Complainant filed an answering brief with respect to the Respondent's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions and supporting brief filed by the Respondent and the answering brief filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions 2/ and recommendations.

1/ The Respondent did not except to the Administrative Law Judge's finding that Section 19(d) of the Order did not preclude consideration in this proceeding of the allegation that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to supply the Complainant with certain requested information.

2/ Although I agree with the Administrative Law Judge's conclusion that the information sought by the Complainant was necessary and relevant, I find it unnecessary to pass upon his conclusion on page 18 of his Recommended Decision and Order that the information sought by the Complainant "by its very nature carries with it the presumption that it was relevant and necessary to the Union to carry out its warrant to represent unit employees, regardless of whether negotiations were pending at that particular time."

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Cincinnati, Ohio, shall:

1. Cease and desist from:

(a) Instituting a reassignment of employees represented exclusively by the National Treasury Employees Union and NTEU Chapter 88, or any other exclusive representative of its employees, without affording such representative the opportunity to meet and confer, to the extent consistent with law and regulations, on the procedures which management will observe in implementing such reassignment and on the impact the reassignment will have on adversely affected unit employees.

(b) Refusing or failing to furnish, upon request by the National Treasury Employees Union and NTEU Chapter 88, or any other exclusive representative of its employees, any information bearing upon reassignment which is relevant and necessary to enable the National Treasury Employees Union and NTEU Chapter 88, or any other exclusive representative of its employees, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, make available to the National Treasury Employees Union and NTEU Chapter 88 any information bearing on the reassignment of employees announced in September 1976, which information is relevant and necessary to enable the National Treasury Employees Union and NTEU Chapter 88 to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

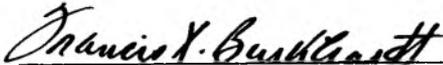
(b) Upon request, meet and confer with the National Treasury Employees Union and NTEU Chapter 88, to the extent consistent with law and regulations, concerning the procedures which management observed in reaching the decision as to who was subject to the reassignments announced in September 1976, and the impact the reassignments had on adversely affected employees in the exclusively recognized unit. Any agreement reached by the parties shall be promptly effectuated, including, if consistent with such agreement, the return of any reassigned employees to the Bardstown facility.

(c) Post at all Central Regional facilities of the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to the steps taken to comply herewith.

Dated, Washington, D. C.

May 16, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a reassignment of employees represented exclusively by the National Treasury Employees Union and NTEU Chapter 88, or any other exclusive representative of our employees, without affording such representative the opportunity to meet and confer, to the extent consistent with law and regulations, on the procedures which management will observe in implementing such reassignment and on the impact the reassignment will have on adversely affected unit employees.

WE WILL NOT refuse or fail to furnish, upon request by the National Treasury Employees Union and NTEU Chapter 88, or any other exclusive representative of our employees, any information bearing upon reassignment which is relevant and necessary to enable the National Treasury Employees Union and NTEU Chapter 88, or any other exclusive representative of our employees, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, make available to the National Treasury Employees Union and NTEU Chapter 88 any information bearing on the reassignment of employees announced in September 1976, which information is relevant and necessary to enable the National Treasury Employees Union and NTEU Chapter 88 to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

WE WILL, upon request, meet and confer with the National Treasury Employees Union and NTEU Chapter 88, to the extent consistent with law and regulations, concerning the procedures which management observed in reaching the decision as to who was subject to the reassignments announced in September 1976, and the impact the reassignments had on adversely affected employees in the exclusively recognized unit. Any agreement reached with the National Treasury Employees Union and NTEU Chapter 88 shall be promptly effectuated, including, if consistent with such agreement, the return of any reassigned employees to the Bardstown facility.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
 Suite 700-1111 20th Street, N.W.
 Washington, D.C. 20036



 Agency or Activity

Dated _____ By: _____
 Signature

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 any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 1060, Federal Office Building, 230 South Dearborn Street, Chicago, Illinois 60604.

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 In the Matter of .
 .
 DEPARTMENT OF THE TREASURY, .
 BUREAU OF ALCOHOL, TOBACCO .
 AND FIREARMS, .
 Respondent .
 .
 and . Case No. 53-09582 (CA)
 .
 NATIONAL TREASURY EMPLOYEES .
 UNION AND NTEU, CHAPTER 88, .
 Complainant .

JOHN A. CHEVRIER, and
 ROBERT WEISS, ESQS.
 Office of the Chief Counsel
 Bureau of Alcohol, Tobacco & Firearms
 U.S. Treasury Department
 Washington, D.C. 20226
 On Behalf of the Respondent

CAROL HADDAD, ESQ.
 Suite 1101
 1730 K Street, N.W.
 Washington, D.C. 20006
 On Behalf of the Complainant

Before: SALVATORE J. ARRIGO
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding heard in Cincinnati, Ohio, on June 14, 1977 arises under Executive Order 11491, as amended (hereinafter called the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter called the Assistant Secretary), a Notice of Hearing on Complaint issued on May 5, 1977 with reference to alleged violations of Sections 19(a)(1) and (6) of the Order.

The complaint, filed by National Treasury Employees Union and NTEU Chapter 88 (hereinafter called the Union or Complainant), alleged that the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Cincinnati, Ohio (hereinafter called the Activity or Respondent) violated the Order by failing to negotiate with the Union on the impact and implementation of various employee reassignments and denying the Union's request for various staffing information.

At the hearing the parties were represented by Counsel and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by both parties.

Upon the entire record in this matter, from my reading of the briefs and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact and Conclusions of Law

At all times material hereto the Union has been the exclusive collective bargaining representative for various of the Activity's employees including Inspectors (GS-1854 series) and Technicians or Plant Officers (GS-1855 series). In March 1974 the Activity and the Union signed a collective bargaining agreement the terms of which were in effect at all times material.

In late September 1976 Chapter 88 President Martin Connell received a telephone call from John Hauschildt, the Activity's Assistant Chief of Field Operations, and was informed that some involuntary transfers were to occur. Hauschildt suggested that various representatives of the parties meet to discuss the matter. Hauschildt also informed Connell that the Bardstown, Kentucky office would be affected by the transfers, but he did not wish to talk about the matter in detail until the meeting. Connell replied that without more information he would not be able to discuss the subject in depth.

The parties met on September 27, 1976 in Bardstown. Hauschildt was accompanied by Robert Lumpkin and Connell was accompanied by Francis Dickerson, area steward at Bardstown. The Activity indicated that the Bardstown facility was overstaffed with Inspectors while other sites were understaffed and accordingly, it was anticipated that three Inspectors would be transferred from Bardstown to other locations within the Bureau of Alcohol, Tobacco and Firearms (ATF) Central Region.

Transfers were to begin in a couple of months. An individual selected for transfer would have the option of refusing the transfer and being considered for reassignment at Bardstown as a Technician. However, the Inspectors who formed the pool of employees affected by the transfers were at the GS-7 pay grade and due for promotion to GS-9 journeyman grade within approximately three months time. The Technician journeyman grade was GS-7, the pay grade that the affected employee would remain if he chose to stay in the Bardstown area. Hauschildt gave Connell a typewritten copy of the specific criteria used for determining who would be selected for transfer, *infra*. The Union stated that it had the right to negotiate on the matter and would definitely want to make suggestions and proposals on the transfer situation. The Activity informed the Union that it felt no obligation consult on the transfers or matters concerning the implementation or impact thereof, but nevertheless invited the Union to make suggestions on the subject. The Union replied that it obviously could not do so at that time since it needed some background information. The Union asked various questions concerning the matter and told the Activity it would meet with the affected group of Inspectors and see if any employees wished to volunteer for transfer.

After the meeting had concluded Connell rode with Hauschildt and Lumpkin from Bardstown to Louisville, Kentucky. During the drive the pending transfers were discussed and Connell expressed his appreciation for receiving notice of the transfers before they occurred. Connell also indicated that the criteria set forth by the Activity seemed reasonable and objective.

Subsequently, a Union membership meeting was held to discuss the subject. The criteria established for reassignments by the Activity was circulated and the Union's officers received numerous questions, many of which they were unable to answer due to their own lack of information on the subject. The employees were told that management was interested in obtaining volunteers for transfer but no attempt to poll the employees was made in this regard.

On September 29, 1976 Hauschildt sent a memorandum to Connell which was captioned "Informative Meeting". 1/ The memorandum stated as follows:

1/ All further communications between the parties on this matter was through exchange of correspondence.

"This will confirm the 9/27/76, meeting with F. Dickerson, R. Lumpkin, you and me in attendance. The meeting was arranged by me for the specific purpose of informing the union that management is reassigning three ATF inspectors from the Bardstown area to the Detroit and Cleveland areas.

Management takes the position that they have the authority to make these assignments under E.O. 11491 and the NTEU contract without consultation or negotiation; however, in the best interest of management and employees alike, management developed a criteria for identifying the employees to be reassigned. The criteria to be used was presented to you and Mr. Dickerson so that any suggestions by the union concerning the criteria could be considered prior to informing the employees of their selection for reassignment.

A copy of the criteria for these reassignment selections is attached. This criteria is not to be considered precedent setting. Management hereby declares its right to change or amend this criteria, if necessary or desirable, to accomplish these or any future reassignments."

Attached to the memorandum was the following list of "Criteria For Determining Transfer of GS-1854 Employees":

"1. Geographic locations

Transfers will be made from locations having predominant plant assignments duties with only limited opportunity for field inspection assignments

2. Grade levels of affected employees.

Employees in the GS-1854 series at the GS-7 level or above with not more than 3 years of ATF experience will be included on rosters for reassignment consideration.

3. Identification of employees selected for transfer.

Employees appearing on a roster under Item #2 above will be selected for transfer on the basis ATF service time by selecting the employee with

the least service for transfer and continuing this process in sequence, as necessary.

In the event that a tie exists between candidates, the first consideration for a tie breaker will be selection of the employee with the least total Federal service (SCD). If a tie still exists, the second tie breaker consideration will be based on performance evaluations and supervisory recommendations."

Connell was particularly disturbed at the Activity's statement in the September 29 memorandum relative to the criteria being subject to change. Accordingly, Connell sent the following letter to the Activity's Regional Director, Fred Murrell, on October 3, 1976:

"This is to invoke the right of NTEU Chapter 88 to negotiate on the impact and implementation of two impending changes: namely, the re-assignment of four GS-1854 inspectors from Bradstown to Cleveland, Detroit, and Hammond; and an increase in the number of lower graded GS-1855 Alcohol Tax Technician positions and a corresponding decrease in the number of GS-1854 Inspector positions at the distilled spirits plants.

Prior to commencing negotiations and in time to make adequate preparation the Union requires the following items of information:

1. The authorized staffing pattern, and the actual staffing, for each Regulatory Enforcement post of duty in the Central Region, with breakdowns by positions and grades.
2. Identification of each distilled spirits plant where a GS-1855 Alcohol Tax Technician position is authorized.
3. The extent of any overstaffing or understaffing, by post of duty with breakdowns by positions and grades.
4. With respect to each post of duty, identification of any changes that have so affected the workload as to result in a

general overstaffing, or a staffing imbalance among GS-1854 and GS-1855 employees.

5. The Bureau's immediate recruiting intentions for each Regulatory Enforcement post of duty in the Central Region, with indication as to the position series in which any new hires will be placed.
6. Target dates for effecting the planned changes.

Over a period of more than two years, the Union has made repeated requests for the authorized staffing pattern in the ATF Central Region. In view of the impending changes, the staffing pattern and the other items of information requested are now absolutely essential for the Union to fulfill its obligation to effectively represent affected Bargaining Unit employees."

The Activity replied to Connell on October 7, 1976 with the following letter:

"This will acknowledge the NTEU Chapter 88 request to negotiate the impact of the reassignment of four GS-1854 Inspectors from Bradstown to Cleveland, Detroit, and Hammond.

We do not agree with your request to negotiate with management on the mission of the Bureau; its budget; its organization; the number of employees; and the members, types, and grades of positions or employees assigned to an organizational unit. Section 11(B) of E.O. 11491 clearly defines management's authority in these matters. Additionally, Section 12(B) of the E.O. identifies management's obligation to direct the employees of the Bureau, to hire, promote, transfer, assign and retain employees in positions within the Bureau; to relieve employees from duties because of lack of work; to maintain the efficiency of the Government operations entrusted to them; and to determine the methods, means, and personnel by which such operations are to be conducted.

The Union request for items of information as itemized in 1 thru 5 relate specifically to issues that are not negotiable; therefore, we find no compelling reasons for inclusion of the information. Item 6 related to target dates for effecting the reassignments of the four employees and we agree that this information has an impact on the employees who will be reassigned.

Management will request each selected employee to complete the required forms for the cost of the household move at least 30 days in advance of the reporting date and we will expect to have all four employees relocated by no later than January 16, 1977. We have always negotiated with employees on short term adjustments of a reporting date to alleviate individual circumstances and we intend to continue this practice on reasonable requests.

The meeting between Union and management officials on 09-27-76 was scheduled by management for the express purpose of advising the union of the criteria to be applied for selecting the employees for reassignment. We have previously furnished you with a copy of the criteria and we are agreeable with any request by the union to negotiate the merits of the criteria or to negotiate acceptance of any voluntary substitution of employees not identified by the criteria for reassignment to the posts of duty at Hammond, Cleveland, and Detroit. Management will also accept for consideration any request from the four selected employees on a preference for the three locations being filled.

In order to accomplish the reassignments within the stated time frame, management will expect the union to submit for negotiation, any changes in the criteria or substitutions of employees by no later than October 22, 1976."

On October 21, 1976 Connell responded to the Activity, stating:

"This is in reply to your letter of October 7, 1976, concerning the Union's invocation of its right to negotiate the impact and implementation of the reassignment of four GS-1854 Inspectors from Bardstown to Cleveland, Detroit, and Hammond, and a decrease in the number of GS-1854 Inspector position to accommodate a corresponding increase in the number of lower graded GS-1855 Alcohol Tax Technician (Plant Officer) positions.

The second and third paragraphs of your letter lead me to believe that there is some misunderstanding. The Union did not request to negotiate with management on issues that are not negotiable, but only on the impact and implementation of the changes referred to above.

We agree that the information requested in my letter of October 3, 1976, has a relationship to issues that are not negotiable, but we do not agree that this is valid reason for withholding the information from the Union. The Union has a right to the requested information under Sections 19(a)(1) and 19(a)(6) of E.O. 11491.

The withholding of the requested information has kept the Union from being fully informed as to the nature and extent of the changes which will affect Bargaining Unit employees. It has significantly hindered the Union in its efforts to properly advise and assist affected Bargaining Unit employees and in its efforts to establish a negotiating posture consistent with the best interests of such employees.

We will appreciate reconsideration of the decision to withhold the information requested by the Union. However, if the requested information is not furnished to NTEU Chapter 88 prior to the commencement of negotiations, and in time to make adequate preparation, it is the intention of the Union to negotiate under protest and to immediately file Unfair Labor Practice Charges.

Our proposals for negotiations (under protest) are as follows:

1. The Employer will first poll employees at the Bardstown post of duty in an effort to obtain a sufficient number of volunteers for reassignment to Cleveland, Detroit, and Hammond.
2. If the number of volunteers available at Bardstown is insufficient the Employer will:
 - a. Establish a roster of GS-1854-7 & 9 employees who are assigned at the Bardstown post of duty and have less than 3 years ATF service.
 - b. On the basis of ATF service time, select employees from the established roster for involuntary reassignment, by selecting the employee with the least amount of ATF service and continuing this process in sequence, as necessary. In the event that a tie exists, first consideration will be given to total Federal service (SCD) to

break the tie. If a tie still exists, the second tie breaker consideration will be based on performance evaluations and supervisory recommendations.

3. Any GS-1854 employee selected for involuntary reassignment from Bardstown to another post of duty may, within 5 calendar days of the date that he or she is notified of such selection, make a written request for reassignment to a GS-1855 position at Bardstown and in this way avoid reassignment to another post of duty.
4. Employees who request reassignment from an 1854 series position to an 1855 series position and have such personnel action affected will receive priority consideration for reassignment to any GS-1854-9 vacancy that subsequently occurs, provided they meet basic eligibility requirements and have applied for the vacant position in writing.
5. Management will inform all employees identified by the criteria in paragraph 2-a regarding promotional opportunities, working conditions (e.g. amount of travel and types of inspections), and living conditions (e.g. cost of living, available housing, transportation, schools, etc.) in the Detroit, Cleveland, and Hammond areas.
6. Management will negotiate with employees on reasonable adjustments of a reporting date to alleviate individual circumstances.
7. Unresolved disagreements on any of the above proposals are subject to arbitration under the collective bargaining agreement.

A representative of the NTEU National Office (if available), Frank Dickerson, and I will be the negotiators for the Union."

By letter dated October 28, 1976 the Activity responded to Connell as follows:

"This will acknowledge receipt of your letter dated October 21, 1976 concerning the transfer of four inspectors from Bardstown, Kentucky to other posts of duty in the Central Region.

Your continuing request for information from management on matters which, you agree, are not negotiable will not be granted for the same reasons stated in previous correspondence. Management has the authority to reassign or transfer employees; therefore, the employees selected for transfer or reassignment through a fair and proper criteria have not been victimized by unfair labor practices. Furthermore, management has not refused to negotiate the negotiable aspects of the subject transfers, on the contrary, it was management's desire to consult with NTEU, on the negotiable aspects of the transfers, that precipitated the initial meeting scheduled by management on September 27, 1976. Your premise that you have a right to the requested information under sections 19(a)(1) and 19(a)(6) of E.O. 11491 is negated by the facts that the transferees are not victims of unfair labor practices and management has not refused to consult, confer or negotiate the impact on the affected employees.

Your proposals for negotiation as itemized are addressed as follows:

1. This request is inconsistent with Article 28 of the negotiated contract since we are dealing with employees who have less than 10 years of ATF service. Additionally, you agreed with management on September 27, 1976 that a meeting would be scheduled by the union with the Bardstown employees and that you would discuss the possibility of volunteers, we agreed to consider any voluntary applications from Bardstown, Kentucky to the posts of duty at Cleveland, Detroit and Hammond. In view of the above, we see no justification for your proposal. It is obvious that the Bardstown employees are aware of the proposed reassignments and any voluntary application for the reassignments will be duly considered by management if they are received prior to notification of the affected employees.
2. Since this item is a restatement of management's original criteria for selection of the employees for reassignment, it must be recognized as a concurrence by NTEU in management's selection criteria; therefore, this item reflects total agreement leaving no purpose to further negotiation.

3. This item is improper and not negotiable. Subchapter 4-1 of FPM Chapter 715 states, in part, that 'A voluntary reduction in rank or pay is a reduction requested by the employee for personal reasons and in his own interest. The employee's request for reduction should not be demanded as an alternative to some other action to be taken or withheld.' Subchapter 4-2 states: 'When a suitable vacancy exists, when the employee is eligible for the position change, and when the change will contribute to the efficiency of the service, the agency should favorably consider the request for a voluntary reduction.'
4. This item is also improper and not negotiable since employees are being reassigned and not demoted by the agency. An employee who requests a reduction in rank or pay for personal reasons and in his own interest and is subsequently demoted as a result, is only entitled to competitive promotion procedures as prescribed for all qualified candidates. Reference FPM Chapter 335, Subchapter 4(1)(B).
5. Promotion opportunities and working conditions in these reassignments are not relevant issues since all Inspectors are assigned to standard position descriptions regardless of the post of duty and work assignments are the responsibility of the supervisor at each post of duty. Promotion opportunities are the same for all employees as outlined by the merit promotion plan and NTEU contract. Living conditions are a matter of personal preferences and employees assigned to new posts of duty are always provided guidance and assistance by other employees and supervisors at the new post to the extent that requests for assistance are solicited and reasonable. We do not believe that management or the union can properly negotiate a standard of living for individual employees.
6. This item compares with item two as a repeat of an already stated management policy. Thus, no variation of proposal exists between the union and the agency; thus, reflecting no purpose for further negotiation.

7. This item is unacceptable because proposals 1, 3, 4 & 5 are clearly not negotiable. Items 2 and 6 are negotiable and your proposals are identical to management's position at the initial consultation on September 27, 1976. The union has been granted reasonable time to offer alternatives on the negotiable issues in these reassignments and they have failed to offer negotiable alternatives to management's proposal; therefore, management will notify the affected employees of their selection for transfer reassignment and request estimates on their relocation costs without further delay."

Thereafter, by letters dated November 5 and 22, 1976 the Union filed with the Activity the unfair labor practice charge which gave rise to the Complaint considered herein.

The Union contends that through the submission of its proposals for negotiations it sought, but was refused, the right to bargain with the Activity relative to matters concerning implementation and impact of the reassignments. The Union also urges that the Activity violated the Order by refusing to provide the information it sought, which data was necessary to properly negotiate and to advise and best represent the interests of its members.

The Activity essentially contends that it bargained with the Union to the extent it was required under the Order relative to matters of implementation and adverse impact occasioned by the reassignments. The Activity takes the position that through Article 28 of the parties agreement all matters concerning reassignment procedures, implementation and impact were negotiated and agreed to, thereby leaving the Activity the right to act unilaterally in reassignment matters except for the proscriptions of Article 28. The Activity also contends that in any event, through its meeting with the Union and the exchange of correspondence on the reassignments, above, it did in fact negotiate with the Union on all required matters.

With regard to the refusal to supply the requested information, the Activity contrary to the Union, contends that there has been no showing that the information was necessary and relevant for the Union to negotiate on implementation and impact of the reassignments. Further, the Activity takes the position that a grievance was filed on the Activity's prior refusal to supply staffing pattern data and accordingly, under Section 19(b) of the Order the matter may not be raised in this unfair labor practice complaint.

While there was no obligation on the part of the Activity to meet and confer on its decision to adjust the staffing of Inspectors in the Central Region, the Assistant Secretary has repeatedly held that the exclusive representative must be afforded the opportunity to meet and confer, to the extent consonant with law and regulations, as to the procedures management intends to observe in effectuating such a decision, and as to the impact of the decision on those employees adversely affected. ^{2/} Indeed, in the Federal Railroad Administration case, the Assistant Secretary clearly spelled out the nature of the obligation to negotiate on the "implementation" aspect of a decision to reassign employees. In the "Order" of that case, the activity, therein was required to meet and confer in good faith "on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment...." Stated another way, the obligation to meet and confer in such a matter extends to "...determining either the criteria to be followed or the standards to be observed in selecting men for transfer..." ^{3/} or the formulation of and procedures to be utilized in effectuating the decision as well as the impact on adversely affected employees. ^{4/}

In my view the Activity's conduct, considered in its totality, demonstrates a refusal to bargain in good faith on the implementation of the reassignments and the impact on employees adversely affected. The Activity initially took the position that it had no obligation to negotiate on the matter. Robert Lumpkin, who was present at the September 27, 1976 meeting with the Union, supra, testified that the Activity had no intention whatever to negotiate with the Union on the reassignment at that time. In its correspondence to the Union of October 7, 1976 the Activity seemed to open itself to bargaining on the subject. However, in its response to five of the seven Union proposals which differed from the Activity's already decided criteria for reassignment, the Activity declared all to be "not negotiable" and effectively

^{2/} Cf. Federal Railroad Administration, A/SLMR No. 418, and cases cited therein including Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 329, and United States Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289.

^{3/} Federal Aviation Administration, supra.

^{4/} Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 438.

terminated further negotiation by stating that affected employees would be notified of their selection for transfer reassignment "without further delay". In the Activity's eyes there was nothing left to discuss having concluded that two of the remaining five Union proposals were not negotiable since they were contrary to the Federal Personnel Manual (FPM) and three other proposals, which I find were clearly negotiable, were also "not negotiable".

With regard to the first Union proposal, I find that the Union never agreed to poll the employees on behalf of the Activity. During the September 27, 1976 meeting the Union merely indicated it would meet with the membership on the intended reassignments and see if there were any volunteers for reassignment. This action was for its own benefit. There was no understanding that it would act as an agent of the Activity to take a formal poll for volunteers nor was the Union's comment part of a negotiated plan to effectuate the transfers.

Further, I find that negotiations were not precluded by the terms of Article 28 of the agreement. Article 28, entitled "Reassignments", provides as follows:

"Section 1

Reassignments will not be used in lieu of discipline.

Section 2

A. When an employee with ten (10) or more years of ATF service is selected for an involuntary reassignment which involves an authorized household move, the Employer will review the selection in the following manner:

1. The Employer will first confirm that all fully qualified employees at the post of duty were polled to determine if any would voluntarily accept reassignment.

2. If an insufficient number of fully qualified volunteers were available at the post of duty, the Employer will then determine that there were no fully qualified employees at the post of duty with less than ten (10) years of ATF service that could have been involuntarily reassigned.

3. If no fully qualified employees at the post of duty with less than ten (10) years of ATF service were available for involuntarily reassignment, the Employer

will confirm the fact that reasonable and jobrelated criteria for the vacant position(s) were established and compared against the qualifications of basically qualified employees at the post of duty listed on a register in groups of those with less than ten (10) years of ATF service and those with ten (10) or more years of ATF service.

B. When an employee with ten (10) or more years of ATF service is selected for an involuntary reassignment which involves an authorized household move, the employee and the Union will be provided with a copy of the criteria used and a copy of the register showing those basically qualified employees at the post of duty with less than ten (10) years of ATF service and those with ten (10) or more years of ATF service.

C. (This subsection provides for a grievance-arbitration procedure available for grieving the provisions of 'this Section' and further states that employees with less than ten years of service may not grieve the provisions of this section.)

Section 3

The Employer agrees that when an employee has been reassigned due to the abolishment of his position, he will be given consideration if that position is reestablished within one (1) year and he applies for the position within fifteen (15) days after written notification to him of its reestablishment.

Section 4

When an involuntary reassignment involves an authorized household move, the Employer agrees to give the affected employee at least fifteen (15) days written notice and when possible, thirty (30) days written notification.

Section 5

The Article will not apply to involuntary reassignment resulting from reduction-in-force or transfer-of-function."

Section 2 of Article 28 does not, on its face, apply to the situation herein - the reassignment of employees with less than ten years service. The other terms of Article 28 while they may apply to all employees involved in reassignments are of limited application.

At the hearing a witness for the Activity testified that it was understood during negotiations of that article that the execution of Article 28 was intended to extinguish all reassignment rights of employees of less than ten years service not specifically set forth. However, a witness for the Union who attended the negotiations, including a closed session with a mediator relative to negotiations on this Article which the Activity witness did not attend, testified that it was not understood by the Union that the execution of Article 28 served as a waiver of any right of negotiation on future reassignments of employees with less than ten years service.

I find and concluded that neither the express terms of Article 28 nor the testimony relative to negotiations on that provision establish that the Union clearly and unmistakably waived any further right to negotiate on the reassignment of employees with less than ten years service. The right to negotiate on the implementation and adverse impact of a reassignment is granted by the Order. The Assistant Secretary has held that to waive such a right, the action constituting the waiver must be "clear and unmistakable." 5/ On the facts of this case I find no such clear and unmistakable waiver of a right guaranteed by the Order and accordingly, the contention is rejected.

With regard to the Union's proposal number "5" as set forth in its October 21, 1976 letter, supra, I find that matter is a proper subject for negotiation. While the Activity was not obligated to agree that it would provide employees with information about working conditions, living conditions and promotional opportunities in the areas involved in the transfer, nevertheless the duty to negotiate in good faith was breached when the Activity summarily decided that such matters are "not relevant", improper or simply, "not negotiable". The matters in question are basic topics which employees considering a transfer would have a deep interest and the Union, as the employees representative should be expected to raise such matters. The Activity

5/ See NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223 and Department of Treasury, Bureau, of Alcohol, Tobacco and Firearms, Washington, D.C., A/SLMR No. 680.

should also be expected to consider requests for discussion in good faith, rather than rejecting even the concept of negotiating on the subjects.

Similarly, the Activity was under no compulsion to accept the Union's proposal number "7" seeking arbitration of unresolved disagreements on the proposals. However, refusing to further discuss the proposal on the basis of an incorrect conclusion of non-negotiability demonstrates a closed mind on the subject and undermines the very concept of good faith bargaining with the employees' collective bargaining representative. Accordingly, I conclude the Activity's conduct in this regard also violated the requirements of the Order.

Turning now to the Union's October 3, 1976 request for information, supra, which was denied by the Activity in toto, I conclude that the refusal to provide such information violated the Order. 6/ The Activity's effort to redistribute Inspectors from the Bardstown location, the implementation and impact of which were legitimate matters of Union concern, resulted in four involuntary transfers, one voluntary transfer and two employees being reassigned to the lower graded technician position by the time reassignments were completed in April 1977. One Inspector transferred to Hammond, Indiana was transferred a short time later to South Bend, Indiana when the Hammond post of duty was closed. Six locations were involved in the action including Bardstown, Hammond, Indiana; South Bend, Indiana; Cleveland, Ohio; Louisville, Kentucky and Detroit, Michigan. In these circumstances I find the information the Union sought from the Activity would, on its face, have been extremely valuable in "...establish(ing) a negotiating posture consistent with the best interest of...(the)...employees" and properly advising and assisting unit employees, as set forth in the Union's October 21, 1976 letter to the Activity. Therefore, as the information sought was "relevant and necessary" to the Union's duty to properly represent unit employees regarding the implementation and impact of the reassignments, the Activity's failure to furnish the information violated Sections 19(a)(1) and (6) of the Order. 7/

6/ Respondent cites Department of the Air Force, etc., A/SLMR No. 733 as standing for the proposition that "staffing criteria" has been found by the Assistant Secretary to be a non-negotiable subject. However, In that case "staffing criteria" consisted of the projected number of specialist and teacher to student ratios in schools for the next school year. Accordingly, I find that case to be inapposite.

7/ See Agency For International Development, Department of State, A/SLMR No. 676.

In addition, in my view the information sought by its very nature carries with it the presumption that it was relevant and necessary to the Union to carry out its warrant to represent unit employees, regardless of whether negotiations were pending at that particular time. Representation, interim bargaining and contract negotiations - all closely allied when considering a union's legitimate functions - merge in meaning and are continuing activities. Information relative to an employer's operation, job positions, grades, the extent of overstaffing or understaffing, workload factors and specific and immediate recruiting intentions are all matters within management's particular knowledge and which a union must have in its arsenal of information in order to be constantly prepared to make thoughtful proposals and act on an ongoing basis. Further, such information is vital in order to provide a union with the capability to react to managerial decisions in a timely and intelligent fashion. Accordingly, I find that the withholding of such relevant and necessary information which the Union herein sought violated Sections 19(a)(1) and (6) of the Order. 8/

Finally, the Activity contends that the Union's request for the Central Region's authorized staffing pattern was the subject of a prior grievance and accordingly, the Activity, by virtue of the provisions of Section 19(d) of the Act, was privileged to withhold the information without violating

8/ See generally Department of Justice, Immigration and Naturalization Service, A/SLMR No. 902, where the Assistant Secretary stated, "In my view, to enable a labor organization to intelligently perform its bargaining duties, it is not required that the documents sought be the sole basis for proposals, or that they form the basis for fixed, final proposals, before they become necessary and relevant to the exclusive representative for negotiaticn purposes". See also Internal Revenue Service, Austin Service Center, A/SLMR No. 675, where the Assistant Secretary, in dismissing a complaint, held that the respondent fulfilled its obligation to provide the complainant, "...with the relevant and necessary information it was entitled to receive in order to properly administer and police the parties' negotiated agreement." (Emphasis added.)

the Order. 9/ Section 19(d) provides, in relevant part, that:

"Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures."

In March 27, 1976 the Union filed a grievance with the Activity's Regional Director on the Activity's failure to furnish the authorized staffing pattern with a breakdown by position and grade for the ATF Central Region. 10/ The Union contended that withholding this information violated Article 37, Section 1 of the agreement which provided, inter alia, that the Employer "...accord consultation rights to the Union to the fullest extent provided by Executive Order 11491...." The Activity's response of April 2 essentially recited some of the provisions of Section 11(b) of the Order and concluded that the staffing pattern was "...specifically a tool of management, to be utilized in the administration of matters with respect to the mission of the agency and, therefore, it is not subject to distribution to NTEU or its members."

The grievance was not processed any further.

I find that Section 19(d) of the Order is inapplicable to the situation presented herein. In a recent decision, Administrative Law Judge Milton Kramer had the occasion to interpret the meaning of the term "issues" as used in Section 19(d), above. 11/ Judge Kramer concluded "...the

9/ This argument is made by the Activity with respect to the first three items of information requested by the Union in its October 3, 1976 correspondence to the Activity, supra. The other items of information requested were not involved in the prior grievance to be discussed herein.

10/ The Union requested the first three steps of the grievance procedure be waived and such request was apparently granted.

11/ Department of Defense, U.S. Navy, Norfolk Naval Shipyard, A/SLMR No. 908, Recommended Decision of the Administrative Law Judge, pp. 7-8. While the Assistant Secretary in his Decision and Order did not specifically discuss this contention he nevertheless adopted Judge Kramer's findings and conclusions which were not inconsistent [Cont'd on next page].

second sentence of Section 19(d) refers not to issues in the abstract but issues in the same incident." In the case herein the filing of the grievance for staffing pattern information was a distinctly different incident from the request for information regarding the reassignments. The two incidents were separated by approximately six months time and there is no indication that any reassignment was connected with the prior request. Accordingly, I find and conclude that since the Union's October 3, 1976 request for information was a completely separate incident from the March 27, 1976 grievance, Section 19(d) does not preclude considering for unfair labor practice determination under the Order the Activity's October 7 refusal to supply such information. 12/

Accordingly, in all the circumstance I find and conclude that Respondent's conduct described herein constituted a failure to meet and confer on the implementation of its decision to reassign employees and the impact on employees adversely affected by that decision thereby violating Sections 19(a)(1) and (6) of the Order. I further conclude that Respondent's refusal to furnish the Union the information which it sought, as set forth in the Union's October 3, 1976 letter to the Activity, also violated Sections 19(a)(1) and (6) of the Order. 13/

Remedy

Complainant requests as a remedy for the violations found herein that Respondent immediately enter into negotiations with it regarding the implementation and impact of the reassignments thus far effected and any "projected" reassignments. Complainant also requests: "Should the outcome of these negotiations indicate that people other than those already chosen for reassignment should have gone,

11/ [Cont'd] with his own findings and conclusions. The Assistant Secretary went on to treat the unfair labor practice allegations as if Section 19(d) did not preclude such consideration. Accordingly, the Assistant Secretary adopted Judge Kramer's findings and conclusions on this matter.

12/ Respondent's motion to sever the request for staffing pattern information from the complaint and dismiss it pursuant to Section 19(d) of the Order is therefore denied.

13/ I reject Respondent's contention that the conduct of Regional management officials did not bind the Activity when dealing with the Union.

we further request that such employees be allowed to return to their Inspector jobs in Bardstown". In addition, Complainant seeks the information requested in the Union's letter of October 3, 1976, supra, be provided prior to the commencement of negotiations.

Complainant's request does not seek a return to the status quo ante before commencing bargaining. 14/ Rather, the remedy Complainant seeks generally follows remedies the Assistant Secretary has provided in other cases in which similar violations have occurred relative to improper failure to bargain on implementation and impact 15/ and improper failure to supply information. 16/ Accordingly, I shall recommend an order consistent in substance with Complainant's prayer for relief.

Recommendation

Having found that Respondent has engaged in conduct violative of Sections 19(a)(1) and (6) of the Order, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Order.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Cincinnati, Ohio, shall:

1. Cease and desist from:

(a) Reassigning unit employees without notifying the National Treasury Union, Chapter 88, the exclusive representative, and affording it a reasonable opportunity to meet and confer, to the extent consonant with law

14/ See generally Department of the Treasury, Internal Revenue Service, Indianapolis, Indiana, A/SLMR No. 909.

15/ Id.

16/ General Services Administration, Region 3, A/SLMR No. 734 and Department of the Navy, Long Beach Naval Shipyard, Long Beach, California, A/SLMR No. 728.

and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to the reassignment and on the impact the reassignment will have on adversely affected employees.

(b) Withholding or failing to provide, upon request by National Treasury Employees Union, Chapter 88, any information relevant to the reassignment of unit employees, including staffing, workload and recruiting information, which information is necessary to enable National Treasury Employees Union, Chapter 88, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request by the National Treasury Employees Union, Chapter 88, meet and confer, to the extent consonant with law and regulations, concerning the procedures which management observed in reaching the decision as to who was subject to the reassignments announced in September 1976, and the impact the reassignments had on adversely affected employees. Any agreement reached by the parties shall be promptly effectuated including return of any reassigned Inspector to Bardstown.

(b) Upon request, make available to the National Treasury Employees Union, Chapter 88, any information relevant to the reassignment of employees announced in September 1976 including staffing, workload and recruiting information, which information is necessary to enable National Treasury Employees Union, Chapter 88, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

(c) Post at all the Central Regional facilities of the Bureau of Alcohol, Tobacco and Firearms, Department of Treasury copies of the attached notice marked "Appendix" on the forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.


SALVATORE J. ARRIGO
Administrative Law Judge

Dated: December 28, 1977
Washington, D.C.

SJA:mjm

APPENDIX

- 2 -

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT reassign unit employees without notifying the National Treasury Union, Chapter 88, the exclusive representative, and affording it a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in reaching the decision as to who will be subject to reassignment and on the impact the reassignment will have on adversely affected employees.

WE WILL NOT withhold or fail to provide, upon request by National Treasury Employees Union, Chapter 88, any information relevant to the reassignment of unit employees, including staffing, workload and recruiting information, which information is necessary to enable National Treasury Employees Union, Chapter 88, to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights assured by Executive Order 11491, as amended.

WE WILL upon request by the National Treasury Employees Union, Chapter 88, meet and confer, to the extent consonant with law and regulations, concerning the procedures which management observed in reaching the decision as to who was subject to the reassignments announced in September 1976, and the impact the reassignments had on adversely affected employees. Any agreement reached by the parties shall be promptly effectuated including return of any reassigned Inspector to Bardstown.

WE WILL, upon request, make available to the National Treasury Employees Union, Chapter 88, any information relevant to the reassignment of employees, announced in September 1976, including staffing, workload and recruiting information, which information is necessary to enable National Treasury Employees Union, Chapter 88, to discharge its obligation as the exclusive representative to represent effectively employees in the exclusively recognized unit.

Agency or Activity

Dated _____ By _____
(Signature)

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor Management Services Administration, United States Department of Labor, whose address is: Room 1033-B Federal Building 230 S. Dearborn Street, Chicago, Illinois 60604.

May 17, 1978

A/SLMR No. 1046

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
ALASKA REGION
A/SLMR No. 1046

This case involved an unfair labor practice complaint filed by the Professional Air Traffic Controllers Organization, MEBA, AFL-CIO (PATCO) alleging the Respondent violated Section 19(a)(1) of the Order during the course of an accident investigation by, among other things, the conduct of its Chief, Air Traffic Division, in making statements to a PATCO vice-president that he had delayed and impeded the investigation and that the controllers involved should be allowed to make up their own minds in regard to any statements they wished to make.

The Administrative Law Judge found that the Respondent did not violate Section 19(a)(1) of the Order. In this regard, he concluded that, under the circumstances, the Respondent's conduct in writing letters threatening dismissal of the controllers involved, unless they provided additional information regarding the accident as required by agency regulations, was not improper. He also concluded that the statements of the Respondent's Air Traffic Division Chief, in the context in which they were made, did not violate the Order in that they were directed over the telephone to the PATCO vice-president and were not made directly to unit employees.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the case be dismissed.

FEDERAL AVIATION ADMINISTRATION,
ALASKA REGION

Respondent

and

Case No. 71-4260(CA)

PROFESSIONAL AIR TRAFFIC
CONTROLLERS ORGANIZATION,
PACIFIC REGION

Complainant

DECISION AND ORDER

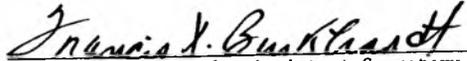
On February 21, 1978, Administrative Law Judge Alexander Karst issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 71-4260(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 17, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
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San Francisco, California 94105



(202) 653-5092
(415) 556-0555

In the Matter of

FEDERAL AVIATION ADMINISTRATION
ALASKAN REGION

Respondent

- and -

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, PACIFIC REGION

Complainant

CASE NO. 71-4260(CA)

Paul Colbert
Labor Relations Specialist
Federal Aviation Administration
1531 West 12th Avenue
Anchorage, Alaska 99501
For the Respondent

Charles R. Campbell
Regional Vice President
Professional Air Traffic
Controllers Organization
745 Fort Street
Honolulu, Hawaii 96813
and

Duane Bledsoe
Facility Representative of
Anchorage Air Traffic Control
Center
For the Complainant

Before: ALEXANDER KARST
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding under Executive Order 11491, as amended
(hereafter Executive Order) arises out of a crash of a

military aircraft in the vicinity of Anchorage, Alaska, on February 10, 1977. An Army plane with seven persons on board was erroneously cleared by an Anchorage air traffic controller to fly at an altitude of 10,000 feet. The proper altitude for that airway is 13,000 feet because in its middle stands a mountain of more than 10,000 feet. Although the wreckage was never found, it is assumed that the plane struck the mountain.

The case was commenced by a complaint of May 9, 1977, filed by the Professional Air Traffic Controllers Organization (hereafter PATCO or Union) against the Federal Aviation Administration (hereafter FAA). The complaint alleges that in the course of an FAA investigation of the accident, FAA officials, in violation of the Executive Order, threatened to fire some controllers who were PATCO members, and that an FAA official made disparaging remarks to a PATCO Vice President, which actions "discouraged membership in [PATCO] by arbitrarily and capriciously disciplining those employees for following the advise [sic] and seeking representation by their recognized union representative and legal counsel ... [and which] actions had a chilling effect on the members of [PATCO] and held their union up to ridicule." FAA denied these allegations on April 22, 1977. A Notice of Hearing was regularly issued on October 19, 1977, and pursuant to it, the matter was heard before me on November 29, 1977, in Anchorage, Alaska. Neither party was represented by counsel at the hearing, but PATCO's general counsel filed a brief. The Union attaches special significance to this case because it represents its first challenge of the FAA in connection with an accident investigation.

To be understood, this controversy must be viewed in terms of the problems inherent in the work of air traffic controllers. Air traffic controllers appear to have one of the most demanding and stressful occupations known to man. Because of its very nature, a small human inadvertence which in most other callings would be insignificant, can, in their work, result in unspeakable tragedies. They work under extreme tension and pressure throughout their careers, which tend to be brief because of the toll the job takes on their mental and physical wellbeing. In the event of an accident or a near-miss a controller is subject to investigation and perhaps to discipline. They must endure constant apprehension of a disaster, feelings of guilt, and sometimes public disgrace. In addition, there is now concern among controllers that under some circumstances they may be exposed to personal liability in tort actions which they might have to defend without government help. Although FAA has taken some measures to alleviate their lot

with provisions for traumatic leave, second career retraining, good compensation benefits, and such, it remains a very hard lot.

The FAA, on the other hand, being charged with the awesome responsibility for the safety of public airways, must demand from the controllers extraordinary standards of care, and has the duty to investigate their conduct and impose discipline for errors or inadvertence. This is resented by the controllers and makes for a uniquely adversary relationship between employer and employee.

The Anchorage controllers have an extraordinarily distrustful and hostile attitude toward the FAA. Their testimony shows bitter unhappiness with the FAA management. From their vantage the Anchorage Center is a uniquely unhappy center, it is woefully understaffed, and beset with more than usual labor-management strife.

The informal FAA investigation in this case was commenced shortly after the presumed crash, and it quickly focused on the Anchorage Control Center and five controllers who guided the ill-fated plane. Four of these controllers were PATCO members, and at their request, the Union sent Mr. Charles R. Campbell, PATCO Regional Vice President, to assist them. Mr. Campbell and a local Union official conferred with the controllers early on February 14, 1977, and then accompanied them to a meeting with Mr. Robert Altizer, the Facility Chief, an FAA attorney and two FAA investigators. They were briefed about the FAA investigation and the concurrent investigation by the Army Fact Finding Board, and each controller was asked to make a written narrative of the facts known to him or her. On Mr. Campbell's advice they limited their statements to information which was recorded on tapes. When other information was requested, Mr. Campbell, acting with the advice of PATCO's general counsel, instructed each controller not to provide it in writing, but to indicate a willingness to give it orally. Although most of the information sought by the FAA investigation was factual, Mr. Campbell and the controllers took the position that the questions called for conjectures and opinions or were not relevant, and that they would therefore not answer. Mr. Campbell maintained, for instance, that information passed on by a controller to his relief should not be divulged because that called for conjecture, and he would only permit the controller to say generally that he "briefed" his relief.

That evening, Mr. Willard Reazin, the FAA Air Traffic Division Chief, telephoned Mr. Campbell at the latter's

hotel in an effort to explain the reasons why more information was necessary and to persuade Campbell to change his mind. In the course of the hour long conversation, Reazin said that while discipline for controller error was seldom if ever imposed, and was unlikely here, if the controllers continue to refuse to make a more detailed written summary they may be subject to discipline; and that if only Campbell had not interjected himself into the investigation, it would have been handled more expeditiously and brought to a quick satisfactory conclusion. Unbeknownst to Reazin, the controllers were in Campbell's hotel room during this conversation.

At their supervisor's request, the controllers reported to the Center conference room the next morning. They came with Mr. Campbell. Although the controllers expected a meeting, no one came to talk to them. At about 10:30 a.m., at Campbell's insistence, a meeting was scheduled for the afternoon, and the controllers were excused. When no FAA representative came to this meeting either, Campbell telephoned Reazin to complain. Reazin replied that no formal meeting was intended, but that the controllers were on administrative duty all day and should wait until someone came to question them. The conversation became heated. Campbell told Reazin that the waiting was deliberate harassment, and that the controllers should be given leave. Reazin complained that Campbell was discourteous in not having told him in advance that he was coming to Anchorage, 1/ blamed Campbell for delaying the investigation, and again urged him to change his mind. Campbell responded that the PATCO controllers would give additional statements only if FAA agreed in writing to grant them immunity from any discipline. Such an agreement was later typed up by Campbell, but Reazin and his superior refused to sign it.

When the investigation resumed later that afternoon, on Campbell's instructions the first controller to be interviewed refused to answer whether he noted the planes' altitudes on devices called scrimp boats, and the meeting ended on an impasse. Shortly thereafter each controller was handed a letter, which, read in context, said that should they continue to refuse to make a written statement as required by the FAA Handbook, they may be fired. One of

1/ Mr. Edward Shields, one of the FAA investigators, was advised on February 11, 1977, that Mr. Campbell would come to Anchorage on February 13, 1977.

the controllers exploded in a manner which, most charitably described, was vulgar and insubordinate to the Facility Chief and they all declined to give a further statement. Mr. Campbell advised them to stand fast, that FAA was bluffing, that the letters were blackmail and coercion, and the FAA was testing the Union. But after reflection and extensive consultation with other Union officials and counsel over the next three days, Mr. Campbell and the controllers relented and agreed to write additional statements which satisfied the FAA investigators. The letters warning that the controllers may be fired were withdrawn and torn up. The controllers were interviewed by the Army the following week, and both investigations were concluded. In the aftermath one of the controllers attempted suicide, the Facility Chief was transferred, and four controllers, one non-PATCO member among them, were disciplined by suspensions from work of varying lengths. The four disciplined controllers thereafter received medical retirements and are now in second career training.

Although PATCO's complaint alleges that the FAA attempted to punish its employees for seeking Union representation and following its advice, PATCO's brief puts primary stress on the statements of Mr. Reazin about Mr. Campbell's dilatory influence. PATCO's principal complaint is that Mr. Reazin was critical of the advice given to the controllers by PATCO officials, and made remarks to the effect that Campbell delayed the investigation and that the controllers should be permitted to make up their own minds whether to follow the Union's advice. PATCO does not claim that FAA attempted to cut the controllers off from contacts with Mr. Campbell or other Union officials; nor does it claim that the controllers were hampered in getting advice from the Union. And it is clear that the controllers had every opportunity to obtain whatever assistance the Union chose to give them. Indeed, although neither the Executive Order nor the PATCO-FAA Agreement seems to give the controllers a clear right to be represented or assisted by their Union in an investigation like the one in question, the FAA officials never raised the point. 2/

2/ The controllers' right to have PATCO or its counsel represent them in this investigation seems at best arguable. The Federal Labor Relations Council in its Statement on Major Policy Issue, FLRC No. 75 P-2, held that an employee does not have "a protected right under the Order to assistance or representation at a nonformal investigative meeting

Mr. Campbell, moreover, took full advantage of the opportunity and treated the investigation as a direct union-management confrontation. Not only did he counsel the controllers, but took charge of them, decided what they should and should not do or say, and otherwise became their spokesman and leader. In his report to his Superior, Mr. Robert Poli, of March 23, 1977, Mr. Campbell indicated that after the controllers could not unanimously agree on whether to make a further statement, he, Campbell, decided "that because we [presumably PATCO] had made some big gains and the membership was satisfied that they were being fairly represented ..." they would all give further statements. And they did.

Under the circumstances, and especially since the Anchorage press and radio were already blaming them for the crash, the controllers' reluctance to give information which may have further tended to point to controller error as the cause of the crash, and even their somewhat clumsy legalistic posturing to justify it, are understandable. Nevertheless, I conclude that they had an inescapable duty, imposed on them by the regulations in the FAA Handbook, to make a complete written narrative, and that they were aware of that duty. They could properly refuse to give the statements only by validly invoking the privilege against self-incrimination since the regulations permitted it. But they did not invoke this privilege. Because they refused on other than valid grounds, regardless whether their reason was a fear of civil liability, or fear of FAA discipline or public obloquy, their employer had a right to attempt to coerce them to do their duty, and failing that, to discharge them for insubordination. The fact that they acted with the advice and encouragement of their Union or its attorney, did not make them immune from these consequences. Nor did the Union's presence make the FAA's proper efforts to

2/ (cont.) or interview to which he is summoned by management, unless such a right is created by the labor contract." PATCO's agreement with FAA does not appear to contain it. Sections 2, 6, 5, 7 and 71 thereof cited in PATCO's brief do not seem to create this right. But this is a peripheral issue which need not be decided herein. It is significant only in that the FAA did not object to PATCO's vigorous role although it had some legal grounds for doing so. This tends to bolster FAA's contention that it was not attempting to limit or undercut the Union's role in this investigation, as PATCO alleges.

persuade or coerce its employees to do their duty an anti-union act.

PATCO points out that it can give bad advice and counsel its members to act even wrongfully, and that that is none of the employer's business. The Union's right to give advice, bad or good, is not in question here, since in fact it did give the controllers advice and did represent them without any FAA objection. But I know of no authority, nor does PATCO cite any, which supports PATCO's contention that the employing agency cannot take exception or criticize the Union's improper advice or actions, or to punish illegal employee conduct counseled by a Union.

The evidence before me does not permit the conclusion that the dismissal letters, and the other acts of the FAA complained of were attempts to punish the controllers for seeking Union help or representation. Nor does it show that either Reazin or the FAA officials harbored anti-union animus or acted with enmity or malice toward PATCO. The Union's allegations that the FAA supervisors were plotting to embarrass PATCO is unsupported. Rather, on balance, the FAA officials seem to have acted with forbearance and restraint given the adamant efforts to either barter a written statement for a grant of immunity from discipline or else to thwart a necessary investigation of clearly relevant facts on rather contrived grounds. The controllers could not properly refuse to give information because, in their opinion, or in the opinion of their Union or counsel, the information was not sufficiently relevant or factual.

Accordingly, I conclude that the Alaska FAA officials acted properly in writing the letters threatening dismissals of the controllers unless they provided the written summaries asked of them. I therefore find the charge of an unfair labor practice in violation of the Executive Order on this ground to be without merit.

I also agree with FAA's procedural point that the dismissal letters were the subject of a negotiated grievance under the FAA-PATCO Agreement, and thus their effect cannot now be raised again in this proceeding, for section 19(d) of the Executive Order says that an issue can be raised one way or the other but not in both ways. PATCO elected its remedy when it chose to pursue the grievance procedure.

I also find that the remarks of Mr. Reazin to Mr. Campbell do not constitute an unfair labor practice. Firstly, the statements to the effect that if Campbell had

stayed out of it the investigation would have been conducted more expeditiously seem harmless under these circumstances. They do not appear to have been calculated to disparage the Union nor to hold it up to ridicule as PATCO charges. Secondly, the FAA is not prohibited by the Executive Order from saying to a Union official that he was instrumental in unreasonably delaying an investigation, and that the members ought to be allowed to make up their own minds whether to follow his counsel. That is especially so here where the Union counseled conduct which I find to have been improper.

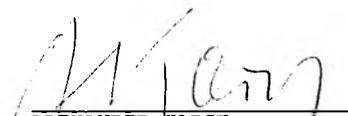
Moreover, Reazin's comments were not made publicly but to Campbell, under what Reazin had a right to assume were private circumstances. The fact that the controllers were in Campbell's hotel room during the conversation, unbeknownst to Reazin, and may have surmised what Reazin said, does not alter it. If Campbell wished to avoid a "chilling effect" on the members, he could have warned Reazin that the employees were with him and might infer what Reazin said. Also, Campbell could have asked Reazin to return the call when he had more privacy, or chosen his responses in such a way as to not echo Reazin's harsher words. Campbell apparently did none of these things. I conclude that Reazin was not responsible for any effects his comments may have had on the controllers since he did not address them to the controllers and had no reason to believe they would be relayed to them.

It appears clear to me that it is the general, perhaps inherent and irreconcilable, conflict between the controllers and the FAA, as well as the pre-existing discord between the Anchorage controllers and their superiors, which are at the bottom of much of this controversy. At the very least, these factors have fueled the Union's and the controllers' suspicions that the FAA attempted to embarrass PATCO and to punish the controllers for seeking its help. I find no factual basis for these suspicions. On the other hand, given the unenviable plight of the controllers, it is difficult to be critical of PATCO's or the controllers' conduct in this case. In the end, I am inescapably led to the conclusion that the FAA's responsibility for the safety of air travel overshadows all other considerations herein, and that safety investigations cannot be thwarted or impeded because they work an added hardship on the already overburdened controllers. The controllers and their Union may have just cause for seeking more protection for controllers involved in accidents, but the remedy should not be at the expense of the FAA's ability to uncover and prevent safety violations. In any event, the remedy does not lie in this forum.

May 17, 1978

RECOMMENDATION

For the reasons set forth, and on the basis of my findings of fact summarized above, I recommend that this complaint be dismissed in its entirety.



ALEXANDER KARST
Administrative Law Judge

Dated: February 21, 1978
San Francisco, California

AK:vag

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL AVIATION ADMINISTRATION,
FAA AERONAUTICAL CENTER,
OKLAHOMA CITY, OKLAHOMA
A/SLMR No. 1047

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local Union 2282 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by publishing and implementing an order changing parking and traffic policies without first notifying the Complainant. The Respondent maintained that the change was not a "matter affecting working conditions" and was, therefore, not an appropriate subject of bargaining under Section 11(a) of the Order. Further, the Respondent contended that its Director had no obligation to consult, confer, or negotiate with the Complainant regarding the order because the Office of the Director was a level of agency management above the level of exclusive recognition.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order when it issued and implemented the parking and traffic order without prior notice to the Complainant and without affording the Complainant the opportunity to consult, confer, or negotiate on the change. In this regard, the Administrative Law Judge found that because the Respondent's order changed various policies regarding parking and traffic, it was a "matter affecting working conditions" under Section 11(a), and thus gave rise to an obligation on the part of the Respondent to consult, confer, or negotiate with the Complainant over its issuance. He further found that the Respondent's Director was "agency management" within the meaning of Section 2(f) of the Order, and noted that the acts and conduct of any individual found to be agency management under Section 2(f) may provide the basis for a Section 19(a) violation.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations, and ordered that the Respondent cease and desist from conduct found violative of the Order and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
FAA AERONAUTICAL CENTER,
OKLAHOMA CITY, OKLAHOMA

Respondent

and

Case No. 63-7302(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL UNION 2282

Complainant

DECISION AND ORDER

On January 12, 1978, Administrative Law Judge John D. Henson issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as recommended in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed a reply brief thereto.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief and the Complainant's reply brief thereto, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for

Labor-Management Relations hereby orders that the FAA Aeronautical Center, Oklahoma City, Oklahoma, shall:

1. Cease and desist from:

(a) Changing policies governing parking and traffic at the Aeronautical Center without first affording the American Federation of Government Employees, AFL-CIO, Local Union 2282, notice and an opportunity to meet and confer concerning a proposed change in such policies.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

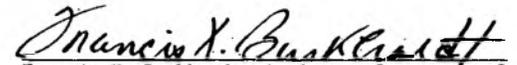
(a) Rescind FAA Aeronautical Center Order AC 1600.18E, issued on November 1, 1976, concerning parking and traffic at the Center.

(b) Upon request, meet and confer with the American Federation of Government Employees, AFL-CIO, Local Union 2282, concerning any proposed change in policy regarding parking and traffic at the Aeronautical Center.

(c) Post at the FAA Aeronautical Center, Oklahoma City, Oklahoma, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, FAA Aeronautical Center, Oklahoma City, Oklahoma, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
May 17, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change policies governing parking and traffic at the Aeronautical Center without first affording the American Federation of Government Employees, AFL-CIO, Local Union 2282, notice and an opportunity to meet and confer concerning a proposed change in such policies.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind FAA Aeronautical Center Order 1600.18E, issued on November 1, 1976, concerning parking and traffic at the Center.

WE WILL, upon request, meet and confer with the American Federation of Government Employees, AFL-CIO, Local Union 2282, concerning any proposed change in policy regarding parking and traffic at the Aeronautical Center.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036

211 Main Street, Suite 600
San Francisco, California 94105



(202) 653-5092
(415) 556-0555

In the Matter of)
)

FAA AERONAUTICAL CENTER,
OKLAHOMA CITY, OKLAHOMA)

Respondent)

and)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL UNION 2282)

Complainant)

CASE NO. 63-7302 (CA)

Gerald Guziak, Esquire
FAA Aeronautical Center
Oklahoma City, Oklahoma

For the Respondent

Raymond J. Malloy
Labor Relations Specialist
1325 Massachusetts Avenue, N.W.
Washington, D. C. 20006

For the Complainant

Before: JOHN D. HENSON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Pursuant to a complaint filed on March 14, 1977, under Executive Order 11491, as amended, by American Federation of Government Employees, AFL-CIO, Local Union 2282 (hereinafter called the Complainant), against FAA Aeronautical Center, Oklahoma City, Oklahoma (hereinafter called the Respondent), a Notice of Hearing on Complaint was issued on August 23, 1977. The Complaint alleged that Respondent violated §§ 19(a)(1) and (6) of the Executive Order.

A hearing was held in this matter on September 27, 1977, in Oklahoma City, Oklahoma. All parties were represented

and afforded full opportunity to be heard and to introduce relevant evidence on the issues involved herein.

Upon the entire record herein, including my observation of the witnesses and their demeanor, and upon the relevant evidence adduced at the hearing, I make the following findings, conclusions, and recommendations.

Findings of Fact

1. The Respondent, Aeronautical Center, is an organizational element of the Federal Aviation Administration, equivalent to an FAA Region (Agency Exhibit 1). The Center is comprised of sixteen operating and support divisions, all of which are under the management and jurisdiction of the Director (Agency Exhibit 2). Nine of the divisions have units of exclusive recognition, seven of which are represented by Complainant, AFGE Local 2282 (Joint Exhibits 3 through 9). Approximately 1200 of the 3500 employees of the Center are represented by Complainant, AFGE Local 2282.

2. On November 1, 1976, FAA Aeronautical Center Order AC 1600.18E (Joint Exhibit 2) was issued by Thomas J. Creswell, Director, Aeronautical Center, superseding FAA Aeronautical Center Order AC 1600.18D (Joint Exhibit 1) issued by Director Creswell on February 24, 1975.

3. It was stipulated and the record reflects that Order AC 1600.18E, superseding Order AC 1600.18D, was issued and implemented without prior notice to Complainant, AFGE Local 2282.

4. The subject of Order AC 1600.18D was "Parking and Traffic at the Aeronautical Center."

Contentions of the Parties

The Complainant argues that the Respondent violated the Order and committed an unfair labor practice by issuing and implementing FAA Aeronautical Center Order AC 1600.18E effective November 1, 1976, revising Parking and Traffic at the Center without prior notice to Complainant and without an opportunity to consult, meet and confer and/or negotiate on the issuance of said Order and its impact on the employees represented by Complainant.

Respondent takes the position that it did not violate Executive Order 11491 for failing to give notice to Complainant and by refusing to consult, confer or negotiate concerning the implementation of FAA Aeronautical Center Order

AC 1600.18E. It argues that the Director of the Center has no obligation to consult, confer or negotiate with Complainant concerning personnel policies, practices, or other matters affecting working conditions because the Office of the Director is a level of agency management above that which coincides with the units of exclusive recognition.

Discussion and Conclusions

A. Obligation to consult, confer, or negotiate concerning issuance of FAA Aeronautical Center Order AC 1600.18E

The obligation to negotiate is set forth in § 11(a) of the Order and encompasses

"personnel policies and practices and matters affecting working conditions"

FAA Aeronautical Center order AC 1600.18E effective November 1, 1976, cancelling Order AC 1600.18D then in effect, changed various agency policies concerning employee parking and traffic at the Aeronautical Center including registration of employee vehicles, movement of traffic, and penalties for parking and traffic violations. Accordingly, I conclude that the issuance and implementation of Order AC 1600.18E was a matter affecting working conditions and was an appropriate subject of bargaining under § 11(a) of the Order. General Services Administration, Region 3, Public Buildings Service, Central Support Field office, A/SLMR No. 583, 5 A/SLMR 706 (1975); U. S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 653, 6 A/SLMR 228 (1976); and Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 828 (1977).

B. Scope of obligation to consult, confer, or negotiate

Section 19(a) of the Order provides a list of specified unfair labor practices in which "agency management" may not engage, including § 19(a)(6) which prohibits "agency management" from refusing to consult, confer, or negotiate with a labor organization as required by the Order. The phrase "agency management" is specifically defined in § 2(f) of the Order:

"'Agency management' means the agency head and all management officials, supervisors, and other representatives of management having authority to act for the agency on any matters

relating to the implementation of the agency labor-management relations program established under the Order."

Calvin H. Davenport, Deputy Director of the Center, testified that the Director is the highest management official at the Center. Agency Exhibits 1 through 5 support the finding that the Director is "agency management" within the meaning of § 2(f) of the Order and I so conclude.

It is clear that the acts and conduct of any individual found to be agency management, as defined in § 2(f), may provide the basis for a § 19(a) violation. There is no basis in the Order to draw artificial distinctions between organizational levels of such agency management so as to relieve the responsibility for such acts. Naval Air Rework Facility, Pensacola, Florida, FLRC No. 76A-37 (1977).

Having found that the issuance and implementation of Order AC 1600.18E was a change in working conditions and was an appropriate subject of bargaining under § 11(a) of the Order and that the Director, Aeronautical Center is agency management as defined by § 2(f) of the Order and it being stipulated that said Order AC 1600.18E was issued and implemented without prior notice to Complainant and without an opportunity afforded Complainant to consult, meet and confer and/or negotiate on the matter, I conclude that Respondent engaged in conduct which was in violation of §§ 19(a)(1) and (6) of Executive Order 11491. I recommend that the Assistant Secretary adopt the following Order designed to effectuate the policies of Executive Order 11491, as amended.

Recommended Order

Pursuant to § 6(b) of Executive Order 11491, as amended, and § 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the FAA Aeronautical Center, Oklahoma City, Oklahoma, shall:

1. Cease and desist from:

a. Refusing to consult, confer, or negotiate concerning any change in policies and responsibilities governing parking and traffic at the Aeronautical Center, or refusing to negotiate prior to changing any other condition of employment which is a proper subject for collective bargaining negotiations under § 11(a) of Executive Order 11491, as amended.

b. Interfering with, restraining or coercing members of American Federation of Government Employees, AFL-CIO, Local Union 2282, in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of Executive Order 11491, as amended:

a. Rescind, in writing, FAA Aeronautical Center Order AC 1600.18E unilaterally issued on November 1, 1976, unless such changes are mutually agreed to by the parties, or upon request, meet and confer in good faith, to the extent consonant with law and regulations.

b. Bargain, after notice and upon request, with American Federation of Government Employees AFL-CIO, Local Union 2282 prior to changing any established condition of employment.

c. Post at FAA Aeronautical Center, Oklahoma City, Oklahoma, copies of the attached notice marked "appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, FFA Aeronautical Center, Oklahoma City, Oklahoma, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

d. Pursuant to § 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this Order as to what steps have been taken to comply therewith.


JOHN D. HENSON
Administrative Law Judge

Dated: January 12, 1978
San Francisco, California

JDH:scm

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally change the policies and responsibilities governing parking and traffic at the Aeronautical Center without affording any exclusive representative the opportunity to meet and confer on such change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, meet and confer with any labor organization determined to be the exclusive representative of our employees with respect to any proposed changes of employment conditions.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE, REGION VI,
HOUSTON, TEXAS
A/SLMR No. 1048

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapters 145, 160, and 163 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to notify the Complainant and negotiate concerning the impact and implementation of certain proposed changes in a work schedule and the issuance of new regulations dealing with terms and conditions of employment.

In recommending that the allegation relating to a change in patrol officer schedules be dismissed, the Administrative Law Judge concluded that the Complainant had not sustained its burden of proving by a preponderance of the evidence that the Respondent had refused to negotiate regarding the work schedule in question. The Administrative Law Judge also found that the issuance by the Respondent of a circular dealing with the acceptance of gratuities by Customs employees did not constitute a violation of the Order noting that the regulation constituted a mere reiteration of existing Agency policy. With regard to the allegation that the unilateral implementation of a circular covering district communications constituted a violation of the Order, the Administrative Law Judge found a violation of Section 19(a)(1) and (6) of the Order. In this regard, he found that the new circular constituted a change in existing working conditions and that the Respondent had failed to notify the exclusive representative and afford it an opportunity for negotiation over the impact and implementation of the new policy.

The Assistant Secretary agreed with the recommendations of the Administrative Law Judge that certain of the Complainant's allegations be dismissed. However, contrary to the Administrative Law Judge, the Assistant Secretary found no violation of the Order with regard to the issuance of the circular concerning district communications. In this regard, he concluded that, while the effect of a literal reading of the circular involved would constitute a change in employee terms and conditions of employment, subsequent discussions between the parties following the issuance of the circular served to clarify its intent and limit its scope. Under these circumstances, and noting the fact that the Complainant offered insufficient evidence that the circular in question was ever applied in such a fashion as to alter established employee terms and conditions of employment, the Assistant Secretary found that the Respondent's conduct was not violative of the Order. Accordingly, the Assistant Secretary dismissed the complaint in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE, REGION VI,
HOUSTON, TEXAS

Respondent

and

Case No. 63-6892 (CA)

NATIONAL TREASURY EMPLOYEES UNION (NTEU)
AND NTEU CHAPTERS 145, 160, AND 163

Complainant

DECISION AND ORDER

On January 25, 1978, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge also found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended that those portions of the complaint be dismissed. Thereafter, both the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order. 1/

1/ The Complainant excepted to the Administrative Law Judge's recommended dismissal of the allegation in the complaint concerning the Respondent's alleged unilateral implementation of a new regional boat reporting and control procedure. At the hearing, the Complainant requested permission to withdraw this allegation. Since the case had proceeded to a hearing, the Administrative Law Judge, in effect, denied the Complainant's request to withdraw but, instead, recommended dismissal of the allegation. In my view, where, as here, a complainant at a hearing seeks to withdraw an allegation from its complaint, the Administrative Law Judge should refer such request either to the appropriate Regional Administrator or to the Assistant Secretary for appropriate action. Under the circumstances outlined above, I shall treat the Complainant's withdrawal request as having been referred to me by the Administrative Law Judge for appropriate action and hereby approve such request.

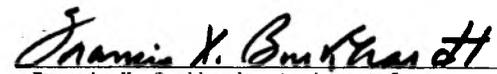
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, including the exceptions and briefs filed by the parties, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (6) of the Order when its District Director in Laredo, Texas, issued a circular concerning "District Communications" without prior notice to, or negotiations with, the exclusive representative. While I agree with the determination of the Administrative Law Judge that the effect of a literal reading of the circular involved would constitute a change in employee terms and conditions of employment, the record reveals that shortly after the issuance of the circular in question there were discussions between a representative of the Complainant and the District Director in which the latter clarified the intent of the circular and limited its scope so that it no longer could constitute a change in employee terms and conditions of employment. Under these circumstances, and noting particularly that the Complainant offered insufficient evidence that the circular in question was ever applied in such a fashion as to alter established employee terms and conditions of employment, I find that the Respondent's conduct herein was not violative of the Order. 2/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-6892(CA) be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C.
May 17, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

2/ Cf. Vandenberg Air Force Base, California, 3 FLRC 491, FLRC No. 74A-77 (1975).

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



RECOMMENDED DECISION AND ORDER

Statement of the Case

.....
 In the Matter of :
 TREASURY, U.S. CUSTOMS SERVICE, :
 REGION VI, HOUSTON, TEXAS :
 Respondent :
 and : CASE NO. 63-6892(CA)
 NATIONAL TREASURY EMPLOYEES UNION :
 (NTEU) and NTEU CHAPTERS 145, :
 160 and 163 :
 Complainant :

APPEARANCES:

ALLAN B. GOLDSTEIN, Esquire
 Office of the Chief Counsel
 U.S. Customs Service
 1301 Constitution Avenue, N.W.
 Washington, D. C. 20279
 For the Respondent

ROB V. ROBERTSON, Esquire
 Assistant Counsel
 National Treasury Employees Union
 300 East Huntland Drive
 Suite 104
 Austin, Texas 78752

DAVID VAN OS, Esquire #
 Assistant Counsel
 National Treasury Employees Union
 300 East Huntland Drive
 Suite 104
 Austin, Texas 78752
 For the Complainant

Before: RHEA M. BURROW
 Administrative Law Judge

David Van Os prepared the brief for Complainant in this proceeding.

This is an Unfair Labor Practice proceeding in which a formal hearing of record was held on August 17, 1977 pursuant to Executive Order 11491, as amended, (hereinafter referred to as the Order). In a complaint dated July 14, 1976, the Complainant alleged violations of Section 19(a) (1) and (6) of the Order. It was further alleged in substance that: (1) Ken Epperson, a member of management in Houston, Texas, unilaterally effected a new work schedule for Custom Patrol Offices in Houston that resulted in a change in working conditions; the change was not negotiated as to impact and implementation despite request by the exclusive bargaining representative; (2) Management in Customs Region VI unilaterally implemented a new boat reporting and control procedure (Circular VES-4-0:I x BOR-2, dated February 13, 1976). The new procedure involved personnel policies, practices and working conditions affecting the customs inspection force at Brownsville, Texas, in that it created an additional work load without commensurate increases in manpower and affected the overtime earnings of individual inspectors. At no time was NTEU notified or given the opportunity to bargain on impact and implementation of the change in policy; (3) A Circular PER 2-L:DD:C, entitled "Acceptance of Gratuities by Customs Employees," dated February 4, 1976 was signed by the District Director, Donald Working and issued to Customs Personnel in the Laredo District. The Circular created and unilaterally implemented a new policy by expanding upon definitions as outlined in Chapter 735 of the Customs Personnel Manual. This new policy was instituted prior to any notification to NTEU or any negotiation concerning the substance, impact and implementation of the Circular; and, (4) A Circular, MAN-1-L:DD:C, entitled District Communications dated February 4, 1976 was signed by District Director, Donovan F. Working and issued to all Customs personnel in the Laredo District. The Circular created and unilaterally implemented a new policy that deviated from past practice and caused substantial impact on personnel in the Laredo District. The new policy was instituted without notification to or negotiation with the exclusive representative of the employees as to impact or implementation of said Circular provisions.

During the course of the hearing the Complainant requested that Charge No. 2 in the complaint be withdrawn since it had ascertained facts relating to previous bar-

gaining as to the charge not previously known, and, in view thereof, would not offer proof as to this matter. Since the case had proceeded to hearing, I will recommend dismissal of the second charge or issue in the complaint in lieu of withdrawal of that issue.

Upon the basis of the entire record, including the evidence adduced, the timely submitted briefs, and my observation of the witnesses and judgment of their credibility, I make the following findings, conclusions and recommendations.

Findings of Fact

1. The National Treasury Employees Union (hereinafter referred to as NTEU), is, and was at all times material herein, the exclusive bargaining representative for employees of Region VI, also known as the Houston Region, of the United States Customs Service. NTEU's initial certification occurred in the Fall of 1975, when the previous exclusive representative of Region VI employees, the National Customs Service Association (NCSA), affiliated with NTEU. NTEU was approved by the Department of Labor as the successor to NCSA and was certified as the exclusive representative. 1/

2. Issue No. 1 - Work Schedule Houston - By memorandum dated March 4, 1976 from Kenneth H. Epperson, Director, District Patrol Division, addressed to Roger W. Rogers, Customs Inspector and President of NTEU Chapter 163, Houston District notice and a copy of a work schedule to be implemented or effective on April 4, 1976 was forwarded.

3. Rogers, the President of NTEU Chapter 163 denied receiving a copy of the memorandum but acknowledged having been furnished a copy of the work schedule by the Assistant Director of Patrol on March 12, 1976.

1/ Prior to NTEU's accession to NCSA's exclusive status, a rival union had, on June 4, 1975, filed an RO petition challenging NCSA's certification. NTEU then filed an unfair labor practice charge against Customs for assisting the rival organization in its challenge. In settlement of the RO petition and unfair labor practice charge, the parties agreed to a Labor Department directed election to resolve the certification question. The election was completed on April 8, 1976 and NTEU was certified as the victor on April 30, 1976.

4. After contacting the chapter employees Rogers and Henry L. Loveless, NTEU employee representative and a Customs Patrol Officer met with Ken Epperson, Director of Patrol, on March 22, 1976 to express the employees dissatisfaction with the schedule. I find that regardless of whether Rogers received the memorandum dated March 4, 1976, the evidence establishes that he had timely notice of the proposed change and discussed the matter with a management agent or representative on March 22, 1976.

5. After the meeting on March 22, 1976 a revised schedule was prepared based in part on the union's input and suggestions made at the March 22, 1976 discussion and it was transmitted to Rogers, President of NTEU Chapter 163 on March 30, 1976.

6. The effect of the changed work schedule was to increase the number of weekends off duty and in some cases to reduce the workweek to five consecutive days as desired by Local 163 union representatives and to include a mid-night schedule to provide essential full dock coverage mandated by the District Director for the Houston district. Thus, some parts of the benefits requested by the Union at the March 22 meeting were granted when the revised schedule was issued.

7. There was no request for a meeting by the union to discuss impact or implementation after the revised schedule was posted and transmitted to the Complainant on March 30, 1976.

8. Issue No. 2, Brownsville, Texas. See Discussion and Conclusion "B: infra.

9. Issue or Charge No. 3, Laredo, Texas: On February 4, 1976 Respondent's District Director of Customs, Laredo District, issued a Circular 2/ with entitled subject "Acceptance of Gratuities by Customs Employees." The Circular referred to the purpose and background for the publication and stated the previous guidelines issued by the Region and Headquarters regarding gratuities may leave some doubt as to the acceptance of small gratuities. It further stated:

"Government employees may not accept gifts, etc., no matter of how little value that may be. This includes but is not limited to, free lunches, drinks, and for

2/ Complainant Exhibit No. 5.

that matter items of small value such as advertising ball point pens. Any acceptance of these items may suggest to others an endorsement of services.

"We should all strive to maintain a pleasant professional relationship with brokers, importers, and the public in general. Any attempt to offer gratuities should be dealt with in a manner befitting the Service you serve. Be pleasant, courteous, and firm in rejecting or returning any such items offered or given you." The respondent issued the Circular without advance notification to the Complainant.

10. Previous publications such as Customs Patrol Manual, CPM 735-2 page 18 3/ and Agency Regulation 0.735-33 (b) (4) 4/ relating to Acceptance and Gifts or other things of Monetary Value from Outside Sources provided that the specified restrictions do not apply to certain situations including "(g) the acceptance of unsolicited specialty advertising or promotional material such as pens, note pads, calendars and other items of trivial intrinsic value..."

11. The evidence before me establishes that both prior to and after Respondent's issuance of the February 4, 1976 Circular an employee was precluded from accepting a gift or gratuity from one who

"(1) has, or is seeking to obtain, contractual or other business or financial relations with the Treasury Department;

(2) conducts operations or activities that are regulated by the Treasury Department; or

(3) has interests that may be substantially affected by the performance or non-performance of his official duty.

The Circular provisions did not by intent or application in practice change or modify the prior regulations or manual provisions relating to acceptance of gratuities by Custom employees but merely reiterated prior agency or management policy.

3/ Complainant Exhibit No. 7

4/ Complainant Exhibit No. 8

12. The method of application as to enforcement of the provisions against accepting gifts and gratuities was unchanged and did not effect a change in the working conditions of employees.

13. Since a change in policy or working conditions was not intended or effected by reason of the Circular published February 4, 1976, the Respondent was not obligated to provide the Complainant advanced notification as to a policy being reiterated.

Issue or Change No. 4, Laredo District

14. Respondent's District Director, Donavon F. Working, issued Circular No. MAN 1-L:DD:C on February 4, 1976, Subject: District Communications, for the expressed purpose of establishing "...effective communications in the District with regard to established organizational lines." (Underscoring supplied).

15. The action required by the Circular specified that: "Consistent with good management practices, all future communications must follow the established organizational chain of command; i.e., Port to District to Region to Headquarters." 5/ The Circular indicated that distribution was to be made to all employees but was not directed to any individual or group.

16. The Respondent admits and I so find that the Circular relating to District Communications was implemented without advance notification to the Union.

17. While the requirements and specifications of the Circular relating to District Communications primarily involved port directors and supervisory personnel they also applied to bargaining unit personnel.

5/ Complainant Exhibit No. 6. The Circular stated under "Background" that: "In the past the communications between personnel in this District and those outside the District followed no organizational lines. Telephone calls were made freely by employees to other Districts, Region, and Headquarters without clearance by Port or District authorities. Memorandums and Correspondence were issued directly, with copies sent to the District office for their information. Orders were issued by individuals in both Region and Headquarters, sometimes directly to individuals at the Port.

Discussion and Conclusions

A

The Complainant charges that the Respondent violated Section 19(a)(1) and (6) of the Order by its action in unilaterally effecting a new work schedule for Customs patrol officers in the Houston, Texas area without negotiation with Complainant as to impact and implementation resulting in a change of working conditions of bargaining unit employees.

Section 19(a)(1) and (6) of Executive Order 11491 provides that "Agency management shall not (1) interfere with, restrain or coerce an employee in the exercise of rights assured by this Order; and (6) refuse to consult, confer or negotiate with a labor organization as required by this Order."

Section 11(a) of the Order, as amended, imposes upon any agency the obligation to meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions of unit employees.

Section 11(b) of the Order, however, makes it clear that the obligation to meet and confer (imposed by Section 11(a)) does not include matters with respect to the mission of the Agency; its budget; its organization; the numbers of employees assigned an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices.

The above exception contained in Section 11(b) with respect to those normally categorized as "management perogatives" is applicable only to the initial decision or action of the Agency. Thus, as noted in the last sentence of Section 11(b) and as interpreted by the Assistant Secretary and the Federal Labor Relations Council, the Agency or activity is obligated to consult and confer with respect to the impact of any such "initial decision" or action on unit personnel. 6/

6/ Immigration and Naturalization Service, FLRC No. 70-A-10 (April 15, 1971; Plum Island Animal Disease Laboratory, FLRC No. 71-A-11, (July 9, 1971); Griffis [continued on next page].

The Respondent had the right under Section 11(b) of the Order unilaterally to arrange and provide full dock coverage of the Port in furtherance of performing its work project and the technology it utilized in performing such work. An agency or activity is obligated however to afford the exclusive representative a reasonable opportunity to meet and confer concerning the impact and implementation of decisions taken with respect to subjects within the ambit of Section 11(b) of the Executive Order. (United States Air Force Electronics Systems Division (AFCS) Hanson Air Force Base, and Local 975, National Federation of Federal Employees, A/SLMR No. 571 (1975).)

While the President of NTEU Chapter 163 denies he received the March 4, 1976 Memorandum addressed to him enclosing a copy of the work schedule to be effective April 4, 1976, he admitted having been furnished a copy on March 12, 1976. He and another Union representative thereafter met with the Director of Patrol on March 22, 1976. As a result of input received from the Union, the proposed schedule to be effective on April 4, 1976 was revised to grant in part some of the changes requested by the Union and the union NTEU President of Chapter 163 was notified on March 30, 1976. The Respondent was not thereafter contacted by the Complainant before the revised schedule was implemented and made effective on April 4, 1976.

Thus, as to the issue that Respondent unilaterally effected and implemented a new work schedule for Customs Patrol Officers in the Houston area without negotiation with NTEU Chapter 163, I conclude:

- (1) The Respondent did not refuse to consult, confer, or negotiate with a labor organization as required by this Order.
- (2) The Respondent did not interfere with, restrain or coerce an employee in the exercise of rights assured by this Order.

6/ - continued

Air Force Base, 71-A-30, (April 19, 1973); Norton Air Force Base, A/SLMR No. 261, (April 30, 1973); U.S. Department of Interior, Bureau of Indian Affairs, A/SLMR No. 34 (January 9, [continued on next page]

(3) The Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of Section 19(a) (1) and (6) of the Order.

B

The Complainant charges that Respondent unilaterally implemented a new boat reporting and control procedure without notifying the NTEU representatives is not supported.

In fact the Union requested that the charge be withdrawn. Since the case had proceeded to hearing I will recommend to the Assistant Secretary dismissal of this issue in lieu of withdrawal.

C

The Complainant urges that the February 4, 1976 Circular relating to Acceptance of Gratuities by Customs Employees issued by the District Director of Customs constituted a change in past practice that impacted on working conditions of Respondent's employees. A cursory observation without more careful study of the situation would indicate some grounds for concern as to what small gratuities the February 4, 1976 Circular precluded.

The obligation to meet and confer arises only when agency management takes action that effects a change in existing terms and conditions of employment. 7/

6/ - continued

1974); New Mexico Air National Guard, A/SLMR No. 362, (February 28, 1974); Army Air Force Exchange Service, A/SLMR No. 451, (October 31, 1974); Federal Railroad Administration, A/SLMR No. 418, (July 31, 1974).

7/ Department of Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 814; Northeastern Program Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 753, and Department of the Navy, Mare Island Shipyard, A/SLMR No. 736.

The evidence depicting the circumstances existing before, at the time of, and, after the February 4, 1976 Circular was to preclude solicitation of any gift or gratuity from any person, corporation or groups which (1) has, or is seeking to obtain, contractual business or other financial relationship with his agency; (2) conducts operations or activities which are regulated by his agency; or (3) has interests which may be substantially affected by the performance or non-performance of his official duty.

While some fear and concern was expressed by Complainant as to application of the February 4, 1976 Circular provisions relating to gifts and gratuities, it did not preclude gifts from those having no relationship to Customs. Thus, I conclude that the Circular was in effect a reaffirmation of prior policy and practice and no change in employment conditions was effected. It is my opinion that more than an illusory fear or concern of a change in practice must be demonstrated to constitute a change in working conditions and an unfair labor practice charge is not supported by the evidence in this case. Therefore, I conclude as to this issue;

(1) that the Respondent did not refuse to consult, confer, or negotiate with a labor organization as required by this Order;

(2) the Respondent did not interfere with, restrain, or coerce, an employee in the exercise of rights assured by this Order; and

(3) The Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of Section 19(a) (1) and (6) of the Order.

D

Respondent's February 4, 1976 Circular relating to "District Communications" was issued for the expressed purpose of establishing "...effective communications in the District with regard to established organizational lines." The Circular distribution was to all employees and unlike the Circular relating to Acceptance of Gratuities by Customs Employees it is evident that no prior policy established by official regulations or publications effectively governed the matter and the Circular issuance was not a reaffirmation, but a change in practice.

In its brief, counsel for the Respondent urged in effect, that the February 4, 1976 Circular provisions as to District Communications applied only to Port Directors and other supervisory personnel and not to rank and file or bargaining unit employees. I disagree. Neither the contents of the Circular or the overall evidence adduced establish an intent or purpose for the provisions to apply only to Port Directors and supervisory personnel. The changes, or, established new policies, constituted more than illusory fear and concern on the part of bargaining unit employees. In fact, there was impact as to the method, manner, content, and routing of communications before material aspects of the established policy could be ascertained and clarified. This is the type of situation that lends itself to advanced negotiation on impact and implementation of procedures rather than belated explanation and clarification after a new policy has been established or a change in policy and practice effected.

Ordinarily I would conclude that the Respondent committed an unfair labor practice by attempting to limit bargaining unit employee communication thus establishing a change in District Communications policy affecting employee working conditions without affording the union an opportunity to negotiate the impact and implementation prior to the date it became effective.

However, before doing so, I must examine what effect the pending petition of a rival labor organization had on Respondent's refusal to negotiate. At the beginning of the hearing, Counsel for the Respondent agency stated in effect that during the time all of the above issues were pending, there was a question concerning representation since a rival labor organization had petitioned for representation of Region VI employees; therefore, for the Agency to negotiate with the Complainant in the face of the representation question would have constituted violation of Section 19(a) (3) of the Order, as amended.

The Assistant Secretary of Labor for Labor-Management Relations has held on a number of occasions that when a question of representation exists, management is precluded from entering into negotiations with the incumbent union. The incumbent may continue to administer its existing contract to represent employees in grievances, collect dues, etc., but it may not enter into new negotiations with management.

In Department of the Navy, Naval Air Rework Facility, Jacksonville, Florida, et al, A/SLMR No. 155, the Assistant Secretary elaborated upon the difficulties in striking a balance between maintaining a neutral posture and the status quo.

A part of the elaboration and discussion mentioned that management's role is to maintain the status quo by administering the existing contract while keeping a neutral position as to the outcome of the representation proceedings. If management does negotiate with the incumbent union, the employees in the unit could receive rights and benefits they had not enjoyed before. This would give the incumbent union an unfair advantage in election proceeding. By giving the incumbent such an opportunity to bargain, management has therefore, inadvertently or not, assisted the incumbent labor organization and therefore tainted its neutral stance. Such a neutral stance is prescribed under Section 1(a) as well as 19(a)(1) and (3) of Executive Order 11491.

In Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma Arizona, A/SLMR No. 808, it was held that during the pendency of an RA petition in the reorganization circumstances here involved an agency is obligated to continue recognition and adhere to the terms of existing agreements to the maximum extent possible until the representation matter is resolved. 8/

In Warner Robins Air Logistics Center, Robins Air Force Base, Georgia A/SLMR No. 912 one of the complaints alleged was that the Respondent violated Section 19(a)(1) and (6) of the Order 9/ by its unilateral implementation of its last negotiation offer regarding the amount of official time available to stewards for representational purposes when the issue was pending before the Federal Service Impasses Panel.

The Assistant Secretary adopted the Administrative Law Judges' findings, conclusions and recommendations that no overriding exigency existed to permit the implementation of an impasse issue while pending before the Federal Service Impasses Panel, (citing U.S. Army Corps of Engineers,

8/ Also see, FLRC No. 74A-52.

9/ A violation of Section 19(a)(2) was also alleged and the recommendation for dismissal of the Section 2 violation [continued on next page]

A/SLMR No. 673), and he concluded that the Respondent violated Section 19(a)(1) and (6) of the Order.

The communication practices that Complainant sought to correct in this case were not of recent vintage and there was no overriding exigency to permit the Respondent to blithely engage in unilateral conduct before determination of the petition as to the proper labor organization representative. Rather than stabilize labor relations such conduct enhances or increases the disharmony between parties. This was not in my opinion the intent or purpose of the framers of the Order.

My findings, conclusions and recommended disposition as to the first three allegations of the complaint are predicated on a different basis than the pending petition of a rival labor organization. As to the allegation relating to District Communications, I find that the Respondent failed in its obligation to meet and confer in good faith with the Complainant in violation of Section 19(a)(1) and (6) of the Order.

RECOMMENDATION

Based upon the foregoing findings and conclusions, I recommend that the complaint against the Respondent alleging violations of Section 19(a)(1) and (6) of the Order be dismissed as to the following issues: (1) that the Respondent unilaterally effected a new work schedule for Customs Patrol Officers in the Houston, Texas area that affected a change in working conditions of bargaining unit employees without conferring or consulting with the Complainant as to impact and implementation of the change; (2) the Respondent unilaterally implemented a new boat reporting and contact procedure which changed personnel policy or practices and affected working conditions of the Customs inspection force in the Brownsville, Texas area without conferring or consulting with the Complainant as to the impact and implementation of the change; and, (3) the Respondent issued a circular in February 1976 limiting acceptance of any and all gratuities and this constituted a policy change affecting working conditions of Customs personnel in the Laredo, Texas area and the Complainant was not notified or given the opportunity to bargain on impact or implementation of the change before it became effective.

9/ - continued

by the Administrative Law Judge was adopted by the Assistant Secretary.

I, having found that the Respondent has engaged in conduct which violated Section 19(a)(1) and (6) of the Order with respect to it having issued a circular creating and implementing a change in District Communications policy and procedures without affording the Complainant an opportunity to bargain on impact or implementation before the change became effective, I shall recommend that the Assistant Secretary adopt the following Recommended Order designed to effectuate the policies of Executive Order 11491, as amended.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations promulgated thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby Orders that the Respondent, Treasury, U.S. Customs Service, Region VI, Houston, Texas, shall:

(1) Cease and desist from:

- (a) Failing and refusing to notify National Treasury Employees Union pursuant to Section 9(b) of Executive Order 11491, as amended, of proposed substantive changes in District Communications personnel policies that affect employees it represents and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the procedure involved and the impact of the decision to change and limit District Communications activities.
- (b) Failing and refusing to provide an opportunity for National Treasury Employees Union to comment on proposed substantive changes in personnel policies and/or practices that affect employees it represents.
- (c) Refusing to consult with National Treasury Employees Union, upon request, at reasonable times on policy changes and practices affecting bargaining unit personnel.
- (d) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) In the future, notify National Treasury Employees Union Chapter No. 145, the exclusive representative of Customs Patrol Officers in the Laredo, Texas area, and afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations prior to changing communications policy and practices and matters affecting working conditions of unit employees.

(b) Post at the Laredo Customs Patrol Office, Laredo, Texas, copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the District Director or other appropriate official in charge of the Laredo Customs Patrol Office, Laredo, Texas; the notices shall be posted and maintained by the District Director and/or other appropriate official for 60 consecutive days thereafter, in conspicuous places, where notices to employees are customarily posted. The District Director or other appropriate official shall take reasonable steps to insure that such notices are not covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.


RHEA M. BURROW
Administrative Law Judge

Dated: January 25, 1978
Washington, D.C.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally change or implement matters limiting communication activities of employees represented by National Treasury Employees Union (NTEU), Chapter 145, or any other exclusive representative, without affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the procedure involved and the impact of the decision to change or limit the source, methods and areas of communications.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of rights assured by Executive Order 11491.

WE WILL, in the future, notify Chapter 145, National Treasury Employees Union, the exclusive representative of Customs Patrol Officer employees in the Laredo, Texas Region and afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, prior to changing personnel policies and practices and matters affecting working conditions of unit employees.

(Agency or 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

May 18, 1978

covered by any other material.

If employees have any questions concerning this NOTICE or compliance with its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
A/SLMR No. 1049

These cases involved two unfair labor practice complaints filed by the the National Treasury Employees Union (Complainant), and were before the Assistant Secretary on stipulated facts. One complaint alleged that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally declaring terminated certain provisions of the parties' nationwide, negotiated agreement which, upon its terms, had expired at an impasse in negotiations for a new agreement. The second complaint alleged that the Respondent's Puerto Rico Office violated Section 19(a)(1) and (6) of the Order by its refusal to process an employee's grievance filed under the negotiated procedure of the parties' expired nationwide agreement.

Regarding the first complaint, the Assistant Secretary found that the Respondent violated Section 19(a)(1) and (6) of the Order by its unilateral conduct in changing existing personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) of the Order after the expiration of the parties' negotiated agreement. The Assistant Secretary dismissed the second complaint. He found that since the conduct of the Puerto Rico Office was clearly based on instructions from higher level management, a separate finding of violation of Section 19(a)(1) and (6) of the Order against the Puerto Rico Office was not warranted.

Accordingly, with respect to the first complaint, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of Section 19(a)(1) and (6) of the Order and that it take certain affirmative remedial actions. He ordered that the second complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

Respondent

and

Case Nos. 22-07962(CA) and
37-01854(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator Hilary M. Sheply's Order Transferring Cases to the Assistant Secretary of Labor, in accordance with Section 203.5(b), 203.7(a)(4), and 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject cases, including the parties' stipulation of facts and accompanying exhibits, the Assistant Secretary finds:

The complaint in Case No. 22-07962(CA) alleges that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, when it unilaterally declared terminated certain provisions of the parties' expired nationwide negotiated agreement. In Case No 37-01854(CA), it is alleged that Section 19(a)(1) and (6) of the Order was violated when the Puerto Rico Office of the Bureau of Alcohol, Tobacco and Firearms refused to process an employee's grievance under the negotiated procedure of the expired agreement.

The undisputed facts, as stipulated by the parties, are as follows:

Since April 1973, the Complainant, National Treasury Employees Union, has been the exclusive representative of all nonprofessional General Schedule and Wage Grade employees employed by the regional offices of the Department of

the Treasury, Bureau of Alcohol, Tobacco and Firearms, except management officials, supervisors, confidential employees, professional employees, employees of the Criminal Enforcement Divisions, employees engaged in Federal personnel work in other than a purely clerical capacity, and guards. There are approximately 1,000 employees in the nationwide unit.

The parties executed their first negotiated agreement on March 5, 1974. Thereafter, on March 1, 1976, they began negotiations on a new agreement. On March 8, 1977, the Complainant notified the Federal Service Impasses Panel (FSIP) that an impasse had been reached. By its terms, the 1974 agreement expired when the parties reached impasse in their negotiations for the new agreement. The Respondent thereupon declared terminated certain provisions of the expired agreement by a memorandum to its supervisors of unit employees on March 14, 1977. The memorandum stated, in part, that "the Bureau will not be bound to provide those privileges which were contractually accorded to the union and union members." ^{1/} It listed 22 of 38 articles of the expired agreement that "should continue to be observed even though the contract is terminated, since they constitute the existing personnel policies, practices, and working conditions." Subsequently, in accordance with the Respondent's memorandum of March 14, 1977, the Respondent's Chief of Puerto Rico Operations refused to process under the negotiated procedure of the expired agreement an employee's grievance filed on March 15, 1977.

The Federal Labor Relations Council (Council) has recently stated its view that, upon the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) of the Order, whether or not included in a negotiated agreement, continue as established absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order. The Council noted, in this connection, that agency management retains the right, upon the expiration of a negotiated agreement, to unilaterally change those matters contained therein which are excepted from the obligation to negotiate by Section 11(b) of the Order. ^{2/}

Applying the above principles enunciated by the Council to the circumstances in these cases, I find in Case No. 22-07962(CA) that the Respondent's conduct in unilaterally terminating various agreement provisions at the expiration of the agreement violated Section 19(a)(1) and (6) of

^{1/} The memorandum specifically stated that time should not be provided to union representatives to pursue contract matters and that grievance procedures, disciplinary actions and adverse actions should not be processed according to the negotiated procedure since the agreement no longer existed, but rather should be processed in accordance with agency procedures.

^{2/} Internal Revenue Service, Ogden Service Center, and Internal Revenue Service, et al., A/SLMR No. 806 (1977), FLRC No. 77A-40 (1978), and Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 859 (1977), FLRC No. 77A-92 (1978).

the Order, as, clearly, many of the provisions terminated involved personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) of the Order. For example, among the clauses declared terminated by the Respondent were the parties' negotiated grievance procedure, those dealing with facilities and services supplied by the Respondent to the Union, and those granting the right of the Union representative and an affected employee to be on official time for a reasonable period to present grievances and appeals, clearly mandatory subjects of bargaining within the ambit of Section 11(a) of the Order. 3/

Under these circumstances, I find that the Respondent's unilateral conduct in terminating Section 11(a) terms and conditions set forth in certain provisions of the parties' expired agreement 4/ was in derogation of its bargaining responsibilities under the Order. 5/

The evidence establishes that the refusal by the Respondent's Puerto Rico Office to process a grievance under the negotiated procedure was based on instructions contained in the Respondent's March 14, 1977, memorandum. Under these circumstances, since the conduct of the Respondent's Puerto Rico Office clearly was based on instructions from higher level management, a separate finding of violation in Case No. 37-01854(CA) against the Puerto Rico Office was not considered warranted. 6/ Accordingly, I shall dismiss the complaint in that case.

3/ See Elmendorf Air Force Base (Wildwood Air Force Station), Alaska, 1 FLRC 361, FLRC No. 72A-10 (1973), General Services Administration, Region 5, FLRC No. 76A-121 (1977), and San Antonio Air Logistics Center, Kelly Air Force Base, Texas, 5 A/SLMR 502, A/SLMR No. 540 (1975), FLRC No. 75A-100 (1976).

4/ As noted above, the parties' 1974 negotiated agreement, by its terms, expired when the parties reached impasse in their negotiations for a new agreement. There is no evidence that the agreement provisions which the Respondent terminated included any of the issues at impasse. In any event, the processes of the FSIP having been invoked, the Respondent was required to adhere to established personnel policies and practices and matters affecting working conditions, including those contained in the expired agreement, to the maximum extent possible. Internal Revenue Service, Ogden Service Center, and Internal Revenue Service, et al., cited above.

5/ Article 33 and portions of Article 32 of the expired agreement dealt with advisory arbitration of adverse actions. The right of agencies to establish their own appeals procedures for adverse actions was revoked in 1974 by Executive Order 11787. Therefore, these provisions did not survive the expiration of the 1974 negotiated agreement.

6/ See Naval Air Rework Facility, Pensacola, Florida, and Secretary of the Navy, Washington, D. C., FLRC No. 76A-37 (1977), A/SLMR No. 873 (1977). It should be noted that the remedy which I shall order for the violations found in Case No. 22-07962(CA) will serve to remedy the conduct complained of in Case No. 37-01854(CA).

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, shall:

1. Cease and desist from:

(a) Unilaterally changing, after the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions within the ambit of Section 11(a) of the Order, without providing notice to, and, upon request, meeting and conferring with the National Treasury Employees Union, the exclusive representative of its employees, or any other exclusive representative;

(b) Directing its Puerto Rico Office to make unilateral changes in existing personnel policies and practices and matters affecting working conditions within the ambit of Section 11(a) of the Order based on the expiration of a negotiated agreement;

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Direct its Puerto Rico Office, and any of its other facilities where unit employees are employed, to process, upon appropriate request, any grievance under the parties' negotiated procedure in which past refusal to do so was predicated upon the expiration of the parties' negotiated agreement;

(b) To the extent consonant with law and regulations, require the restoration of all privileges and benefits, including annual leave, denied due to unilateral changes in existing personnel policies and practices and matters affecting working conditions within the ambit of Section 11(a) of the Order after the expiration of the March 5, 1974, negotiated agreement, for the period from March 9, 1977, to the date those personnel policies and practices and matters affecting working conditions were superseded by the terms of a new negotiated agreement or were otherwise modified in a manner consistent with the Executive Order;

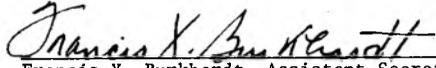
(c) Post at the agency's Puerto Rico Office, and at any of its other facilities where unit employees are employed, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, Bureau of Alcohol, Tobacco and Firearms, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are

customarily posted. The Director, Bureau of Alcohol, Tobacco and Firearms, shall take reasonable steps to insure that such notices are not altered, defaced, or covered with any other material;

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint in Case No. 37-01854(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 18, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally change, after the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions within the ambit of Section 11(a) of the Order, without providing notice to, and, upon request, meeting and conferring with the National Treasury Employees Union, the exclusive representative of our employees, or any other exclusive representative.

WE WILL NOT direct our Puerto Rico Office to make unilateral changes in existing personnel policies and practices and matters affecting working conditions within the ambit of Section 11(a) of the Order based on the expiration of a negotiated agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL direct our Puerto Rico Office and any of our other facilities where unit employees are employed, to process, upon appropriate request, any grievance under the parties' negotiated procedure in which past refusal to do so was predicated upon the expiration of the negotiated agreement.

WE WILL, to the extent consonant with law and regulations, require the restoration of all privileges and benefits, including annual leave, denied due to unilateral changes in existing personnel policies and practices and matters affecting working conditions within the ambit of Section 11(a) of the Order after the expiration of the March 5, 1974, negotiated agreement, for the period from March 9, 1977, to the date those personnel policies and practices and matters affecting working conditions were superseded by the

terms of a new negotiated agreement or were otherwise modified in a manner consistent with the Executive Order.

May 18, 1978

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. ARMY MORTUARY,
OAKLAND ARMY BASE,
OAKLAND, CALIFORNIA
A/SLMR No. 1050

On June 28, 1977, in A/SLMR No. 857, the Assistant Secretary issued an Order Referring Major Policy Issue To The Federal Labor Relations Council (Council). The following issue was presented to the Council for its consideration:

Whether the Assistant Secretary can find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the successor employer and the exclusive representative a period of stability free from rival claims or other questions concerning majority status?

On March 21, 1978, the Council issued its Decision On Referral Of Major Policy Issue From Assistant Secretary, finding, in essence, that the Assistant Secretary may interpret and apply his existing agreement bar rules or prescribe analogous rules to find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the gaining employer and the exclusive representative a period of stability free from rival claims or other questions concerning representation.

In view of the principles enunciated in the Council's decision and A/SLMR No. 857, the Assistant Secretary interpreted his regulations to provide that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the incumbent exclusive representative continues in effect after a reorganization. Consequently, he found that the instant petition was untimely filed during the agreement bar period. Accordingly, he dismissed the petition.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY MORTUARY,
OAKLAND ARMY BASE,
OAKLAND, CALIFORNIA

Activity

and

Case No. 70-5223 (DR)
A/SLMR No. 857
FLRC No. 77A-69

WALTER D. SMITH

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1157, AFL-CIO

Intervenor

SUPPLEMENTAL DECISION AND ORDER

On June 28, 1977, in A/SLMR No. 857, I issued an Order Referring Major Policy Issue To The Federal Labor Relations Council (Council) in the subject case, submitting the following issue to the Council for its consideration:

Whether the Assistant Secretary can find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the successor employer and the exclusive representative a period of stability free from rival claims or other questions concerning majority status?

In connection with the submission of this issue to the Council, I found that the exclusively recognized unit in the subject case was transferred substantially intact, pursuant to a reorganization, from the Military Traffic Management Command, Western Area (MTMCWA) to the Casualty and Memorial Affairs Directorate of the Adjutant General Center (TAGCEN), that the appropriateness of the unit remained unimpaired in the gaining employer, and that, under the principles enunciated by the Council

in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, 3 FLRC 787, FLRC No. 74A-22 (1975), the TAGCEN was a "successor" employer of the employees in the existing exclusively recognized unit. 1/ I further found that, prior to the reorganization, in 1975, the MTMCWA and the Intervenor, the exclusive representative of the employees in the petitioned for unit, had entered into a multi-unit negotiated agreement covering, among other units, the subject bargaining unit. 2/ In this latter connection, I found that the evidence herein established that, subsequent to the reorganization, while the TAGCEN's conduct was in accordance with its duty as a "successor" activity to continue to accord recognition to the Intervenor, there was insufficient evidence to establish that it promised to assume, or did, in fact, assume the MTMCWA negotiated agreement.

Under these circumstances, I noted a possible conflict in policy in the principles enunciated by the Council in its Defense Supply Agency decision, cited above. Thus, in that decision the Council enunciated the policy of allowing questions concerning representation to be raised by employees, rival labor organizations or the gaining employer immediately subsequent to the establishment of a successorship, which would appear to be inconsistent with another consideration noted by the Council, i.e., the maintenance of stable labor relations during the transition period by requiring the "successor" employer to bargain with the incumbent union. As I stated in A/SLMR No. 857:

But for a possible conflict in policy, I would, for the purpose of maintaining labor relations stability following a reorganization where a successor employer emerges, allow the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative to continue in effect after the successor employer assumes control so as to afford the successor employer and exclusive representative a stable period free from the raising of questions concerning representation.

1/ After the transfer, the Intervenor filed a petition seeking to amend its certification by changing the name of the Activity to reflect the change in operational control. The petition was approved by the Regional Administrator, and an amendment of certification was issued on June 8, 1976. The unit description, as amended, reads:

"Included: All General Schedule and Wage Grade employees of the mortuary function located at Oakland Army Base under the operational control of the Casualty and Memorial Affairs Directorate, the Adjutant General Center, Department of the Army, and,

Excluded: All management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order."

2/ This agreement was effective on April 29, 1975, for a term of two years.

On March 21, 1978, in FLRC No. 77A-69, the Council issued its Decision On Referral Of Major Policy Issue From Assistant Secretary, finding, in pertinent part:

. . . the Assistant Secretary may, under his section 6 authority, and consistent with the purposes of the Order, interpret and apply his existing agreement bar rules or prescribe analogous rules with respect to the raising of questions concerning representation following a determination that the recognized unit was transferred substantially intact to the gaining employer and remained appropriate. While the gaining employer, as here, may not have assumed the predecessor agreement /footnote omitted/ and therefore no "agreement bar" as such exists, we see no inconsistency with the purposes of the Order in the Assistant Secretary concluding that similar "bar" principles preclude the raising of a rival claim or other question concerning majority status. /footnote omitted/ In this regard, we note, as did the Assistant Secretary, that under such a rule "questions concerning representation could be raised only during the 'open period' in the term of the predecessor's agreement." /footnote omitted/ 3/

In the Council's opinion, the adoption of such a rule, as indicated by the Assistant Secretary, would maintain the stability of labor-management relations by providing the gaining employer and the exclusive representative a stable period free from the raising of questions concerning representation. /Footnote omitted/ 4/

Therefore, in response to the Assistant Secretary's question, the Council ruled that:

3/ The Council noted that the Assistant Secretary indicated that following a reorganization in which a recognized unit has been transferred substantially intact to a gaining employer and the appropriateness of the unit remains unimpaired in the gaining employer, a representation petition may be timely filed during the "open period" of the agreement between the predecessor employer and the incumbent labor organization. The Council construed this statement, and concurred, that even if a new agreement is executed between the gaining employer and the exclusive representative prior to the "open period," such new agreement could not be raised as a bar.

4/ The Council understood the Assistant Secretary's position, with which the Council agreed, to mean that the agreement bar, which existed pursuant to the predecessor's negotiated agreement with the exclusive representative and continued to exist after the gaining employer assumed control, is not intended to preclude the raising of questions as to the continued appropriateness of the unit, or prevent accretion or other unit clarification issues from being raised following a reorganization, since such issues do not present "questions concerning representation."

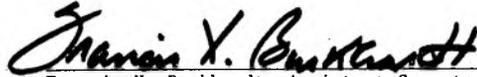
The Assistant Secretary may interpret and apply his existing agreement bar rules or prescribe analogous rules to find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the gaining employer and the exclusive representative a period of stability free from rival claims or other questions concerning representation.

Based on the rationale contained in the Council's decision, and A/SLMR No. 857, and my interpretation of the agreement bar provisions contained in Section 202.3(c) of the Assistant Secretary's Regulations, which I view as applicable in a successorship situation such as that involved in the instant case, I find that the agreement bar which existed herein pursuant to the MTMCWA's negotiated agreement with the Intervenor continued in effect after the reorganization in February 1976, which resulted in the TAGGEN becoming a successor employer. Consequently, in view of the existence of an agreement bar on the date the instant petition was filed, I shall order that it be dismissed. 5/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 70-5223(DR) be, and it hereby is, dismissed.

Dated, Washington, D.C.
May 18, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

5/ The instant petition was filed on May 15, 1976. The agreement bar was effective on April 29, 1975, for a period of two years, which is coextensive with the two-year negotiated agreement between the MTMCWA and the Intervenor.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

-2-

U.S. Army Mortuary,
Oakland Army Base,
Oakland, California

and

Walter D. Smith

A/SLMR No. 857
FLRC No. 77A-69

and

American Federation of Government
Employees, Local 1157, AFL-CIO

DECISION ON REFERRAL OF MAJOR
POLICY ISSUE FROM ASSISTANT SECRETARY

Background of Case

This case came before the Assistant Secretary on a petition filed by Walter D. Smith, an employee of the U.S. Army Mortuary, Oakland Army Base, Oakland, California (the activity) seeking the decertification of the American Federation of Government Employees, Local 1157, AFL-CIO (the union) as the exclusive representative of certain activity employees. During his consideration of the case, the Assistant Secretary determined that it raised a major policy issue which he has referred to the Council for decision pursuant to section 2411.4 of the Council's rules of procedure.^{1/}

In his order referring the major policy issue to the Council, the Assistant Secretary found that the activity had been a component of

^{1/} Section 2411.4 of the Council's rules of procedure provides:

Notwithstanding the procedures set forth in this part, the Assistant Secretary or the Panel may refer for review and decision or general ruling by the Council any case involving a major policy issue that arises in a proceeding before either of them. Any such referral shall be in writing and a copy of such referral shall be served on all parties to the proceeding. Before decision or general ruling, the Council shall obtain the views of the parties and other interested persons, orally or in writing, as it deems necessary and appropriate.

the Military Traffic Management Command, Western Area (MTMCWA), at which time the union was the exclusive representative of a certified unit of the activity's mortuary employees. He further found that in April 1975, the union and MTMCWA entered into a 2-year negotiated agreement covering the mortuary unit and other units at the Oakland Army Base. In February 1976, the Department of the Army implemented the results of a study it had conducted and transferred the unit of mortuary employees from MTMCWA to the U.S. Army Adjutant General Center (TAGCEN). The duty station of these employees remained at the Oakland Army Base, however. The record further indicates that in May 1976, after the reorganization, an employee of the activity filed a petition (DR) seeking to decertify the union as the exclusive representative for the mortuary unit.

In view of the facts present in the case before him, the Assistant Secretary, referring to the Council's decision in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, 3 FLRC 787 [FLRC No. 74A-22 (Dec. 9, 1975), Report No. 88], noted that the Council has determined, in part, that an agency or employing entity is a "successor" when: "(1) the recognized unit is transferred substantially intact to the gaining employer; (2) the appropriateness of the unit remains unimpaired in the gaining employer; and (3) a question concerning representation is not timely raised as to the representative status of the incumbent labor organization." Based on the record before him, the Assistant Secretary found that TAGCEN was a "successor" activity in that the recognized mortuary unit had been transferred substantially intact from MTMCWA to TAGCEN and the appropriateness of the unit had remained unimpaired in the gaining employer following the reorganization. He then questioned the meaning intended by the Council of various aspects of its DSA decision, stating in this regard:

But for a possible conflict in policy, I would, for the purpose of maintaining labor relations stability following a reorganization where a successor employer emerges, allow the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative to continue in effect after the successor employer assumes control so as to afford the successor employer and exclusive representative a stable period free from the raising of questions concerning representation.

In view of the foregoing, the Assistant Secretary referred the following major policy issue to the Council for consideration:

Whether the Assistant Secretary can find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford

the successor employer and the exclusive representative a period of stability free from rival claims or other questions concerning majority status?

The Assistant Secretary concluded:

In my judgment, the purposes of the Order will best be served by not permitting, within the period of the previous negotiated agreement, a questioning of the majority status of the incumbent union. All bar periods represent an accommodation in balancing the interest of employee freedom to choose representatives and the interest of stability in labor relations. The application of the agreement bar period to successorship situations will restore the predictability of periods when representation petitions may be filed. It will reduce administrative confusion in reorganizations; it will enable the gaining employer and incumbent representative to engage in long range planning free from unnecessary disruption; and it will promote effective dealings and efficiency of agency operations.

Opinion

The major policy issue referred to the Council by the Assistant Secretary concerns his application of the agreement bar limitation on the processing of representation petitions in situations where a recognized unit has been transferred substantially intact to a gaining employer and the appropriateness of the unit remains unimpaired in the gaining employer. That is, in such situations, may the agreement bar which existed pursuant to the predecessor's agreement with the exclusive representative or an analogous bar preclude the raising of a question concerning representation as to the representative status of the incumbent labor organization?

The Council has often reaffirmed the Assistant Secretary's authority under section 6(d) of the Order^{2/} to prescribe, interpret and apply regulations in carrying out his functions and responsibilities enumerated in section 6(a) of the Order, including his responsibility to decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues, and to supervise elections in appropriate units and certify

^{2/} Section 6(d) of the Order provides:

Sec. 6. Assistant Secretary of Labor for Labor-Management Relations.

(d) The Assistant Secretary shall prescribe regulations needed to administer his functions under this Order.

the results. See, e.g., U.S. Department of Health, Education, and Welfare, Social Security Administration, Grand Rapids, Michigan, Assistant Secretary Case No. 52-5578 (RO), 3 FLRC 841 [FLRC No. 75A-19 (Dec. 31, 1975), Report No. 94], and Department of the Air Force, Ellsworth Air Force Base, South Dakota, Assistant Secretary Case No. 60-3412 (RO), 2 FLRC 246 [FLRC No. 73A-60 (Oct. 30, 1974), Report No. 59]. Moreover, in its 1975 Report and Recommendations, the Council noted with approval certain "bars to elections," either provided for in the Order or fashioned by the Assistant Secretary in his regulations (Section 202.3) or case decisions, relating to the timeliness of representation petitions filed with the Assistant Secretary for processing.^{3/}

The Council stated in this regard:^{4/}

In our view, such bars foster desired stability in labor-management relations in that parties to an existing bargaining relationship have a reasonable opportunity to deal with matters of mutual concern without the disruption which accompanies the resolution of a question of representation. . . .

Clearly, the Assistant Secretary's authority to prescribe, interpret and apply such bars in carrying out the foregoing responsibilities extends equally to successorship situations such as involved in the instant case before the Assistant Secretary. That is, the Assistant Secretary may, under his section 6 authority, and consistent with the purposes of the Order, interpret and apply his existing agreement bar rules or prescribe analogous rules with respect to the raising of questions concerning representation following a determination that the recognized unit was transferred substantially intact to the gaining employer and remained appropriate. While the gaining employer, as here, may not have

^{3/} More particularly, the Council noted that "a petition is untimely if filed within 12 months of a valid election or within 12 months after the certification of a labor organization as the exclusive representative of employees in an appropriate unit, commonly referred to as an 'election bar' and a 'certification bar' respectively," and that "when there is a signed agreement having a term not to exceed 3 years, a petition for an election among covered employees is untimely unless filed between the 90th and 60th day preceding the expiration of the agreement, commonly called an 'agreement bar.'" Labor-Management Relations in the Federal Service (1975), at 36.

^{4/} Id.

assumed the predecessor agreement^{5/} and therefore no "agreement bar" as such exists, we see no inconsistency with the purposes of the Order in the Assistant Secretary concluding that similar "bar" principles preclude the raising of a rival claim or other question concerning majority status.^{6/} In this regard, we note, as did the Assistant Secretary, that under such a rule "questions concerning representation could be raised only during the 'open period' in the term of the predecessor's agreement."^{7/}

In the Council's opinion, the adoption of such a rule, as indicated by the Assistant Secretary, would maintain the stability of labor-management relations by providing the gaining employer and the exclusive representative a stable period free from the raising of questions concerning representation.^{8/} Specifically, as stated by the Assistant Secretary, a

5/ As the Council stated in DSA (3 FLRC at 803), a "successor" is not "required to adopt and be bound by any agreement which may have been entered into between the losing employer and the incumbent union." (Rather the successor is enjoined to maintain recognition and to adhere to the terms of the prior agreement to the maximum extent possible.)

6/ The Council declared in DSA (3 FLRC at 802) that a "successor" relationship exists only where, among other things, "a question concerning representation is not timely raised as to the representative status of the incumbent labor organization." [Emphasis added.] The Council further stated in that case (at n. 17) that a new secret ballot election would be required if, after a reorganization, the employees or a rival labor organization "duly" raised a question concerning representation. In our view, such a question may be "duly" raised only where it is "timely" raised under rules established by the Assistant Secretary pursuant to his authority under section 6(d) of the Order.

7/ As the Assistant Secretary indicated, following a reorganization in which a recognized unit has been transferred substantially intact to a gaining employer and the appropriateness of the unit remains unimpaired in the gaining employer, a representation petition may be timely filed during the "open period" of the agreement between the predecessor employer and the incumbent labor organization. We construe the Assistant Secretary's statement, and so agree, that even if a new agreement is executed between the gaining employer and the exclusive representative prior to the "open period," such new agreement could not be raised as a bar.

8/ We understand the Assistant Secretary's recommended position (namely, that the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative should continue in effect after the gaining employer assumes control) with which we agree is not intended to preclude the raising of questions as to the continued appropriateness of the unit. Rather, the recommended application of the

(Continued)

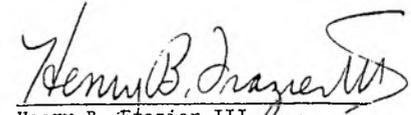
rule so adopted would "restore the predictability of periods when representation petitions may be filed"; "reduce administrative confusion in reorganizations"; "enable the gaining employer and incumbent representative to engage in long range planning free from unnecessary disruption"; and "promote effective dealings and efficiency of agency operations." In our view, such a bar would be consistent with the purposes and policies of the Order previously noted by the Council (supra at 4), namely: To "foster desired stability in labor-management relations [by providing] parties to an existing bargaining relationship . . . a reasonable opportunity to deal with matters of mutual concern without the disruption which accompanies the resolution of a question of representation."

Conclusion

Therefore, in response to the Assistant Secretary's question:

The Assistant Secretary may interpret and apply his existing agreement bar rules or prescribe analogous rules to find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the gaining employer and the exclusive representative a period of stability free from rival claims or other questions concerning representation.

By the Council.


Henry B. Frazier III
Executive Director

Issued: March 21, 1978

(Continued)

agreement bar would only affect the raising of "rival claims or other questions concerning majority status," not questions as to the appropriateness of the unit. We further construe and agree that the recommended bar would not prevent accretion or other unit clarification issues from being raised following a reorganization, since such issues do not present "questions concerning representation."

May 19, 1978

A/SLMR No. 1051

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION HOSPITAL,
LEXINGTON, KENTUCKY
A/SLMR No. 1051

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION HOSPITAL,
LEXINGTON, KENTUCKY

Respondent

and

Case No. 41-5415(CA)

This case involved an unfair labor practice complaint filed by the National Association of Government Employees, Local R05-185 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to bargain with the exclusive representative over the decision to change the designation of which shift would be responsible for the relief of officers on planned leave.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R05-185

Complainant

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (6) of the Order. In this regard, he found that the instant matter concerned differing and arguable interpretations of the parties' newly negotiated agreement as distinguished from actions which would constitute a clear, unilateral breach of the agreement and, therefore, the Respondent's conduct was not violative of the Order. Further, the Administrative Law Judge noted that a decision to change the responsibility for providing relief of officers on planned leave was a reserved right of management, pursuant to Sections 11(b) and 12(b) of the Order.

DECISION AND ORDER

On November 30, 1977, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary concluded that dismissal of the instant complaint was warranted. However, contrary to the Administrative Law Judge, he found that the parties' agreement, by its terms, was not yet in effect at the time of the Respondent's alleged unilateral action and, thus, the change could not concern differing and arguable interpretations of such agreement. Rather, he found that the determination concerning which shift would be responsible for relief was integrally related to and consequently determinative of the number of employees assigned to a particular tour of duty and, therefore, was a permissive subject of bargaining within the ambit of Section 11(b) of the Order. Under these circumstances, and in the absence of the existence of a negotiated agreement covering the subject, the Assistant Secretary found that the Respondent's conduct herein was not in derogation of its bargaining obligations under the Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in this case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, to the extent consistent herewith. 1/

Accordingly, he ordered that the complaint be dismissed in its entirety.

1/ The Administrative Law Judge recommended that the Respondent's Motion to Dismiss, based on the Complainant's alleged noncompliance with the Assistant Secretary's Regulations, be denied. I agree. It appears that such contention was made for the first time at the hearing. It has been held previously that it would not effectuate the purposes of the Order to permit issues to be raised for the first time at a hearing or in a post-hearing brief where a party has had adequate opportunity to raise such matters prior to the issuance of the notice of hearing. Cf. Department of the Treasury, Internal Revenue Service, Chicago, Illinois, A/SLMR No. 962 (1978).

This case arose as a result of a complaint alleging, in essence, that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally changing the agreed-upon shift schedule, a matter affecting working conditions of unit employees, without negotiating with the Complainant, the exclusive representative of the employees involved, over the decision to make the change.

The essential facts of the case, set forth in detail in the Administrative Law Judge's Recommended Decision and Order, are as follows:

The Complainant and the Respondent executed a negotiated agreement on January 3, 1977, which was approved by the Chief Medical Director on February 11, 1977. Article XXIX, Section 1 of the agreement provided that it,

...shall be in full force and effect for a period of three (3) years from the date of approval by the Chief Medical Director....

Article VIII, Section 3, entitled Tours of Duty and Basic Workweek, provided,

3. At shift changeover, rotation will be to the next consecutive shift on the schedule now in effect and from the last shift on the schedule to the first shift on the schedule for the other Division. (Emphasis added.)

After notifying the Complainant on January 21, 1977, of its intent to do so, the Respondent on January 25, 1977, issued a memorandum designating the midnight shift, rather than the day shift, as responsible for relief of officers on planned leave.

The Administrative Law Judge found that the gravamen of the complaint was that the Respondent violated the parties' negotiated agreement by changing "the schedule now in effect," when it made the midnight shift rather than the day shift responsible for relief. He determined that, at most, the dispute herein concerned differing and arguable interpretations of the agreement, as distinguished from actions which would constitute a clear, unilateral breach and, therefore, the Respondent's conduct was not violative of the Order. The Administrative Law Judge noted further that a decision to change the responsibility for providing relief of officers on planned leave was a reserved right of management, pursuant to Sections 11(b) and 12(b) of the Order, about which the Respondent was not obligated to bargain.

While I agree with the Administrative Law Judge's recommendation that the instant complaint should be dismissed, I do not adopt his rationale that dismissal is warranted on the basis that the dispute herein concerns differing and arguable interpretations of a negotiated agreement. Thus, as indicated above, the agreement provides that it "...shall be in full force and effect... from the date of approval by the Chief Medical Director...." The evidence establishes that such approval took place on February 11, 1977. By its terms,

therefore, the parties' negotiated agreement was not in effect at the time of the alleged January 25, 1977, unilateral change by the Respondent. Under these circumstances, as the negotiated agreement was not yet in effect, I find that dismissal of the instant complaint on the basis that the matter involved a question of contract interpretation is not warranted.

As indicated above, the Administrative Law Judge further concluded that the Respondent was not obligated to bargain on its decision as to which shift would be responsible for providing relief of officers on planned leave. I agree. In my view, the determination herein by the Respondent concerning which shift would be responsible for relief is integrally related to and consequently determinative of the number of employees assigned to a particular tour of duty. Consequently, I find that the matter comes within the ambit of Section 11(b) of the Order as a permissive subject of bargaining. ^{2/} Thus, clearly, whichever shift was selected to provide relief, the number of employees on that shift would be reduced, thereby constituting a change in, and being determinative of, the staffing pattern involved.

Under these circumstances, and in the absence of the existence of a negotiated agreement covering the subject of providing personnel for relief of officers on planned leave, I find that the Respondent's conduct herein was not in derogation of its bargaining obligations under the Order. ^{3/}

Accordingly, I shall order that the complaint herein be dismissed in its entirety.

^{2/} Cf. Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, 3 FLRC 324, FLRC No. 73A-36 (1975), and Pium Island Animal Disease Laboratory, Department of Agriculture, Greenport, New York, 1 FLRC 100, FLRC No. 71A-11 (1971). Contrary to the Administrative Law Judge, I find that the matter in question is not a reserved management right under Section 12(b) of the Order. Thus, in my view, the Respondent herein was not prohibited from bargaining on the decision to change the shift designated for providing relief. In view of the above finding, however, that the subject matter involved herein is within the ambit of Section 11(b) of the Order, I find it unnecessary to reopen the record as requested by the Complainant for the presentation of newly discovered evidence pertaining to the Administrative Law Judge's Section 12(b) determination.

^{3/} See also Internal Revenue Service, et al., A/SLMR No. 806 (1977), FLRC No. 77A-40 (1978), and Internal Revenue Service, et al., A/SLMR No. 859 (1977), FLRC No. 77A-92 (1978), where the Federal Labor Relations Council stated "...just as in the situation where no collective bargaining agreement has previously existed, agency management, upon the expiration of a negotiated agreement, retains the right to unilaterally change provisions contained therein relating to permissive subjects of bargaining, i.e., those matters which are excepted from the obligation to negotiate by Section 11(b) of the Order...."

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 41-5415(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May, 19, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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In the Matter of :
:
VETERANS ADMINISTRATION :
VETERANS ADMINISTRATION HOSPITAL :
LEXINGTON, KENTUCKY :
Respondent :
:
and :
:
NATIONAL ASSOCIATION OF GOVERNMENT :
EMPLOYEES, LOCAL RO5-185 :
LEXINGTON, KENTUCKY :
Complainant :
.....

Case No. 41-5415(CA)

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Louisville, Kentucky 40202
On Brief for Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a proceeding under Executive Order 11491, as amended. A charge was filed on, or about, February 9, 1977, and a complaint was filed March 28, 1977, and assigned No. 41-5378 (Res. Exh. 1). By letter dated April 12, 1977, the Regional Administrator dismissed the complaint in No. 41-5378 for the reason that Complainant

"... failed to furnish any evidence in support of the complaint ..." (Res. Exh. 1).

On April 25, 1977, the complaint herein was filed, which is based on the matters raised in the February 9, 1977, charge. The present complaint differs in substance from the March 28, 1977, complaint only to the extent that there is no longer a 19(a)(5) allegation. Notice of Hearing issued on July 15, 1977 (Asst. Sec. Exh. 3) pursuant to which a formal hearing was duly held before the undersigned on September 15, 1977, in Lexington, Kentucky. At the hearing, Respondent's Motion to Dismiss was denied but without prejudice to renewal in post-hearing briefs. Respondent has renewed its Motion to Dismiss which is, again, denied. 1/

1/ Respondent based its Motion to Dismiss on § 203.8 of the Regulations. Respondent's reliance on this Section of the Regulations is misplaced.

Dismissal of the Complaint for failure to furnish any evidence support of the complaint (Complainant's Chief Negotiator, who has all relevant documents, was then, and remains, seriously ill), left unaffected the charge of February 9, 1977, and, in my opinion the timeliness of the present complaint is governed by Section 203.2(b) of the Regulations and not by Section 203.8. Section 203.2(b)(2) of the Regulations provides:

"(2) If a written decision expressly designated as a final decision on the charge is served by the respondent on the charging party, that party may file a complaint immediately but in no event later than sixty (60) days from the date of such service." (Emphasis supplied.)
(Continued)

In essence, Complainant alleges a unilateral change in the terms of the parties negotiated agreement 2/ on January 25, 1977, when the shift that would be responsible for relief of officers on annual, or scheduled leave, was changed. Previously, the officer on day shift was scheduled as relief officer and by memorandum dated January 25, 1977, the midnight shift was designated to cover scheduled leave (Jt. Exh. 3). Respondent's motion to dismiss, made at the conclusion of Complainant's case, was not ruled on at the hearing but was carried with the case and will be decided herein.

All parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issue involved and briefs have been timely filed by the parties which have been carefully considered. Upon the basis of the entire record, I make the following findings of fact, conclusions and recommendation:

Footnote 1 continued from page 2.

Section 203.2(b)(3) of the Regulations provides:

"(3) A complaint must be filed within nine (9) months of the occurrence of the alleged unfair labor practice or within sixty (60) days of the service of a respondent's written final decision on the charging party, whichever is the shorter period of time." (Emphasis supplied.)

The Complaint (Asst. Sec. Exh. 1) shows that Respondent's written final decision on the charge was served on Complainant on March 4, 1977. As the complaint, filed April 25, 1977, was well within 60 days from the date of such service, the present complaint was timely. The fact that Complainant did not appeal the earlier dismissal of its complaint does not affect the timeliness of a subsequent complaint which is within 60 days of the service of Respondent's final decision on the charge. Moreover, Respondent's motion would not, in any event, be granted unless Respondent had raised the matter in timely fashion with the Area or Regional Administrator prior to issuance of the Notice of Hearing. New York Army and Air National Guard, Albany, N.Y., A/SLMR No. 441, 4 A/SLMR 681 (1974).

2/ The agreement was not approved until February 11, 1977, and by its terms (Article XXIX, Section 1) the agreement was to be in force "... from the date of approval . . ." (Jt. Exh. 1).

FINDINGS OF FACT

1. Complainant, National Association of Government Employees, was certified as the exclusive representative of all police officers employed by the Veterans Administration Hospital, Lexington, Kentucky (excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order, and all other employees in other exclusively recognized units) on July 8, 1976.

2. The parties signed a collective bargaining agreement on January 3, 1977, which was approved by the Chief Medical Director on February 11, 1977 (Jt. Exh. 1). Article XXIX, Section 1 provided, in part, that this Agreement

"... shall be in full force and effect for a period of three (3) years from the date of approval by the Chief Medical Director ..." (Jt. Exh. 1).

3. Article VIII - TOURS OF DUTY AND BASIC WORKWEEK, Section 3, of the Agreement signed January 3, 1977, provided as follows:

"Section 3. At shift changeover, rotation will be to the next consecutive shift on the schedule now in effect and from the last shift on the schedule to the first shift on the schedule for the other Division." (Jt. Exh. 1, p. 7) (Emphasis supplied.)

The two Divisions are, and were, Leestown Division and Cooper Drive Division (See, Jt. Exh. 2). The Schedule in effect on December 3, 1976 (Jt. Exh. 2) was prepared by Officer Baldwin and initialed by Chief Dixon on December 3, 1976. There is no dispute that this constituted the "schedule now in effect" as referred to in Article VIII, Section 3.

4. On January 21, 1977, Officer Thomas Frederick, President of Local 185, was informed by Respondent of the contemplated change of making the midnight shift responsible for relief of officers on scheduled, or planned leave, which was made effective by Chief Jackie N. Dixon's memorandum of January 25, 1977 (Jt. Exh. 3). Officer Frederick told Chief Dixon on January 21st that he would have to refer this proposal to higher headquarters in the Union.

5. Chief Dixon testified that a robbery of a cashier of some \$2,300.00 occurred on, or about, January 6 or 7, 1977, which led to assignment to the Protective Service of responsibility for coverage for money escort, ward payments, and canteen escort.

As this additional responsibility required the presence of all officers assigned to the day shift, he could not continue to use officers from the day shift for relief of officers on scheduled, or planned, leave. After meeting with management personnel on January 20, 1977, at which time the problem was reviewed and it was determined that the midnight shift would have to assume the responsibility for relief, Chief Dixon met with Mr. Frederick on January 21, 1977, and told him of the problem; that they had to come up with another relief man. Mr. Frederick said that after he was informed of the decision, on January 21, 1977, to make the midnight shift responsible for planned relief, he was opposed, "its against the contract" and that he was going to get in touch with Harry Bream, the National Vice President. Mr. Frederick did not thereafter further contact Chief Dixon.

6. Thomas D. Carpenter, Chief, Personnel Services, VA Hospital, Lexington, Kentucky, and Respondent's Chief Negotiator, testified that he had repeatedly and categorically refused to place the schedule into the contract because the schedule was a non-negotiable item. Mr. Carpenter testified that Article VIII, Section 3, represented merely the negotiation of the mechanics of how shifts would be rotated, the length of the shift rotation, etc.; but not the shifts themselves. Mr. Carpenter further testified that night shift differential, pursuant to pay regulations, shall continue when an employee is temporarily assigned to another tour of duty; and that employees who work relief shifts for officers on scheduled, or planned, leave do not work double shifts, i.e., they work the relief shift, not their regular shift.

7. Approximately two weeks prior to the hearing (late August or early September, 1977) the parties agreed on a renegotiated version of Article VIII (Comp. Exh. 1-A) which, as modified, substituted revised language for Sections 3 and 5 and added a new Section 8. The revised Sections of Article VIII now provide as follows:

"Section 3. At shift changeover, rotation will be to the next consecutive shift on the schedule now in effect and from the last shift on the schedule to the first shift on the schedule. However, when the officers are rotated to the Monday - Friday, 7 to 3 shift, they will rotate for one shift change (two months) to the other Division. This assignment is for reorientation purposes and for the purpose of this Agreement will be referred to as the reorientation shift. At the completion of the two months assignment to the reorientation shift, the officer will return to the Division from which he was assigned

before the shift change and will be assigned to the next shift on the schedule.

"Section 5. Shift change will be every two (2) months.

"Section 8. It is understood that the Hospital has the right and responsibility to assign and/or reassign police officers to either Division." (Comp. Exh. 1-A).

CONCLUSIONS

There is no dispute that prior to January 25, 1977, the day shift had provided relief for officers on scheduled, or planned, leave and that on January 25, 1977, this responsibility was changed to the midnight shift. Complainant's contention that practice, i.e. that the day shift provide such relief, was contractually agreed to and/or that the January 25, 1977, change constituted a change of Article VIII, Section 3, of the parties negotiated agreement signed on January 3, 1977, is not supported by the literal language of the Agreement. The phrase relied upon by Complainant, "schedule now in effect", has no meaning standing alone and when read in context, this portion of Section 3 plainly states:

"At shift changeover, rotation will be to the next consecutive shift on the schedule now in effect and from the last shift on the schedule to the first shift on the schedule for the other Division." (Jt. Exh. 1, p. 7) (Emphasis supplied.)

Detail of an officer for relief of an officer on scheduled, or planned, leave is not a "shift changeover" or a "rotation" within the meaning of Article VIII, Section 3. To be sure Joint Exhibit 2 was the schedule in effect when Article VIII, Section 3 was agreed to on December 3, 1976, and on January 3, 1977, when the complete Agreement was signed; but Joint Exhibit 2, on which designation of the day shift as "Relief for planned leave" appears, was never made part of the negotiated agreement and, as noted above, Section 3 of the negotiated agreement merely provided that "At shift changeover, rotation will be to the next consecutive shift on the schedule now in effect. ..." Accordingly, the January 25, 1977, change in responsibility for providing relief for planned leave from the day shift to the midnight shift was not a change of the parties negotiated agreement. That is, both before and after January 25, 1977, at shift changeover, rotation was to the next consecutive shift on the schedule in effect on December 3, 1976. Not only is this consistent with the language of Article VIII, Section 3, but is fully supported by the testimony

of Respondent's Chief Negotiator, Mr. Carpenter. Moreover, the revision of Article VIII, renegotiated in August-September, 1977, wholly affirms Respondent's position.

At the most, the gravamen of the complaint was that Respondent violated the parties' negotiated agreement by changing "the schedule now in effect" by making the midnight shift responsible for relief of officers on planned leave, rather than the day shift, which, at best, concerned differing and arguable interpretations of such agreement, as distinguished from action which would constitute a clear, unilateral breach of the agreement, and was not a violation of the Order. Department of Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624, 6 A/SLMR 127 (1976); Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark, Ohio, A/SLMR No. 677, 6 A/SLMR 361 (1976); Puget Sound Naval Shipyard, U.S. Department of the Navy, A/SLMR No. 829 (1977). As Judge Kramer, so well stated, in Puget Sound Naval Shipyard, supra,

"We need not decide whether it [Respondent] was wrong. Even assuming it was wrong, not every breach of contract is an unfair labor practice. Under certain circumstances it can be an unfair labor practice. For example, if sufficiently flagrant so that it appears so unreasonable as to cast doubt on the sincerity of the respondent's position, it may rise to the seriousness of a unilateral change in the contract and hence a violation of Section 19(a)(6) of the Executive Order. But as the Assistant Secretary said in Aerospace Guidance and Metrology Center, Newark Air Force Station, A/SLMR No. 677:

'... alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which constitute clear, unilateral breaches of the agreement, are not deemed to be violative of the Order.'

"This case presents just such a disagreement, and hence the disputed conduct ... even if in violation of the agreement, does not constitute a violation of Section 19(a) of the Agreement."

In view of the foregoing, it may be unnecessary to go further; but it seems appropriate, especially as Complainant contends in its Brief, without doubt to avoid the impact of Watervliet, Newark and Puget Sound, supra, that because the agreement had not been approved on January 25, 1977, this case is not governed by a collective bargaining agreement, to note a further and basic fallacy in Complainant's position. As noted above, the negotiated agreement contained no provision which designated the shift responsible for relief for planned leave. The established practice prior to January 25, 1977, was that the day shift was responsible for providing such relief and, on January 25, 1977, this established practice, which through long adherence had become a condition of employment, was changed and responsibility for providing such relief was assigned to the midnight shift; however, the decision was a reserved right of management, pursuant to Sections 11(b) and 12(b) of the Order, as to which Respondent was not obligated to bargain. Alabama National Guard, A/SLMR No. 660, 6 A/SLMR 267 (1976); AFGE Local 1940 and Plum Island Animal Disease Laboratory, Department of Agriculture, Greenport, N.Y., FLRC No. 71A-11 (1971); AFGE, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36 (Supplemental Decision 1975)(Report No. 73). On January 21, 1977, Respondent advised Complainant's President that, in view of the additional escort duties assigned to the day shift, it would no longer be possible for the day shift to provide relief for planned leave; and that Respondent intended to assign this responsibility to the midnight shift. Complainant, with ample opportunity to negotiate with respect to the impact and implementation of this decision, failed to do so and Respondent did not refuse to consult, confer, or negotiate in violation of Section 19(a)(6) of the Order by issuing its memorandum of January 25, 1977, pursuant to the notice and discussion of January 21, 1977, making the midnight shift responsible for providing relief for planned leave. Alabama National Guard, supra; Department of Air Force, Vandenberg Air Force Base, A/SLMR No. 350, 4 A/SLMR 119 (1974); Department of Air Force, Norton Air Force Base, A/SLMR No. 261, 3 A/SLMR 175 (1973). Indeed, Complainant made it clear in its complaint, as well as in its discussion with Respondent on January 21, 1977, that it did not seek to negotiate on impact or implementation.

Since the Complainant failed to prove a violation of Section 19(a)(1) or (6) of Executive Order 11491, as amended, the complaint should be dismissed.

RECOMMENDATION

The complaint should be dismissed.

William B. Devaney
 WILLIAM B. DEVANEY
 Administrative Law Judge

Dated: November 30, 1977
 Washington, D.C.

WBD/mml

May 22, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE,
OGDEN SERVICE CENTER, AND
INTERNAL REVENUE SERVICE, et al.
A/SLMR No. 1052

On March 1, 1977, the Assistant Secretary issued his Decision and Order in A/SLMR No. 806, in which he found, among other things, that the Respondents violated Section 19(a)(1) and (6) of the Order by unilaterally terminating certain portions of the parties' expired negotiated agreement, characterized by the Respondents as "institutional benefits." The Assistant Secretary concluded, in this connection, that only those rights and privileges which are based solely on the existence of a written agreement, in effect, terminated with the expiration of the negotiated agreement, while other rights and privileges continued in effect until such time as they were modified or terminated pursuant to negotiations or were changed after a good faith bargaining impasse has been reached.

On March 17, 1978, the Federal Labor Relations Council (Council) issued its consolidated Decision on Appeals rejecting the Assistant Secretary's standard, as noted above, and remanding the case to the Assistant Secretary for action consistent with its decision. The Council held that, upon the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) of the Order, whether or not included in a negotiated agreement, continue as established, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of the agreement, or unless otherwise modified in a manner consistent with the Order. The Council noted, in this connection, that only those matters contained in a negotiated agreement which are excepted by Section 11(b) of the Order from the obligation to negotiate may be unilaterally changed by agency management, and that agency regulations issued during an agreement's term become effective upon the agreement's expiration. However, the Council concluded that prior to changing negotiable matters upon which the parties' reached impasse during negotiation of an agreement, adequate notice must be provided by the party desiring to make changes to afford the other party a reasonable period in which to invoke the processes of the Federal Service Impasses Panel, and, if such processes are timely invoked, the parties are required to adhere to the established personnel policies and practices and matters affecting working conditions to the maximum extent possible.

Applying the principles enunciated by the Council to the circumstances of the instant case, the Assistant Secretary found that a contrary result to that reached in A/SLMR No. 806 was not warranted with respect to those matters unilaterally terminated by the Respondents within the ambit of Section 11(a) of the Order. Thus, the Assistant Secretary concluded that the Respondents unilaterally changed certain existing personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) of the Order without providing adequate notice to the Complainants so as to afford them a reasonable opportunity to invoke the processes of the Federal Service Impasses Panel. Nor was any evidence submitted that an agency regulation had been issued which mandated the termination of Section 11(a) matters upon the expiration of the negotiated agreement. Under these circumstances, the Assistant Secretary found that the Respondents violated Section 19(a)(1) and (6) of the Order.

Accordingly, the Assistant Secretary modified his order in A/SLMR No. 806 consistent with the principles enunciated by the Council.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE, OGDEN SERVICE CENTER; INTERNAL REVENUE SERVICE, FRESNO SERVICE CENTER; INTERNAL REVENUE SERVICE, AUSTIN SERVICE CENTER; INTERNAL REVENUE SERVICE, KANSAS CITY SERVICE CENTER; INTERNAL REVENUE SERVICE, CINCINNATI SERVICE CENTER; INTERNAL REVENUE SERVICE, ATLANTA SERVICE CENTER; INTERNAL REVENUE SERVICE, MEMPHIS SERVICE CENTER; INTERNAL REVENUE SERVICE, BROOKHAVEN SERVICE CENTER; INTERNAL REVENUE SERVICE, PHILADELPHIA SERVICE CENTER; INTERNAL REVENUE SERVICE, DATA CENTER; INTERNAL REVENUE SERVICE, NATIONAL COMPUTER CENTER; AND THE INTERNAL REVENUE SERVICE

Respondents

and

Case No. 22-6506(CA)
A/SLMR No. 806
FLRC No. 77A-40

THE NATIONAL TREASURY EMPLOYEES UNION; NTEU CHAPTER NO. 066; NTEU CHAPTER NO. 067; NTEU CHAPTER NO. 070; NTEU CHAPTER NO. 071; NTEU CHAPTER NO. 072; NTEU CHAPTER NO. 073; NTEU CHAPTER NO. 078; NTEU CHAPTER NO. 082; NTEU CHAPTER NO. 097; NTEU CHAPTER NO. 098; AND NTEU CHAPTER NO. 099

Complainants

SUPPLEMENTAL DECISION AND ORDER

On September 3, 1976, Associate Chief Administrative Law Judge Francis E. Dowd issued his Recommended Decision and Order in the above-entitled proceeding, finding, among other things, that the Respondents had not violated Section 19(a)(1) and (6) of the Order. In this regard, the Administrative Law Judge found insufficient evidence to establish that by a memorandum issued on May 29, 1975, by the agency head the Respondents unilaterally changed terms and conditions of employment in derogation of their duty to bargain in good faith.

On March 1, 1977, the Assistant Secretary issued his Decision and Order in A/SLMR No. 806, finding, contrary to the Administrative Law Judge, that the Respondents conduct violated Section 19(a)(1) and (6) of

the Order by unilaterally terminating those portions of the parties' expired negotiated agreement characterized by the Respondents as "institutional benefits." Thus, in the Assistant Secretary's view, only those rights and privileges based solely on the existence of a written agreement, in effect, terminated upon the expiration of the negotiated agreement. All other rights and privileges accorded to the exclusive representatives continued in effect until such time as they were modified or eliminated pursuant to negotiations or changed after a good faith bargaining impasse had been reached.

On March 17, 1978, the Federal Labor Relations Council (Council) issued its consolidated Decision On Appeals remanding the subject case to the Assistant Secretary for action consistent with its decision. In the Council's view, upon the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) of the Order, whether or not included in a negotiated agreement, continue as established, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order. The Council noted, in this connection, that agency management retains the right, upon the expiration of a negotiated agreement, to unilaterally change those matters contained therein which are excepted from the obligation to negotiate by Section 11(b) of the Order. Similarly, those agency regulations issued during the term of a negotiated agreement which were not operative with respect to the bargaining unit during such term become effective, as mandated by Section 12(a) of the Order, upon the expiration of the agreement. The Council also found that where the parties are renegotiating a comprehensive collective bargaining agreement and reach impasse, changes may not be effected upon the expiration of their prior agreement unless adequate notice is provided prior to the implementation of such otherwise negotiable changes in personnel policies and practices and matters affecting working conditions, to afford the other party a reasonable period in which to invoke the processes of the Federal Service Impasses Panel (Panel). Such changes must not exceed the scope of the proposals advanced during prior negotiations. If the Panel's processes are invoked within a reasonable period of time of such notice, the parties must adhere to the established personnel policies and practices and matters affecting working conditions, including those contained in the expired agreement, to the maximum extent possible.

Applying the principles enunciated by the Council to the instant case, I find that a contrary result to that reached in A/SLMR No. 806 is not warranted with regard to those matters unilaterally terminated by the Respondents after the expiration of the parties' negotiated agreement which were mandatory subjects of bargaining within the ambit of Section 11(a) of the Order. Thus, the evidence herein establishes that the Respondents unilaterally changed certain existing personnel policies and matters affecting working conditions within the meaning of Section 11(a) of the Order -- e.g. posting privileges -- without

providing the Complainants with adequate notification so as to afford them a reasonable opportunity to invoke the processes of the Panel. Nor is there any evidence that an agency regulation had been issued during the term of the parties' prior negotiated agreement mandating the Respondents' termination of Section 11(a) matters upon the expiration of such agreement. Under these circumstances, I find that the Respondents violated Section 19(a)(1) and (6) of the Order. In connection with this finding, I shall modify the order in A/SLMR No. 806 consistent with the principles enunciated by the Council.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Ogden Service Center; Internal Revenue Service, Fresno Service Center; Internal Revenue Service, Austin Service Center; Internal Revenue Service, Kansas City Service Center; Internal Revenue Service, Cincinnati Service Center; Internal Revenue Service, Atlanta Service Center; Internal Revenue Service, Memphis Service Center; Internal Revenue Service, Brookhaven Service Center; Internal Revenue Service, Philadelphia Service Center; Internal Revenue Service, Data Center; and Internal Revenue Service, National Computer Center, shall:

1. Cease and desist from:

(a) Unilaterally changing, after the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions within the ambit of Section 11(a) of the Order, without providing adequate notice to and affording the exclusive representatives, National Treasury Employees Union, Chapters 066, 067, 070, 071, 072, 073, 078, 082, 097, 098, and 099, or any other exclusive representative, a reasonable opportunity to invoke the processes of the Federal Service Impasses Panel.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

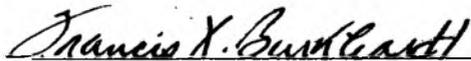
(a) Post at the facilities of the Internal Revenue Service, Ogden Service Center; Internal Revenue Service, Fresno Service Center; Internal Revenue Service, Austin Service Center; Internal Revenue Service, Kansas City Service Center; Internal Revenue Service, Cincinnati Service Center; Internal Revenue Service, Atlanta Service Center; Internal Revenue Service, Memphis Service Center; Internal Revenue Service, Brookhaven Service Center; Internal Revenue Service, Philadelphia Service Center; Internal Revenue Service, Data Center; and Internal Revenue

Service, National Computer Center copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the respective Directors of each of the above-noted activities and shall be posted and maintained by them for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards where notices to employees are customarily posted. The respective Director of each of the above-noted activities shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.

May 22, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

Internal Revenue Service, Ogden Service Center; Internal Revenue Service, Fresno Service Center; Internal Revenue Service, Austin Service Center; Internal Revenue Service, Kansas City Service Center; Internal Revenue Service, Cincinnati Service Center; Internal Revenue Service, Atlanta Service Center; Internal Revenue Service, Memphis Service Center; Internal Revenue Service, Brookhaven Service Center; Internal Revenue Service, Philadelphia Service Center; Internal Revenue Service, Data Center; Internal Revenue Service, National Computer Center; and the Internal Revenue Service

and

A/SLMR No. 806
FLRC No. 77A-40

WE WILL NOT unilaterally change, after the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) of the Order, without providing adequate notice to and affording the exclusive representative of our employees a reasonable opportunity to invoke the processes of the Federal Service Impasses Panel.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

The National Treasury Employees Union; NTEU Chapter No. 066; NTEU Chapter No. 067; NTEU Chapter No. 070; NTEU Chapter No. 071; NTEU Chapter No. 072; NTEU Chapter No. 073; NTEU Chapter No. 078; NTEU Chapter No. 082; NTEU Chapter No. 097; NTEU Chapter No. 098; and NTEU Chapter No. 099

Department of the Treasury,
Internal Revenue Service,
Brookhaven Service Center

and

A/SLMR No. 859
FLRC No. 77A-92

Dated: _____ By: _____
(Signature)

National Treasury Employees
Union and Chapter No. 099, NTEU

DECISION ON APPEALS FROM
ASSISTANT SECRETARY DECISIONS

Background of Cases

These appeals arose from two separate decisions of the Assistant Secretary involving unfair labor practice complaints filed by the National Treasury Employees Union (the union) on behalf of itself and certain of its chapters

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: 14120 Gateway Bldg., 3535 Market St., Philadelphia, Pennsylvania 19104.

alleging violations of section 19(a)(1) and (6) of the Order by the Internal Revenue Service (the agency) and certain of its activities.^{1/} Inasmuch as both appeals arise out of the same basic circumstances and factual background, involve the same agency and national labor organization, and present the same major policy issue, the Council here consolidates them for decision on the merits.

The pertinent factual background of these cases, as found by the Assistant Secretary, is as follows: The agency and the union were parties to a multi-center collective bargaining agreement (MCA) covering the employees at the activities involved herein. The MCA was due to expire on April 12, 1975. During the course of negotiations for a new MCA, the parties twice extended the expiration date of the agreement. On April 24, 1975, the parties executed a memorandum of agreement providing that the MCA would remain in effect until negotiations were completed or the union invoked the impasse procedures provided in the Order, and that the MCA would terminate five days after receipt by either party of notice of termination. On May 27, 1975, the union notified the agency that it was declaring an impasse, and would file its appeal with the Federal Service Impasses Panel (Panel) on June 2, 1975. By letter dated May 28, 1975, the agency wrote the union that, while it would honor the union's "unilateral decision and right to terminate the agreement and thus give up the institutional benefits contained therein . . . , other benefits in the agreement . . . accrue to individual employees. We wish to advise you that it is our intent to continue these benefits to employees intact." The agency's letter included a detailed list indicating which provisions of the MCA would continue in effect and which ones would not. The next day (May 29), the agency head sent a memorandum to all employees which included the same list terminating certain provisions of the MCA and continuing others described as "applicable to you as an employee" [Emphasis in original.] This memorandum was issued to the employees without notice to or discussion with the union, and the agency subsequently refused to negotiate with the union over the agency's changes in personnel policies and practices and matters affecting working conditions contained in the memorandum.^{2/}

^{1/} Section 19(a) of the Order provides, in pertinent part:

Sec. 19. Unfair labor practices. (a) Agency management shall not--

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

^{2/} On July 18, 1975, the parties signed a new multi-center agreement, effective October 18, 1975, and agreed to reinstate the previous MCA pending the effective date of the new agreement.

In A/SLMR No. 806 (FLRC No. 77A-40), the union filed a complaint on behalf of itself and 11 of its chapters alleging, in pertinent part, that the agency and 11 of its activities violated section 19(a)(1) and (6) of the Order by virtue of their elimination of certain portions of the MCA upon its expiration. The agency contended that it eliminated only those portions of the MCA which were "institutional benefits"; i.e., those benefits which, in the agency's view, pertained to the exclusive representative's rights as an organization and therefore terminated with the agreement's expiration. The union asserted that such rights, once negotiated, became personnel policies and practices and other matters affecting working conditions, and, therefore, any unilateral changes with respect to such matters violated the Order. With respect to this complaint, the Assistant Secretary found:

[T]he unilateral elimination of those agreement provisions characterized by the [agency] as "institutional benefits" accruing to the union qua union was violative of Section 19(a)(1) and (6) of the Order. Thus, in my view, only those rights and privileges which are based solely on the existence of a written agreement -- e.g., checkoff privileges -- in effect, terminated with the expiration of a negotiated agreement. On the other hand, other rights and privileges accorded to exclusive representatives continue in effect until such time as they are modified or eliminated pursuant to negotiations or changed after a good faith bargaining impasse has been reached. [Footnotes omitted.]

Under these circumstances, the Assistant Secretary, citing his decision in U.S. Army Corps of Engineers, Philadelphia District,^{3/} found that the

^{3/} In U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673 (June 23, 1976), the Assistant Secretary stated that it has been established that agency management violates its obligation to meet and confer under the Order when it unilaterally changes those terms and conditions of employment which are included within the scope of section 11(a) of the Order. He further determined that, after bargaining to an impasse, agency management does not violate the Order by unilaterally imposing changes in terms and conditions of employment which do not exceed the scope of its proposals made in the prior negotiations, so long as appropriate notice is given to the exclusive representative as to when the changes are to become effective in order to give the exclusive representative ample opportunity to invoke the services of the Panel before the changes are implemented. The Assistant Secretary concluded that the framers of the Order intended to give parties discretion with respect to seeking the Panel's services under section 17. He went on to state that if a party involved in an impasse requested the services of the Panel, it would effectuate the purposes of the Order to require the parties, in the absence of an overriding exigency, to maintain the status quo and permit the processes of the Panel to run their course before the unilateral change in terms and conditions of employment could be effectuated.

(Continued)

activities' "unilateral elimination of other agreement provisions related to the [union's] rights, such as posting privileges, etc., constituted an improper unilateral change in personnel policies and practices in violation of section 19(a)(1) and (6) of the Order." [Footnotes omitted.]^{4/}

In A/SLMR No. 859 (FLRC No. 77A-92), the union filed a complaint on behalf of itself and its chapter representing employees at the Brookhaven Service Center which alleged, in pertinent part, that the agency violated section 19(a)(1) and (6) of the Order by unilaterally altering the negotiated grievance procedure after the MCA had expired by eliminating the arbitration provision of such negotiated agreement, and by refusing to process grievances filed thereafter pursuant to the agency grievance procedure. The elimination of the arbitration provision was among the changes contained in the aforementioned memorandum sent to all employees by the agency head which set forth the list of provisions in the MCA that would continue in effect and the ones that would not.

The Assistant Secretary, again citing his decision in U.S. Army Corps of Engineers, Philadelphia District, supra, found that the agency violated section 19(a)(1) and (6) of the Order by unilaterally excluding arbitration from the negotiated grievance procedure following the expiration of the parties' negotiated agreement. In this regard, the Assistant Secretary stated:

Thus, it has been found previously in Internal Revenue Service, Ogden Service Center, and Internal Revenue Service, et al., A/SLMR No. 806, that, ". . . only those rights and privileges which are based solely on the existence of a written agreement -- e.g., checkoff privileges -- in effect, terminated with the

(Continued)

The union appealed to the Council. The Council, in denying review of the appeal [FLRC No. 76A-94 (Feb. 25, 1977), Report No. 122], did not pass upon the Assistant Secretary's statement concerning the obligation of the parties involved in an impasse to maintain the status quo (absent an overriding exigency) once the services of the Panel have been requested and to avoid effectuating any unilateral changes in terms and conditions of employment until the Panel's processes have run their course. The Council noted that such statement, which had been included in the Assistant Secretary's decision merely as dictum, had not been appealed to the Council and therefore, apart from other considerations, was not properly before the Council for review.

^{4/} The union's complaint had also alleged that the agency and activities had violated section 19(a)(1) and (6) of the Order by attempting to deal directly with unit employees by means of the memorandum issued to them by the agency head. However, as a grievance over the memorandum had been filed previously at one of the activities, the Assistant Secretary

(Continued)

expiration of a negotiated agreement." In my view, arbitration is not one of those rights or privileges uniquely tied to a written agreement which terminates upon the expiration of a Federal sector negotiated agreement. Rather, I find that arbitration, once agreed upon by the parties as the final step for the settling of disputes arising under a negotiated agreement, continues thereafter as a term and condition of employment, unless the parties have expressly agreed that it terminates with the expiration of such negotiated agreement.^{5/}

The agency, on behalf of itself and its activities, appealed the Assistant Secretary's decision in each case to the Council. Upon consideration of the petitions for review, and the oppositions filed thereto, the Council determined that both decisions of the Assistant Secretary present the same major policy issue concerning "the rights and obligations of the parties with respect to the maintenance and/or modification of existing personnel policies and practices and matters affecting working conditions upon the expiration or termination of an agreement." The Council also determined that the agency's request for a stay in each case met the criteria for granting stays as set forth in section 2411.47(e)(2) of the Council's rules and granted the requests.

In both cases, the agency and the union filed briefs on the merits with the Council as provided for in section 2411.16 of the Council's rules.^{6/} The Department of the Interior filed an amicus curiae brief in FLRC No. 77A-40, as provided in section 2411.49 of the Council's rules.

(Continued)

determined that section 19(d) of the Order precluded his passing upon that aspect of the complaint. The union's petition for review of this portion of the Assistant Secretary's decision was denied by the Council. Internal Revenue Service, Ogden Service Center, et al., A/SLMR No. 806, FLRC No. 77A-40 (Aug. 12, 1977), Report No. 133.

^{5/} In a footnote to this statement, the Assistant Secretary continued as follows:

This is not to say that an activity may not unilaterally change a term or condition of employment if such change does not exceed the scope of its proposals made in prior negotiations, and if such change is made after the activity has bargained to impasse in good faith, and where the matter involved has not been submitted to the Federal Service Impasses Panel pursuant to Section 17 of the Order. See U.S. Army Corps of Engineers, Philadelphia District, cited above.

^{6/} The union requested oral argument in both cases here consolidated for decision, and the agency requested oral argument in FLRC No. 77A-92. Pursuant to section 2411.48 of the Council's rules, the requests are denied because the positions of the participants in these cases are adequately reflected in the entire record now before the Council.

Opinion

The major policy issue presented in this case concerns the rights and obligations of the parties with respect to the maintenance and/or modification of existing personnel policies and practices and matters affecting working conditions upon the expiration or termination of an agreement. The standard enunciated by the Assistant Secretary for determining which provisions of an agreement terminate and which provisions continue in effect upon the expiration of an agreement, as noted above, is that only those rights and privileges which are based solely on the existence of a written agreement terminate with the expiration of the agreement, whereas other rights and privileges accorded to an exclusive representative continue in effect until such time as they are modified or eliminated pursuant to negotiations or changed after a good faith bargaining impasse has been reached. Thus, as previously indicated, the Assistant Secretary concluded that, under his standard, for example, negotiated provisions calling for the arbitration of grievances and posting privileges would survive the expiration of the agreement while checkoff privileges would not. For the reasons stated below, we find this standard to be inconsistent with the purposes of the Order.

Section 11(a) of the Order provides that an "agency and a labor organization that has been accorded exclusive recognition . . . shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions" In addition to the obligation to negotiate concerning personnel policies and practices and matters affecting working conditions, section 11(a) comprehends the obligation of the parties to give effect to the terms of their collective bargaining agreement throughout the duration of that agreement.^{7/} Thus, an agency may not breach its obligation owed to an exclusive representative, as set forth in section 11(a) of the Order, by changing personnel policies and practices and matters affecting working conditions contained in the agreement during the term of that agreement.^{8/}

With respect to established personnel policies and practices and matters affecting working conditions which are not specifically provided for in the parties' agreement, the Council stated in its 1975 Report and Recommendations accompanying the issuance of Executive Order 11838:^{9/}

[T]he question is raised as to whether the Order requires . . . that a party must meet its obligation to negotiate prior to making changes in established personnel policies and practices and matters affecting working conditions during the term of an agreement.

7/ See, e.g., Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485, FLRC No. 75A-25 (Nov. 19, 1976), Report No. 118, at 8 of the Council's decision.

8/ Id.

9/ Labor-Management Relations in the Federal Service (1975), at 41.

The Assistant Secretary, when faced with this issue in a case, concluded that the Order does require adequate notice and an opportunity to negotiate prior to changing established personnel policies and practices and matters affecting working conditions during the term of an existing agreement unless the issues thus raised are controlled by current contractual commitments, or a clear and unmistakable waiver is present. We believe that the Assistant Secretary's conclusion on this matter is correct

That is, a party may not unilaterally change established personnel policies and practices and matters affecting working conditions not specifically provided for in the agreement without first fulfilling its obligation to negotiate -- i.e., without first providing notice to the other party of the proposed change and, upon that party's request, negotiating over such proposal. Thus, it is clear that the obligation to negotiate, as set forth in section 11(a) of the Order, requires both parties during the term of an agreement to maintain established personnel policies and practices and matters affecting working conditions, whether or not such terms are incorporated in such agreement, unless and until they are modified in a manner consistent with the Order.

As stated above, the question presented in this case concerns the rights and obligations of the parties with respect to the maintenance and/or modification of existing personnel policies and practices and matters affecting working conditions upon the expiration or termination of an agreement. In our view, existing personnel policies and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, continue as established upon the expiration of a negotiated agreement, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order.

Such conclusion implements the recognized policy of the Order to foster stability in the Federal labor-management relations program.^{10/} Further, it is consistent with the established framework of the Order which constricts unilateral changes in current personnel policies and practices and matters affecting working conditions and which provides for the peaceful resolution of bargaining disputes. Finally, our conclusion as to the continuation of established personnel policies and practices and matters affecting working conditions may be readily applied by the

10/ See, e.g., Labor-Management Relations in the Federal Service (1975), at 36; Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401, FLRC No. 74A-52 (Sept. 27, 1976), Report No. 112, at 11; Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, 3 FLRC 787, 803 [FLRC No. 74A-22 (Dec. 9, 1975), Report No. 88].

parties and facilitates "the maintenance of constructive and cooperative relationships between labor organizations and management officials," which is an underlying objective of the Order.^{11/}

In the Council's view, the standard applied by the Assistant Secretary under which "those rights and privileges . . . based solely on the existence of a written agreement . . . [are] terminated with the expiration of a negotiated agreement" is inconsistent with the purposes and policies of the Order. Thus, the application of this standard would reduce desired stability in that certain personnel policies and practices and matters affecting working conditions previously established by the parties' agreement would automatically terminate upon its expiration. In addition, this standard is unclear as to which personnel policies and practices and matters affecting working conditions "are based solely on the existence of a written agreement" and which are not, and such uncertainty would be potentially disruptive of the relationships between the parties. In the latter regard, as noted above,^{12/} the Assistant Secretary found, for example, that negotiated provisions calling for the arbitration of grievances and posting privileges were not dependent upon the existence of a written agreement and therefore would survive the expiration of an agreement, whereas a provision for dues checkoff was dependent upon the existence of such an agreement and therefore would not survive.

Thus, to repeat, the Order in our opinion requires that existing personnel policies and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, must continue as established upon the expiration of a negotiated agreement, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order.^{13/}

^{11/} See paragraph 3 of the Preamble of the Order, and Labor-Management Relations in the Federal Service (1975), at 63.

^{12/} Supra at 6.

^{13/} This requirement includes dues withholding, which clearly falls within the scope of bargaining under section 11(a) of the Order. Section 21 of the Order provides in pertinent part that allotments of dues terminate when "the dues withholding agreement between the agency and the labor organization is terminated . . ." [Emphasis added.] In the Council's opinion, the language of section 21 requires an affirmative act by one or both parties to the agreement in order to effect cancellation of the dues withholding agreement. That is, the occurrence of the expiration date of a negotiated agreement which contains a dues withholding agreement does not, in and of itself, result in termination of dues withholding. As with other personnel policies and practices and matters affecting working

(Continued)

Of course, just as in the situation where no collective bargaining agreement has previously existed, agency management, upon the expiration of a negotiated agreement, retains the right to unilaterally change provisions contained therein relating to "permissive" subjects of bargaining, i.e., those matters which are excepted from the obligation to negotiate by section 11(b) of the Order,^{14/} and either party may change matters which are outside the scope of such obligation under section 11(a) of the Order. Consequently, absent the parties' agreement to the contrary, the parties are not obligated to maintain those matters upon the expiration of their agreement.^{15/} Similarly, those agency regulations issued during the term of an agreement and which were not operative with respect to the bargaining unit during such term become

(Continued)

conditions, dues withholding provisions in expired negotiated agreements continue in effect and cannot be unilaterally changed except as consistent with the bargaining obligation under section 11(a) of the Order. Thus, for example, if the parties during negotiations wish to provide clearly and specifically in their collective bargaining agreement that dues withholding will terminate upon the expiration of the agreement, without the necessity of an affirmative act by the parties, such a provision would constitute a valid waiver of the parties' rights and would operate to terminate dues withholding upon the agreement's expiration. Cf. Labor-Management Relations in the Federal Service (1975), at 49-50, and Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, 3 FLRC 787, 804-806 [FLRC No. 74A-22 (Dec. 9, 1975), Report No. 88].

^{14/} Section 11(b) of the Order provides in pertinent part:

[T]he obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. . . .

^{15/} See, e.g., AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, 3 FLRC 396 [FLRC No. 74A-48 (June 26, 1975), Report No. 75]. In this regard, the Council has held that a proposal advanced during negotiations for a new agreement is excepted from the obligation to bargain by section 11(b) regardless of the fact that the proposal has been contained in prior agreements between the parties. See International Association of Machinists and Aerospace Workers, Local Lodge 1859 and Marine Corps Air Station and Naval Air Rework Facility, Cherry Point, North Carolina, FLRC No. 77A-28 (Feb. 28, 1978), Report No. 145 at note 2.

effective upon the expiration of that agreement.^{16/} Such a result is mandated by section 12(a) of the Order, which, as explained in the Report accompanying the Order, requires that "an agreement must be brought into conformance with current agency policies and regulations at the time it is renegotiated or before it is extended, except where specific exceptions are granted or renewed."^{17/}

Also--just as in the situation where the parties are for the first time negotiating a comprehensive collective bargaining agreement and where upon impasse in those negotiations a party wishes to change otherwise negotiable personnel policies and practices and matters affecting working conditions-- a party to the renegotiation of an agreement may not effect such changes unless it provides the other party with sufficient notice of its intent to implement the changes (which cannot exceed the scope of the proposals advanced by that party during prior negotiations) so that the other party is afforded a reasonable opportunity under the circumstances to invoke the processes of the Federal Service Impasses Panel. If the processes of the Panel are not invoked within a reasonable time of such notification, the Council finds, in agreement with the Assistant Secretary, that it is consistent with the Order for the party seeking to implement the changes to effect those changes. However, once the Panel's processes are invoked within a reasonable time of such notification, we further find, in substantial agreement with the Assistant Secretary, that the parties must adhere to established personnel policies and practices and matters affecting working conditions, including those contained in the expired agreement, to the maximum extent possible.^{18/}

16/ Section 12(a) of the Order provides:

Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level[.]

17/ Labor-Management Relations in the Federal Service (1975), at 72.

18/ See Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, supra n. 10, at 12 of the decision, in which the phrase "to the maximum extent possible" was indicated to encompass changes consistent with the necessary functioning of the agency.

The above requirements afford a party the opportunity to invoke the impasse resolution machinery of the Order^{19/} and at the same time effectuate the policy of the Order to foster stability in the Federal labor-management relations program. Thus, in our view, it is consistent with the purposes and policies of the Order to require the parties to maintain the status quo to the maximum extent possible once the Panel's processes have been invoked in order to permit the Panel to decide whether to require further negotiations or to exercise jurisdiction over the dispute and, in the 20/ latter event, to take the action deemed necessary to settle the dispute. In this regard, as the Council has previously noted, the impasse resolution machinery of the Panel established by the Order was intended to be (and has operated as) one aspect of the bargaining process.^{21/}

Summary

Thus, to summarize the principles discussed herein: Upon the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, continue as established, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order. However, agency management retains the right upon the expiration of a negotiated agreement to unilaterally change provisions

19/ Sections 16 and 17 of the Order provide:

Sec. 16. Negotiation disputes. The Federal Mediation and Conciliation Service shall provide services and assistance to Federal agencies and labor organizations in the resolution of negotiation disputes. The Service shall determine under what circumstances and in what manner it shall proffer its services.

Sec. 17. Negotiation impasses. When voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or other third-party mediation, fail to resolve a negotiation impasse, either party may request the Federal Service Impasses Panel to consider the matter. The Panel, in its discretion and under the regulations it prescribes, may consider the matter and may recommend procedures to the parties for the resolution of the impasse or may settle the impasse by appropriate action. Arbitration or third-party fact finding with recommendations to assist in the resolution of an impasse may be used by the parties only when authorized or directed by the Panel.

20/ Labor-Management Relations in the Federal Service (1975), at 72-73.

21/ Id., at 58.

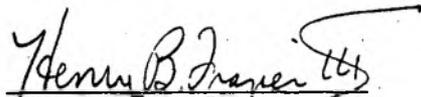
contained therein relating to "permissive" subjects of bargaining, i.e., those matters which are excepted from the obligation to negotiate by section 11(b) of the Order, and either party may change matters which are outside the scope of such obligation under section 11(a) of the Order. Similarly, those agency regulations issued during the term of a negotiated agreement which were not operative with respect to the bargaining unit during such term become effective, as mandated by section 12(a) of the Order, upon the expiration of that agreement. Also, where (as here) the parties are renegotiating a comprehensive collective bargaining agreement and reach impasse, a party may not effect changes in otherwise negotiable personnel policies and practices and matters affecting working conditions without first providing the other party with sufficient notice of its intent to implement the changes (which changes cannot exceed the scope of the proposals advanced during prior negotiations by the party seeking to implement the changes) so that the other party is afforded a reasonable opportunity under the circumstances to invoke the processes of the Panel. If the Panel's processes are not invoked within a reasonable time of such notification, the party seeking to implement the changes may effect those changes. However, once the Panel's processes are invoked within a reasonable time of such notification, the parties must adhere to established personnel policies and practices and matters affecting working conditions, including those contained in the expired agreement, to the maximum extent possible -- i.e., to the extent consistent with the necessary functioning of the agency.

Accordingly, as the Assistant Secretary's decisions in A/SLMR No. 806 and A/SLMR No. 859 are based on a standard which the Council has found to be inconsistent with the purposes of the Order, the Council will remand the cases to him for action consistent with the principles set forth herein.

Conclusion

For the foregoing reasons, we find that the Assistant Secretary's decision and order in each of the above-entitled cases is inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we remand the cases to him for action consistent with our decision herein.

By the Council.


 Henry B. Frazier III
 Executive Director

Issued: March 17, 1978

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF SUPPLEMENTAL DECISION AND ORDER
 OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED.

DEPARTMENT OF THE TREASURY,
 INTERNAL REVENUE SERVICE,
 BROOKHAVEN SERVICE CENTER
 A/SLMR No. 1053

On June 29, 1977, the Assistant Secretary issued his Decision and Order in A/SLMR No. 859, in which he found, among other things, that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally excluding arbitration, which the Respondent characterized as an "institutional benefit," from the negotiated grievance procedure following the expiration of the parties' negotiated agreement. In this regard, the Assistant Secretary, applying the rationale enunciated previously in Internal Revenue Service, Ogden Service Center and Internal Revenue Service, et al., A/SLMR No. 806 (1977), concluded that arbitration was not one of those rights and privileges which are based solely on the existence of a written agreement that, in effect, terminate upon the expiration of a negotiated agreement.

On March 17, 1978, the Federal Labor Relations Council (Council) issued its consolidated Decision on Appeals rejecting the Assistant Secretary's standard, as noted above, and remanding the case to the Assistant Secretary for action consistent with its decision. The Council held that, upon the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) of the Order, whether or not included in a negotiated agreement, continue as established, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of the agreement, or unless otherwise modified in a manner consistent with the Order. The Council noted, in this connection, that only those matters contained in a negotiated agreement which are excepted by Section 11(b) of the Order from the obligation to negotiate may be unilaterally changed by agency management, and that agency regulations issued during an agreement's term become effective upon the agreement's expiration. However, the Council concluded that prior to changing negotiable matters upon which the parties reached impasse during negotiation of an agreement, adequate notice must be provided by the party desiring to make changes to afford the other party a reasonable period in which to invoke the processes of the Federal Service Impasses Panel, and if such processes are timely invoked, the parties are required to adhere to the established personnel policies and practices and matters affecting working conditions, to the maximum extent possible.

Applying the principles enunciated by the Council to the circumstances of the instant case, the Assistant Secretary found that a contrary result to that reached in A/SLMR No. 859 was not required. Thus, he concluded that the Respondent's unilateral exclusion of arbitration, which is clearly a mandatory subject of bargaining within the meaning of Section 11(a) of the Order, from the negotiated grievance procedure without providing adequate notice to the Complainant so as to afford it a reasonable opportunity to invoke the processes of the Federal Service Impasses Panel was violative of Section 19(a)(1) and (6) of the Order.

Accordingly, the Assistant Secretary modified his order consistent with the principles enunciated by the Council.

A/SLMR No. 1053

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
BROOKHAVEN SERVICE CENTER

Respondent

and

Case No. 30-6612(CA)
A/SLMR No. 859
FLRC No. 77A-92

NATIONAL TREASURY EMPLOYEES
UNION AND CHAPTER NO. 099, NTEU

Complainant

SUPPLEMENTAL DECISION AND ORDER

On November 17, 1976, Administrative Law Judge Garvin Lee Oliver issued his Recommended Decision and Order in the above-entitled proceeding, finding, among other things, that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally excluding arbitration from the negotiated grievance procedure following the expiration of the parties' negotiated agreement.

On June 29, 1977, the Assistant Secretary issued his Decision and Order in A/SLMR No. 859, adopting the Administrative Law Judge's conclusion, applying the rationale enunciated previously in Internal Revenue Service, Odgen Service Center, and Internal Revenue Service, et al., A/SLMR No. 806 (1977). In this regard, he found that arbitration was not one of those rights and privileges which are based solely on the existence of a written agreement that terminated upon the expiration of the parties' negotiated agreement.

On March 17, 1978, the Federal Labor Relations Council (Council) issued its consolidated Decision on Appeals remanding the subject case to the Assistant Secretary for action consistent with its decision. In the Council's view, upon the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) of the Order, whether or not included in a negotiated agreement, continue as established, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order. The Council noted, in this connection, that

agency management retains the right, upon the expiration of a negotiated agreement, to unilaterally change those matters contained therein which are excepted from the obligation to negotiate by Section 11(b) of the Order. Similarly, those agency regulations issued during the term of a negotiated agreement, which were not operative with respect to the bargaining unit during such term, become effective, as mandated by Section 12(a) of the Order, upon the expiration of the agreement. The Council also found that where the parties are renegotiating a comprehensive collective bargaining agreement and reach impasse, changes may not be effected upon expiration of their prior agreement unless adequate notice is provided prior to the implementation of such otherwise negotiable changes in personnel policies and practices and other matters affecting working conditions, so as to afford the other party a reasonable period in which to invoke the processes of the Federal Service Impasses Panel (Panel). Such changes must not exceed the scope of the proposals advanced during prior negotiations. If the Panel's processes are invoked within a reasonable period of time of such notice, the parties must adhere to the established personnel policies and practices and matters affecting working conditions, including those contained in the expired agreement, to the maximum extent possible.

Applying the principles enunciated by the Council to the circumstances of the instant case, I find that a contrary result to that reached in A/SLMR No. 859 is not required. Thus, following the expiration of the parties' negotiated agreement the Respondent herein unilaterally excluded arbitration from the negotiated grievance procedure. Clearly, arbitration is a mandatory subject of bargaining within the ambit of Section 11(a) of the Order. Further, the evidence establishes that the Respondent did not provide the Complainant with sufficient notice of its intent to terminate arbitration so as to afford the Complainant a reasonable opportunity to invoke the processes of the Panel. Nor is there any evidence that an agency regulation had been issued during the term of the parties' prior negotiated agreement mandating the termination of arbitration upon the expiration of such agreement.

Under all of these circumstances, I find that the Respondent's conduct in unilaterally altering the parties' negotiated grievance-arbitration procedure violated Section 19(a)(1) and (6) of the Order. In connection with this finding, I shall modify the order in A/SLMR No. 859 to reflect the violation found herein based on the principles enunciated by the Council.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, shall:

1. Cease and desist from:

(a) Unilaterally changing, after the expiration of a negotiated agreement, the negotiated grievance-arbitration procedure, or any other existing personnel policies and practices and matters affecting working conditions within the ambit of Section 11(a) of the Order, without providing adequate notice to and affording the National Treasury Employees Union, Chapter No. 099, the exclusive representative of its employees, or any other exclusive representative, a reasonable opportunity to invoke the processes of the Federal Service Impasses Panel.

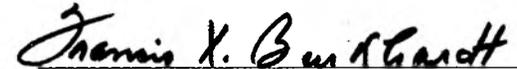
(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Post at the facilities of the Internal Revenue Service, Brookhaven Service Center, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Brookhaven Service Center and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director of the Brookhaven Service Center shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
May 22, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally change, after the expiration of a negotiated agreement, the negotiated grievance-arbitration procedure, or any other existing personnel policies and practices and matters affecting working conditions within the ambit of Section 11(a) of the Order, without providing adequate notice to and affording the National Treasury Employees Union, Chapter 099, the exclusive representative of our employees, or any other exclusive representative, a reasonable opportunity to invoke the processes of the Federal Service Impasses Panel.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 3515, 1515 Broadway, New York, New York 10036.

Internal Revenue Service, Ogden Service Center; Internal Revenue Service, Fresno Service Center; Internal Revenue Service, Austin Service Center; Internal Revenue Service, Kansas City Service Center; Internal Revenue Service, Cincinnati Service Center; Internal Revenue Service, Atlanta Service Center; Internal Revenue Service, Memphis Service Center; Internal Revenue Service, Brookhaven Service Center; Internal Revenue Service, Philadelphia Service Center; Internal Revenue Service, Data Center; Internal Revenue Service, National Computer Center; and the Internal Revenue Service

and

A/SLMR No. 806
FLRC No. 77A-40

The National Treasury Employees Union; NTEU Chapter No. 066; NTEU Chapter No. 067; NTEU Chapter No. 070; NTEU Chapter No. 071; NTEU Chapter No. 072; NTEU Chapter No. 073; NTEU Chapter No. 078; NTEU Chapter No. 082; NTEU Chapter No. 097; NTEU Chapter No. 098; and NTEU Chapter No. 099

Department of the Treasury,
Internal Revenue Service,
Brookhaven Service Center

and

A/SLMR No. 859
FLRC No. 77A-92

National Treasury Employees
Union and Chapter No. 099, NTEU

DECISION ON APPEALS FROM
ASSISTANT SECRETARY DECISIONS

Background of Cases

These appeals arose from two separate decisions of the Assistant Secretary involving unfair labor practice complaints filed by the National Treasury Employees Union (the union) on behalf of itself and certain of its chapters

alleging violations of section 19(a)(1) and (6) of the Order by the Internal Revenue Service (the agency) and certain of its activities.^{1/} Inasmuch as both appeals arise out of the same basic circumstances and factual background, involve the same agency and national labor organization, and present the same major policy issue, the Council here consolidates them for decision on the merits.

The pertinent factual background of these cases, as found by the Assistant Secretary, is as follows: The agency and the union were parties to a multi-center collective bargaining agreement (MCA) covering the employees at the activities involved herein. The MCA was due to expire on April 12, 1975. During the course of negotiations for a new MCA, the parties twice extended the expiration date of the agreement. On April 24, 1975, the parties executed a memorandum of agreement providing that the MCA would remain in effect until negotiations were completed or the union invoked the impasse procedures provided in the Order, and that the MCA would terminate five days after receipt by either party of notice of termination. On May 27, 1975, the union notified the agency that it was declaring an impasse, and would file its appeal with the Federal Service Impasses Panel (Panel) on June 2, 1975. By letter dated May 28, 1975, the agency wrote the union that, while it would honor the union's "unilateral decision and right to terminate the agreement and thus give up the institutional benefits contained therein . . . , other benefits in the agreement . . . accrue to individual employees. We wish to advise you that it is our intent to continue these benefits to employees intact." The agency's letter included a detailed list indicating which provisions of the MCA would continue in effect and which ones would not. The next day (May 29), the agency head sent a memorandum to all employees which included the same list terminating certain provisions of the MCA and continuing others described as "applicable to you as an employee" [Emphasis in original.] This memorandum was issued to the employees without notice to or discussion with the union, and the agency subsequently refused to negotiate with the union over the agency's changes in personnel policies and practices and matters affecting working conditions contained in the memorandum.^{2/}

^{1/} Section 19(a) of the Order provides, in pertinent part:

Sec. 19. Unfair labor practices. (a) Agency management shall not--

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

^{2/} On July 18, 1975, the parties signed a new multi-center agreement, effective October 18, 1975, and agreed to reinstate the previous MCA pending the effective date of the new agreement.

In A/SLMR No. 806 (FLRC No. 77A-40), the union filed a complaint on behalf of itself and 11 of its chapters alleging, in pertinent part, that the agency and 11 of its activities violated section 19(a)(1) and (6) of the Order by virtue of their elimination of certain portions of the MCA upon its expiration. The agency contended that it eliminated only those portions of the MCA which were "institutional benefits"; i.e., those benefits which, in the agency's view, pertained to the exclusive representative's rights as an organization and therefore terminated with the agreement's expiration. The union asserted that such rights, once negotiated, became personnel policies and practices and other matters affecting working conditions, and, therefore, any unilateral changes with respect to such matters violated the Order. With respect to this complaint, the Assistant Secretary found:

[T]he unilateral elimination of those agreement provisions characterized by the [agency] as "institutional benefits" accruing to the union qua union was violative of Section 19(a)(1) and (6) of the Order. Thus, in my view, only those rights and privileges which are based solely on the existence of a written agreement -- e.g., checkoff privileges -- in effect, terminated with the expiration of a negotiated agreement. On the other hand, other rights and privileges accorded to exclusive representatives continue in effect until such time as they are modified or eliminated pursuant to negotiations or changed after a good faith bargaining impasse has been reached. [Footnotes omitted.]

Under these circumstances, the Assistant Secretary, citing his decision in U.S. Army Corps of Engineers, Philadelphia District,^{3/} found that the

^{3/} In U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673 (June 23, 1976), the Assistant Secretary stated that it has been established that agency management violates its obligation to meet and confer under the Order when it unilaterally changes those terms and conditions of employment which are included within the scope of section 11(a) of the Order. He further determined that, after bargaining to an impasse, agency management does not violate the Order by unilaterally imposing changes in terms and conditions of employment which do not exceed the scope of its proposals made in the prior negotiations, so long as appropriate notice is given to the exclusive representative as to when the changes are to become effective in order to give the exclusive representative ample opportunity to invoke the services of the Panel before the changes are implemented. The Assistant Secretary concluded that the framers of the Order intended to give parties discretion with respect to seeking the Panel's services under section 17. He went on to state that if a party involved in an impasse requested the services of the Panel, it would effectuate the purposes of the Order to require the parties, in the absence of an overriding exigency, to maintain the status quo and permit the processes of the Panel to run their course before the unilateral change in terms and conditions of employment could be effectuated.

(Continued)

activities' "unilateral elimination of other agreement provisions related to the [union's] rights, such as posting privileges, etc., constituted an improper unilateral change in personnel policies and practices in violation of section 19(a)(1) and (6) of the Order." [Footnotes omitted.]^{4/}

In A/SLMR No. 859 (FLRC No. 77A-92), the union filed a complaint on behalf of itself and its chapter representing employees at the Brookhaven Service Center which alleged, in pertinent part, that the agency violated section 19(a)(1) and (6) of the Order by unilaterally altering the negotiated grievance procedure after the MCA had expired by eliminating the arbitration provision of such negotiated agreement, and by refusing to process grievances filed thereafter pursuant to the agency grievance procedure. The elimination of the arbitration provision was among the changes contained in the aforementioned memorandum sent to all employees by the agency head which set forth the list of provisions in the MCA that would continue in effect and the ones that would not.

The Assistant Secretary, again citing his decision in U.S. Army Corps of Engineers, Philadelphia District, supra, found that the agency violated section 19(a)(1) and (6) of the Order by unilaterally excluding arbitration from the negotiated grievance procedure following the expiration of the parties' negotiated agreement. In this regard, the Assistant Secretary stated:

Thus, it has been found previously in Internal Revenue Service, Ogden Service Center, and Internal Revenue Service, et al., A/SLMR No. 806, that, ". . . only those rights and privileges which are based solely on the existence of a written agreement -- e.g., checkoff privileges -- in effect, terminated with the

(Continued)

The union appealed to the Council. The Council, in denying review of the appeal [FLRC No. 76A-94 (Feb. 25, 1977), Report No. 122], did not pass upon the Assistant Secretary's statement concerning the obligation of the parties involved in an impasse to maintain the status quo (absent an overriding exigency) once the services of the Panel have been requested and to avoid effectuating any unilateral changes in terms and conditions of employment until the Panel's processes have run their course. The Council noted that such statement, which had been included in the Assistant Secretary's decision merely as dictum, had not been appealed to the Council and therefore, apart from other considerations, was not properly before the Council for review.

^{4/} The union's complaint had also alleged that the agency and activities had violated section 19(a)(1) and (6) of the Order by attempting to deal directly with unit employees by means of the memorandum issued to them by the agency head. However, as a grievance over the memorandum had been filed previously at one of the activities, the Assistant Secretary

(Continued)

expiration of a negotiated agreement." In my view, arbitration is not one of those rights or privileges uniquely tied to a written agreement which terminates upon the expiration of a Federal sector negotiated agreement. Rather, I find that arbitration, once agreed upon by the parties as the final step for the settling of disputes arising under a negotiated agreement, continues thereafter as a term and condition of employment, unless the parties have expressly agreed that it terminates with the expiration of such negotiated agreement.^{5/}

The agency, on behalf of itself and its activities, appealed the Assistant Secretary's decision in each case to the Council. Upon consideration of the petitions for review, and the oppositions filed thereto, the Council determined that both decisions of the Assistant Secretary present the same major policy issue concerning "the rights and obligations of the parties with respect to the maintenance and/or modification of existing personnel policies and practices and matters affecting working conditions upon the expiration or termination of an agreement." The Council also determined that the agency's request for a stay in each case met the criteria for granting stays as set forth in section 2411.47(e)(2) of the Council's rules and granted the requests.

In both cases, the agency and the union filed briefs on the merits with the Council as provided for in section 2411.16 of the Council's rules.^{6/} The Department of the Interior filed an amicus curiae brief in FLRC No. 77A-40; as provided in section 2411.49 of the Council's rules.

(Continued)

determined that section 19(d) of the Order precluded his passing upon that aspect of the complaint. The union's petition for review of this portion of the Assistant Secretary's decision was denied by the Council. Internal Revenue Service, Ogden Service Center, et al., A/SLMR No. 806, FLRC No. 77A-40 (Aug. 12, 1977); Report No. 133.

^{5/} In a footnote to this statement, the Assistant Secretary continued as follows:

This is not to say that an activity may not unilaterally change a term or condition of employment if such change does not exceed the scope of its proposals made in prior negotiations, and if such change is made after the activity has bargained to impasse in good faith, and where the matter involved has not been submitted to the Federal Service Impasses Panel pursuant to Section 17 of the Order. See U.S. Army Corps of Engineers, Philadelphia District, cited above.

^{6/} The union requested oral argument in both cases here consolidated for decision, and the agency requested oral argument in FLRC No. 77A-92. Pursuant to section 2411.48 of the Council's rules, the requests are denied because the positions of the participants in these cases are adequately reflected in the entire record now before the Council.

Opinion

The major policy issue presented in this case concerns the rights and obligations of the parties with respect to the maintenance and/or modification of existing personnel policies and practices and matters affecting working conditions upon the expiration or termination of an agreement. The standard enunciated by the Assistant Secretary for determining which provisions of an agreement terminate and which provisions continue in effect upon the expiration of an agreement, as noted above, is that only those rights and privileges which are based solely on the existence of a written agreement terminate with the expiration of the agreement, whereas other rights and privileges accorded to an exclusive representative continue in effect until such time as they are modified or eliminated pursuant to negotiations or changed after a good faith bargaining impasse has been reached. Thus, as previously indicated, the Assistant Secretary concluded that, under his standard, for example, negotiated provisions calling for the arbitration of grievances and posting privileges would survive the expiration of the agreement while checkoff privileges would not. For the reasons stated below, we find this standard to be inconsistent with the purposes of the Order.

Section 11(a) of the Order provides that an "agency and a labor organization that has been accorded exclusive recognition . . . shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions" In addition to the obligation to negotiate concerning personnel policies and practices and matters affecting working conditions, section 11(a) comprehends the obligation of the parties to give effect to the terms of their collective bargaining agreement throughout the duration of that agreement.^{7/} Thus, an agency may not breach its obligation owed to an exclusive representative, as set forth in section 11(a) of the Order, by changing personnel policies and practices and matters affecting working conditions contained in the agreement during the term of that agreement.^{8/}

With respect to established personnel policies and practices and matters affecting working conditions which are not specifically provided for in the parties' agreement, the Council stated in its 1975 Report and Recommendations accompanying the issuance of Executive Order 11838:^{9/}

[T]he question is raised as to whether the Order requires . . . that a party must meet its obligation to negotiate prior to making changes in established personnel policies and practices and matters affecting working conditions during the term of an agreement.

7/ See, e.g., Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485, FLRC No. 75A-25 (Nov. 19, 1976), Report No. 118, at 8 of the Council's decision.

8/ Id.

9/ Labor-Management Relations in the Federal Service (1975), at 41.

The Assistant Secretary, when faced with this issue in a case, concluded that the Order does require adequate notice and an opportunity to negotiate prior to changing established personnel policies and practices and matters affecting working conditions during the term of an existing agreement unless the issues thus raised are controlled by current contractual commitments, or a clear and unmistakable waiver is present. We believe that the Assistant Secretary's conclusion on this matter is correct

That is, a party may not unilaterally change established personnel policies and practices and matters affecting working conditions not specifically provided for in the agreement without first fulfilling its obligation to negotiate -- i.e., without first providing notice to the other party of the proposed change and, upon that party's request, negotiating over such proposal. Thus, it is clear that the obligation to negotiate, as set forth in section 11(a) of the Order, requires both parties during the term of an agreement to maintain established personnel policies and practices and matters affecting working conditions, whether or not such terms are incorporated in such agreement, unless and until they are modified in a manner consistent with the Order.

As stated above, the question presented in this case concerns the rights and obligations of the parties with respect to the maintenance and/or modification of existing personnel policies and practices and matters affecting working conditions upon the expiration or termination of an agreement. In our view, existing personnel policies and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, continue as established upon the expiration of a negotiated agreement, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order.

Such conclusion implements the recognized policy of the Order to foster stability in the Federal labor-management relations program.^{10/} Further, it is consistent with the established framework of the Order which constricts unilateral changes in current personnel policies and practices and matters affecting working conditions and which provides for the peaceful resolution of bargaining disputes. Finally, our conclusion as to the continuation of established personnel policies and practices and matters affecting working conditions may be readily applied by the

10/ See, e.g., Labor-Management Relations in the Federal Service (1975), at 36; Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401, FLRC No. 74A-52 (Sept. 27, 1976), Report No. 112, at 11; Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, 3 FLRC 787, 803 [FLRC No. 74A-22 (Dec. 9, 1975), Report No. 88].

parties and facilitates "the maintenance of constructive and cooperative relationships between labor organizations and management officials," which is an underlying objective of the Order.^{11/}

In the Council's view, the standard applied by the Assistant Secretary under which "those rights and privileges . . . based solely on the existence of a written agreement . . . [are] terminated with the expiration of a negotiated agreement" is inconsistent with the purposes and policies of the Order. Thus, the application of this standard would reduce desired stability in that certain personnel policies and practices and matters affecting working conditions previously established by the parties' agreement would automatically terminate upon its expiration. In addition, this standard is unclear as to which personnel policies and practices and matters affecting working conditions "are based solely on the existence of a written agreement" and which are not, and such uncertainty would be potentially disruptive of the relationships between the parties. In the latter regard, as noted above,^{12/} the Assistant Secretary found, for example, that negotiated provisions calling for the arbitration of grievances and posting privileges were not dependent upon the existence of a written agreement and therefore would survive the expiration of an agreement, whereas a provision for dues checkoff was dependent upon the existence of such an agreement and therefore would not survive.

Thus, to repeat, the Order in our opinion requires that existing personnel policies and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, must continue as established upon the expiration of a negotiated agreement, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order.^{13/}

^{11/} See paragraph 3 of the Preamble of the Order, and Labor-Management Relations in the Federal Service (1975), at 63.

^{12/} Supra at 6.

^{13/} This requirement includes dues withholding, which clearly falls within the scope of bargaining under section 11(a) of the Order. Section 21 of the Order provides in pertinent part that allotments of dues terminate when "the dues withholding agreement between the agency and the labor organization is terminated . . ." [Emphasis added.] In the Council's opinion, the language of section 21 requires an affirmative act by one or both parties to the agreement in order to effect cancellation of the dues withholding agreement. That is, the occurrence of the expiration date of a negotiated agreement which contains a dues withholding agreement does not, in and of itself, result in termination of dues withholding. As with other personnel policies and practices and matters affecting working

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Of course, just as in the situation where no collective bargaining agreement has previously existed, agency management, upon the expiration of a negotiated agreement, retains the right to unilaterally change provisions contained therein relating to "permissive" subjects of bargaining, i.e., those matters which are excepted from the obligation to negotiate by section 11(b) of the Order,^{14/} and either party may change matters which are outside the scope of such obligation under section 11(a) of the Order. Consequently, absent the parties' agreement to the contrary, the parties are not obligated to maintain those matters upon the expiration of their agreement.^{15/} Similarly, those agency regulations issued during the term of an agreement and which were not operative with respect to the bargaining unit during such term become

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conditions, dues withholding provisions in expired negotiated agreements continue in effect and cannot be unilaterally changed except as consistent with the bargaining obligation under section 11(a) of the Order. Thus, for example, if the parties during negotiations wish to provide clearly and specifically in their collective bargaining agreement that dues withholding will terminate upon the expiration of the agreement, without the necessity of an affirmative act by the parties, such a provision would constitute a valid waiver of the parties' rights and would operate to terminate dues withholding upon the agreement's expiration. Cf. Labor-Management Relations in the Federal Service (1975), at 49-50, and Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, 3 FLRC 787, 804-806 [FLRC No. 74A-22 (Dec. 9, 1975), Report No. 88].

^{14/} Section 11(b) of the Order provides in pertinent part:

[T]he obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. . . .

^{15/} See, e.g., AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, 3 FLRC 396 [FLRC No. 74A-48 (June 26, 1975), Report No. 75]. In this regard, the Council has held that a proposal advanced during negotiations for a new agreement is excepted from the obligation to bargain by section 11(b) regardless of the fact that the proposal has been contained in prior agreements between the parties. See International Association of Machinists and Aerospace Workers, Local Lodge 1859 and Marine Corps Air Station and Naval Air Rework Facility, Cherry Point, North Carolina, FLRC No. 77A-28 (Feb. 28, 1978), Report No. 145 at note 2.

effective upon the expiration of that agreement.^{16/} Such a result is mandated by section 12(a) of the Order, which, as explained in the Report accompanying the Order, requires that "an agreement must be brought into conformance with current agency policies and regulations at the time it is renegotiated or before it is extended, except where specific exceptions are granted or renewed."^{17/}

Also--just as in the situation where the parties are for the first time negotiating a comprehensive collective bargaining agreement and where upon impasse in those negotiations a party wishes to change otherwise negotiable personnel policies and practices and matters affecting working conditions--a party to the renegotiation of an agreement may not effect such changes unless it provides the other party with sufficient notice of its intent to implement the changes (which cannot exceed the scope of the proposals advanced by that party during prior negotiations) so that the other party is afforded a reasonable opportunity under the circumstances to invoke the processes of the Federal Service Impasses Panel. If the processes of the Panel are not invoked within a reasonable time of such notification, the Council finds, in agreement with the Assistant Secretary, that it is consistent with the Order for the party seeking to implement the changes to effect those changes. However, once the Panel's processes are invoked within a reasonable time of such notification, we further find, in substantial agreement with the Assistant Secretary, that the parties must adhere to established personnel policies and practices and matters affecting working conditions, including those contained in the expired agreement, to the maximum extent possible.^{18/}

16/ Section 12(a) of the Order provides:

Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level[.]

17/ Labor-Management Relations in the Federal Service (1975), at 72.

18/ See Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, supra n. 10, at 12 of the decision, in which the phrase "to the maximum extent possible" was indicated to encompass changes consistent with the necessary functioning of the agency.

The above requirements afford a party the opportunity to invoke the impasse resolution machinery of the Order^{19/} and at the same time effectuate the policy of the Order to foster stability in the Federal labor-management relations program. Thus, in our view, it is consistent with the purposes and policies of the Order to require the parties to maintain the status quo to the maximum extent possible once the Panel's processes have been invoked in order to permit the Panel to decide whether to require further negotiations or to exercise jurisdiction over the dispute and, in the 20/ latter event, to take the action deemed necessary to settle the dispute. In this regard, as the Council has previously noted, the impasse resolution machinery of the Panel established by the Order was^{21/} intended to be (and has operated as) one aspect of the bargaining process.

Summary

Thus, to summarize the principles discussed herein: Upon the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, continue as established, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order. However, agency management retains the right upon the expiration of a negotiated agreement to unilaterally change provisions

19/ Sections 16 and 17 of the Order provide:

Sec. 16. Negotiation disputes. The Federal Mediation and Conciliation Service shall provide services and assistance to Federal agencies and labor organizations in the resolution of negotiation disputes. The Service shall determine under what circumstances and in what manner it shall proffer its services.

Sec. 17. Negotiation impasses. When voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or other third-party mediation, fail to resolve a negotiation impasse, either party may request the Federal Service Impasses Panel to consider the matter. The Panel, in its discretion and under the regulations it prescribes, may consider the matter and may recommend procedures to the parties for the resolution of the impasse or may settle the impasse by appropriate action. Arbitration or third-party fact finding with recommendations to assist in the resolution of an impasse may be used by the parties only when authorized or directed by the Panel.

20/ Labor-Management Relations in the Federal Service (1975), at 72-73.

21/ Id., at 58.

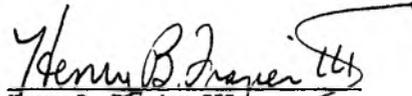
contained therein relating to "permissive" subjects of bargaining, i.e., those matters which are excepted from the obligation to negotiate by section 11(b) of the Order, and either party may change matters which are outside the scope of such obligation under section 11(a) of the Order. Similarly, those agency regulations issued during the term of a negotiated agreement which were not operative with respect to the bargaining unit during such term become effective, as mandated by section 12(a) of the Order, upon the expiration of that agreement. Also, where (as here) the parties are renegotiating a comprehensive collective bargaining agreement and reach impasse, a party may not effect changes in otherwise negotiable personnel policies and practices and matters affecting working conditions without first providing the other party with sufficient notice of its intent to implement the changes (which changes cannot exceed the scope of the proposals advanced during prior negotiations by the party seeking to implement the changes) so that the other party is afforded a reasonable opportunity under the circumstances to invoke the processes of the Panel. If the Panel's processes are not invoked within a reasonable time of such notification, the party seeking to implement the changes may effect those changes. However, once the Panel's processes are invoked within a reasonable time of such notification, the parties must adhere to established personnel policies and practices and matters affecting working conditions, including those contained in the expired agreement, to the maximum extent possible -- i.e., to the extent consistent with the necessary functioning of the agency.

Accordingly, as the Assistant Secretary's decisions in A/SLMR No. 806 and A/SLMR No. 859 are based on a standard which the Council has found to be inconsistent with the purposes of the Order, the Council will remand the cases to him for action consistent with the principles set forth herein.

Conclusion

For the foregoing reasons, we find that the Assistant Secretary's decision and order in each of the above-entitled cases is inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we remand the cases to him for action consistent with our decision herein.

By the Council.


 Henry B. Frazier III
 Executive Director

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NAVY EXCHANGE,
 NAVAL TRAINING CENTER,
 SAN DIEGO, CALIFORNIA
 A/SLMR No. 1054

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2285, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by unilaterally changing the prices charged for haircuts and the commission rates of its barbers.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In reaching this conclusion, he found that the adjustments made by the Respondent were made in accordance with the procedures authorized by FPM Supplement 532-2 and that the Respondent was under no duty to meet and confer on the decision to adjust price and commission rates.

Since the disposition of this case involved, in part, an interpretation of 5 U.S.C. Section 5342-5347 and its implementing Civil Service Commission directives, the Assistant Secretary asked the Commission for an interpretation of its directives as they pertained to the present case. On March 15, 1978, the Commission issued its interpretation in response to the Assistant Secretary's request.

Upon review of the Commission's interpretation and the record herein, which established that the Complainant had notice of the proposed change in commission rates and failed to respond prior to implementation, the Assistant Secretary ordered that the subject complaint be dismissed in its entirety.

Issued: March 17, 1978

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVY EXCHANGE,
NAVAL TRAINING CENTER,
SAN DIEGO, CALIFORNIA

Respondent

and

Case No. 72-6412(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2285, AFL-CIO

Complainant

DECISION AND ORDER

On March 24, 1977, Administrative Law Judge John D. Henson issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, 2/ I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation, to the extent consistent herewith.

1/ The Complainant's request for an extension of time in which to file exceptions was untimely and, therefore, was denied.

2/ In his Recommended Decision and Order, the Administrative Law Judge appears to have inadvertently utilized the original complaint rather than the amended complaint which was subsequently filed. This inadvertence is hereby corrected. It also appears that the amended complaint is ambiguous in that it uses the date of the change in regular haircut commissions with the subsequently changed commission rate used for recruit haircuts which, in fact, occurred on a subsequent date. However, both parties at the hearing accepted the fact that both commission rate changes were at issue and both were litigated. No party, therefore, appears to have been prejudiced.

The facts herein are fully set forth in the attached Administrative Law Judge's Recommended Decision and Order, and I shall repeat them only to the extent deemed necessary.

The instant complaint, filed by the American Federation of Government Employees, Local 2285, AFL-CIO (AFGE) alleges, in substance, that Respondent violated Section 19(a)(1) and (6) of the Order by its action in January and April 1976, in changing the prices charged for haircuts, and the rate of commission paid to the barbers based upon such prices without first notifying and bargaining in good faith with the AFGE, the exclusive representative of its barbers.

The Respondent is a nonappropriated fund instrumentality which reports to the Navy Resale Systems Office in Brooklyn, New York. The mission of the Exchange is to provide goods and services to authorized patrons at the lowest practicable cost and to provide, through its profits, a source of funds to be used for the welfare and recreation of naval personnel. In order to accomplish the latter part of its mission, the Navy Resale Systems Office established for each Navy Exchange department a minimum net profits goal. In the case of barber shops, the minimum net profit goal was set at 10 percent. In October 1975, a review of the Exchange's operating statement indicated that net profits from the barber shop for the previous nine months had averaged only 5.2 percent. The Exchange management determined that the net profit goal could only be achieved by raising haircut prices and decreasing the percentage commission rate paid each barber per haircut. At this time, barbers, with the exception of a salaried manager, were paid on a straight commission basis which was 65 percent of the price for regular and recruit haircuts.

On December 23, 1975, the Commander of the Exchange and his Administrative Assistant met with the barbers, one of whom was the shop steward, to inform them of the decision to raise haircut prices and lower the commission rate. At that meeting, one or more of the barbers indicated that they were going to check with the Complainant. On January 9, 1976, regular haircut prices were raised from \$1.25 to \$1.50 and the barbers' commission rate was reduced from 65 percent to 56 percent. On April 4, 1976, recruit haircuts were increased from \$.90 to \$1.00 and the barber commission rate was reduced from 65 percent to 61 percent. Under the new rates, the record reveals that the barbers received a few cents more per haircut than before the change. The record reveals that the first formal request by the Complainant to negotiate was made in the latter's unfair labor practice charge letter on April 22, 1976.

In his Recommended Decision and Order, the Administrative Law Judge concluded that the Respondent's unilateral change in prices and employee commission rates, without prior consultation with the exclusive representative, was not violative of the Order. In reaching this conclusion, he found that the employees herein are "prevailing rate employees" within the meaning of Public Law 92-392, (Federal Wage System), and its implementing regulations. 3/ The Administrative Law Judge was of the view

3/ Now codified in 5 U.S.C. Sections 5342-5347 (Statute).

that the adjustments made by the Respondent were in accord with the procedures mandated by the Statute and its implementing regulations and, therefore, concluded that the Respondent was under no duty to meet and confer on the decision to adjust the price charged and the commission rates paid employees, citing the Federal Labor Relations Council's (Council) decision in Memphis Naval Air Station, Millington, Tennessee, 3 FLRC 483, FLRC No. 74A-104 (1975). 4/

Under the Statute involved, the Civil Service Commission (Commission) is responsible for prescribing the practices and procedures governing the implementation and administration of the Federal Wage System, which are set forth in Federal Personnel Manual (FPM) Supplement 532-2. The Statute provides, in Section 5343(c)(2), that:

The (Commission's) regulations shall provide for participation at all levels by representatives of organizations accorded recognition as the representative of prevailing rate employees in every phase of providing an equitable system for fixing and adjusting the rates of pay for prevailing rate employees. . . . (Emphasis supplied.)

FPM Supplement 532-2, provides, in paragraph S10-2b(2), that:

Existing agency practices with respect to special schedules for NAF employees paid on other than a time-rate basis will be continued pending further instructions to be issued by the Civil Service Commission. However, when the appropriate agency wage fixing authority determines, after appropriate consultation with labor organization representatives, that an earlier change is required such a change may be made earlier. (Emphasis supplied.)

The relevant special pay plans for the Navy Resale Systems Office Exchanges, listed as existing agency practices in Appendix V of FPM Supplement 532-2, provide an allowable commission percentage range of 55 percent to 94 percent for barbers. The basis for rates is determined by the following formula:

Earnings are set so as to be comparable to those of private industry and regular schedule employees performing essentially the same level of work. Private industry data is collected during regular surveys if possible. (No mention is made in Appendix V for alteration of employees commission rates due to insufficient profits.)

4/ The Administrative Law Judge also found that the Complainant had fulfilled its obligation to meet and confer on the impact of its decision.

Since the disposition of this case involves, in part, an interpretation of the Statute, with its implementing Commission directives, the Commission was requested by the Assistant Secretary for an interpretation of its directives as they pertain to certain questions raised in the present case. The Commission's reply, dated March 15, 1978, is attached hereto.

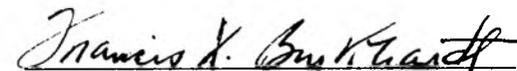
As indicated in the attached statement, the Commission's interpretation of its regulations under the Statute establishes that the only right accorded an exclusive representative to participate in the fixing and adjustment of rates of pay of "prevailing rate employees" is limited to "consultation", unless the parties are covered by a negotiated agreement which enjoys the protection of the savings clause in the Statute. Further, the Commission interprets the agency's obligation to accord "appropriate consultation" to an exclusive representative of its employees, in the absence of negotiated agreement protected by the savings clause, as merely the obligation to notify the exclusive representative of a proposed action to fix or adjust the pay rates, and afford the exclusive representative the opportunity to comment thereon.

In the instant case, the evidence establishes that the Respondent notified the Complainant of its intended action in adjusting the prices charged for haircuts and the commission rates paid to its employees at a meeting of employees, including Complainant's steward, on December 23, 1975. Further, the Complainant failed to respond to this notification until April 22, 1976, long after the effective date of the Respondent's action on January 9, 1976, changing haircut prices and commission rates. Under these circumstances, and in the absence of evidence of the existence of a negotiated agreement between the parties which enjoys the protection of the saving clause of the Statute, I find the Respondent's action on January 9, and April 4, 1976, in adjusting the price charged for haircuts and the commission rate based on such charges did not constitute a violation of Section 19(a)(1) and (6) of the Order. Accordingly, I shall order that the complaint herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-6412(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 5, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations



UNITED STATES CIVIL SERVICE COMMISSION
BUREAU OF POLICIES AND STANDARDS
WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO

YOUR REFERENCE

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MAR 1 8 1978

Honorable Francis X. Burkhardt
Assistant Secretary of Labor
U.S. Department of Labor
Washington, D.C. 20210

Re: Navy Exchange, Naval Training
Center, San Diego, California
Case No. 72-6412(CA)

Dear Mr. Burkhardt:

This is in response to your request for our answers to six questions raised in connection with the Recommended Decision and Order in the above-referenced case. The six questions are repeated below, followed by our answers, which relate to the specific situation described in the Recommended Decision and Order.

1. Do the exclusive representatives of prevailing rate employees have the right to participate in the fixing and adjusting of rates of pay for prevailing rate employees?

The right of exclusive representatives of prevailing rate employees to participate in the fixing and adjusting of rates of pay is limited to consultation unless the parties are covered by a negotiated agreement which enjoys the protection of the savings clause in Section 9(b) of P.L. 93-392.* This case involves nonappropriated fund employees who are paid under special agency schedules. The procedures for fixing and adjusting the pay of nonappropriated fund prevailing rate employees who are paid under special agency schedules are set forth in paragraph S10-2b(2) of FPM Supplement 532-2, which provides that "existing agency practices...will be continued pending further instructions to be issued by the Civil Service Commission." In this case, according to the Findings of Fact contained in the Recommended Decision and Order, it has been the practice of the agency to change the amount of the commission percentage "on at least six previous occasions" since 1965 "without negotiation with the complainant." The file indicates that the exclusive representatives

*The savings clause, Section 9(b) of P.L. 92-392, provides that provisions of any negotiated agreement in effect on the date of enactment of the Act (August 19, 1972) may be renewed, extended, modified or improved through negotiation. The law did not change provisions of existing negotiated agreements pertaining to wages, conditions of employment and other employment benefits, affect existing agreements regarding the various items which are negotiable, or preclude the inclusion of new items in connection with renegotiation of any negotiated agreement.

of the employees did not negotiate in the fixing and adjusting of rates of pay on the six previous occasions. No change has been made in the law or applicable CSC instructions to confer this right in the intervening period.

2. If so, do enforcement, appeal and remedial procedures exist under Civil Service Commission regulations if the right of participation is denied by agencies?

The Civil Service Commission regulations do not provide any enforcement, appeal, or remedial procedures to address alleged denials of the union's right of participation.

3. In view of the mbfe restrictive language of paragraph S10-2b(2) of FPM Supplement 532-2, is the right of labor organization participation under 5 U.S.C. 5342 limited only to those instances wherein "existing agency practices" are changed? (Since section 5342 is limited to definitions, and the right of participation is addressed in section 5343(c)(2), we think that you intended to cite section 5343.)

Yes. The Commission's regulations pertaining to special schedules for nonappropriated fund employees who are paid on other than a time rate basis do not grant a right of participation to a labor organization in matters other than a change in pay practices, unless the negotiated agreement is protected by the savings clause as described in our answer to question number 1.

4. What is meant by the term "existing agency practices" set forth in FPM Supplement 532-2? Is it applicable to a change in the procedure for establishing rates or a change in the rates themselves?

The term "existing agency practices" as used in subchapter S10 (S10-2b(2)) means the methods used by the agency to fix and adjust pay. These practices include writing survey job descriptions, determining the firms to be surveyed, establishing payline formulae, analyzing data, determining cost, reviewing past tipping practices and finally setting piecework rates and determining commission.

Yes, the term is applicable to a change in the procedure for establishing rates as well as to a change in the rates themselves.

5. Since appendix V of FPM Supplement 532-2 includes a listing by the Civil Service Commission of existing agency practices with respect to agency payment methods, does the use by an activity of a criterion not mentioned in appendix V as a basis for rates, e.g., insufficient profits, constitute a change in existing agency practice within the meaning of FPM Supplement 532-2?

No. The descriptions in appendix V of special agency schedules are not intended to cover all the details of the various practices by which the agency determines pay; instead, they are brief descriptions which identify the principal factors normally involved in pay such as the basis for rates, evaluation plan, areas of applicability and employee coverage.

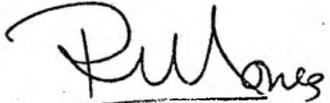
Since insufficient profits appears from the Findings of Fact to have been considered in earlier changes which were effected unilaterally by the agency, we conclude that insufficient profits is a proper criterion under appendix V.

6. What is meant by "appropriate consultation" in paragraph S10-2b(2) of FPM Supplement 532-2?

In the context of paragraph S10-2b(2), "appropriate consultation" refers to the agency's obligation to advise the appropriate labor organization representatives of a proposed decision to take an action, and to afford labor organization representatives an opportunity to comment prior to the final decision.

I hope this information will be helpful to you.

Sincerely yours,



Reginald M. Jones, Jr.
Acting Director

U.S. DEPARTMENT OF LABOR

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AMERICAN FEDERATION OF GOVERNMENT)
EMPLOYEES, LOCAL 2285, AFL-CIO)
Complainant)

v.)

NAVY, NAVY EXCHANGE,)
NAVAL TRAINING CENTER)
SAN DIEGO, CALIFORNIA)
Respondent)

CASE NO. 72-6412

Leo Molina
National Representative
American Federation of Government Employees
5935 Hughes Street
San Diego, California 92115
and
Marion Payne
President, AFGE Local 2285
For the Complainant

James Causey
Labor Relations Advisor
Department of the Navy
880 Front Street, Suite 4-S-21
San Diego, California 92188
and
Gary Carter
Naval Exchange Officer
Navy Exchange
Naval Training Center
San Diego, California 92133
For the Respondent

Before: JOHN D. HENSON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on July 12, 1976, under Executive Order 11491, as amended, by American Federation of Government Employees, Local 2285, AFL-CIO, hereinafter called the Complainant, against the Navy, Navy Exchange, Naval Training Center, San Diego, California, hereinafter called the Respondent, a notice of hearing on complaint was issued by the Regional Administrator for the San Francisco, California, region on October 28, 1976.

The Complainant alleges that the Respondent violated section 19(a)(1), (2), (5) and (6) of the Order.

A hearing was held in the captioned matter on December 14, 1976, in San Diego, California. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

Upon the entire record, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

1. The Respondent is a non-appropriated fund instrumentality whose mission is to provide goods and services to the military personnel and their families at the lowest practicable cost and to provide, through its profits, a source of funds for the maintenance of the Navy recreational program.

2. A guide of operating costs and contribution goals has been established for various departments or components of the Exchange by the Navy Resale System Office. In the case of the barber shop, a maximum payroll of seventy percent and minimum net contribution of ten percent have been established. Wages are authorized on a straight commission basis, with exception of the manager who may be paid a combination of guaranteed salary and commission.¹

1. See Navy Exchange Manual, paragraph 4307, Exhibits C-1 and C-2.

3. In October 1975 a review of the barber shop operations was made, and it was found that the net profit or contribution was 5.2 percent for the preceding nine months which was well below the minimum of ten percent.

4. It was determined by the Respondent that in order to bring the barber shop operations within the guidelines of the manual and achieve the contribution goal of ten percent, it would be necessary to increase the price of regular haircuts from \$1.25 to \$1.50 and lower the commission rate paid the barbers from sixty-five percent to fifty-six percent. Similar adjustments had been made on at least six previous occasions since 1965 without negotiation with the Complainant.

5. On December 23, 1975, Commander Mezzio, Exchange Officer, and Gary Carter, Administrative Specialist of the Exchange, met with the barbers at the main barber shop and informed them of their decision to adjust prices and commission rates to become effective January 9, 1976, and of similar price adjustments of recruit haircuts to become effective in the indefinite future.

6. On January 9, 1976, the adjustments of regular haircut prices and commission rates were implemented and thereafter in April 1976 the price of recruit haircuts was increased from \$.90 to \$1.00 and the commission rate was lowered to sixty-one percent.

7. By letter dated April 22, 1976, the Complainant informed the agency of its charges of unfair labor practice by adjusting the commission rate of the barbers without meeting and conferring with the "exclusive" representative and requested a meeting to resolve the issue informally within thirty (30) days.

8. On May 12, 1976, a meeting was held in an attempt to settle the unfair labor practice charge. Those present were Gary Carter; Commander Mezzio; Mr. Kerley, barber shop manager; Mrs. Hansen, personnel manager; Mr. Molina, National Representative of the union; Mrs. Payne, President of the local union; June Bayers, First Vice-President and Chief Steward of the local union; and Wayne Wilburn, barber.

9. At the May 12, 1976, meeting, Gary Carter explained the problem of not meeting the minimum net contribution requirement and put the basic equation of

price increase and commission rate decrease on the blackboard resulting in an increase in net profit sufficient to meet the contribution requirement and a final result of increase in net income for the barbers. There was no request or demand by the union representatives or members for further discussion, negotiation or documentary evidence.

10. On July 12, 1976, formal complaint was filed by the Complainant.

Contentions of the Parties

The Complainant argues that the Respondent violated the Order and committed an unfair labor practice by raising the price of service at the barber shop and lowering the employees' commission rate. It contends that this constitutes a new or substantive change in personnel policy which affects the employees of the Complainant. It further argues that the Respondent is obligated to consult, confer or negotiate, as appropriate, the impact on the affected employees as a result of the new or substantive change in personnel policy.

The Respondent takes the position that its decision to adjust price and commission rates is not subject to the bargaining obligation and that there was no obligation to negotiate over the impact or procedures of the change because there is no showing of "adverse impact" or no "procedures" involved in the decision and consequently no subject matter over which to bargain. It further argues that the Complainant had notice of the changes and made no demand to negotiate. Finally, it argues that price and commission rates have been changed often and the Complainant as bargaining agent has never requested to negotiate over either the substantive changes or any impact or procedures.

Discussion and Conclusions

The initial question to be addressed here is the negotiability of the price and commission rate changes implemented by the Respondent in the later part of 1975 and early part of 1976.

Public Law 92-392 (5 U.S.C. § 5342) defines a "prevailing rate employee" to be "... an employee of a non-appropriated fund instrumentality ... who is employed in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled

manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade craft, or laboring experience and knowledge as the paramount requirement;"

It is clear that the barbers employed by the Respondent are prevailing rate employees within the meaning of the Law and have been treated as such by the parties hereto.

Section 5341 of P.L. 92-392 provides that "... rates of pay of prevailing rate employees be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates" Under the law, the Civil Service Commission is responsible for prescribing the practices and procedures governing the implementation and administration of the Federal Wage System.

These practices and procedures are embodied in the Federal Personnel Manual Supplement 532-2. In the instant case, I find that the adjustments made by the Exchange were in accordance with the procedures authorized by FPM Supplement 532-2.

In view of the above, I find and conclude that the Respondent was under no duty or obligation to meet and confer on the decision to adjust price and commission rates.²

Although the Respondent may be absolved from the duty and obligation to meet and confer on the decision to raise the price of haircuts and lower the commission rates, consideration must be given to whether it is required under the Order to meet and confer as to the impact and procedures involved in its decision. The Respondent maintains that it is absolved of that obligation because there was no "adverse impact" on the barbers and furthermore there were no "procedures" involved in its decision to change prices and commission rates and consequently no subject matter for negotiations.

The language in the Order, as well as the case law itself, make it clear that an agency is obligated to

2. Memphis Naval Air Station, Millington, Tennessee, FLRC No. 74A-104 (July 30, 1975).

bargain as to the impact and procedures. Since the decision by the Federal Labor Council on Plum Island Animal Disease Laboratory, Department of Agriculture, Greenport, N. Y. FLRC No. 71A-11, numerous decisions have affirmed the obligation of an agency to bargain in this respect. I find no circumstances in the instant case to relieve the Respondent of that obligation.

The factual circumstances in the instance case, however, are quite clear that the Respondent fulfilled that obligation to meet and confer on the impact and procedures of its decision to adjust prices and commission rates.

Immediately upon reaching its decision, Respondent met with the affected employees at the main barber shop. Mr. Carter explained the problem of not meeting the contribution goals and the decision to adjust price/commission rates. Upon being advised of the decision, one of the barbers informed Gary Carter that "they were going to check that out with the union." They were advised to do so by Carter.

There was no request by the Complainant to meet and confer until April 22, 1976, when Marion Payne, President of the local union, wrote Commander Mezzio, Exchange Officer, charging an unfair labor practice and requesting a meeting within thirty days to attempt to resolve the issue. It is noted that the letter of April 22, 1976, only complained of the failure of the Respondent to meet and confer on the decision.

On May 12, 1976, the Exchange officers met with Mr. Molina, National Representative of the Union; Mrs. Payne, President of Local 2285; Mrs. Bayers, Vice President and Chief Steward of the Local; and Wayne Wilburn, one of the barbers. Gary Carter had the operating statement of the barber shop available, explained the lack of meeting the minimum contribution goals and put the basic equation of the adjustment of price/commission rates on the blackboard showing a result of net increase in pay for the barbers. June Bayers testified that the Respondent did not refuse to meet and confer and that "the Exchange was very good in most instances in cooperating." She further testified that there was no request for further discussion or information.

3. Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey A/SLMR No. 329.

In view of the foregoing, I conclude that the Respondent fulfilled its obligation to meet and confer on the impact and procedures involved in its decision to adjust price/commission rates.

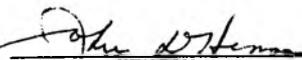
Although there was no allegation in the letter of April 22, 1976, or the formal complaint filed by the Complainant on July 11, 1976, much emphasis has been given to the practice of the barber shop manager being allowed to cut hair while being paid a straight salary, resulting in less receipts going into the fund from which the barbers' commissions are paid.

All the evidence presented establishes that this practice has existed for at least five years preceding this complaint. The evidence also establishes that the Complainant and Respondent entered into a new labor-management agreement dated January 15, 1976. There is no allegation or evidence that the Complainant requested that this matter be considered in negotiating the agreement of January 15, 1976, nor is it contended that the Respondent has ever refused to negotiate this issue. I therefore conclude that this issue is not the subject of an unfair labor practice complaint and therefore not violative of Executive Order 11491.

In summary, considering all of the evidence, it is concluded that Respondent was under no obligation to consult and confer with Complainant on its decision to adjust price/commission rates of the barber shop and that it fulfilled its obligation to meet and confer on the impact of its decision. Accordingly, I conclude Respondent has not violated section 19(a)(1), (2), (5) and (6) of the Order.

Recommendation

Having found that Respondent has not engaged in conduct violative of section 19(a)(1), (2), (5) and (6) of Executive Order 11491, I recommend that the complaint herein be dismissed in its entirety.


JOHN D. HENSON
Administrative Law Judge

Dated: March 24, 1977
San Francisco, California

June 6, 1978

A/SLMR No. 1055

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION,
NATIONAL ARCHIVES AND RECORDS SERVICE
A/SLMR No. 1055

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2578, AFL-CIO (Complainant), alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by discriminating against union officials in the administration of employee automobile parking at the Activity. The complaint further alleged that the Respondent committed an independent Section 19(a)(1) violation when it took certain actions against the Complainant's president, which constituted an attempt to interfere with, restrain, or coerce him in the conduct of business as a union official.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. With regard to the Section 19(a)(1) and (2) allegations, the Administrative Law Judge found that there was no showing of anti-union discrimination in the assignment of parking space. Moreover, he found that, even assuming uneven treatment, there was no evidence of disparity which may be attributed to union activity, and no evidence of anti-union animus. With regard to the independent Section 19(a)(1) allegation, the Administrative Law Judge found that there was no evidence that the Complainant's president was singled out for unjust treatment.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
NATIONAL ARCHIVES AND RECORDS SERVICE

Respondent

and

Case No. 22-07748(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2578, AFL-CIO

Complainant

DECISION AND ORDER

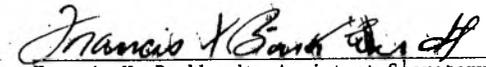
On March 14, 1978, Administrative Law Judge Louis Scalzo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-07748(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 6, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



RECOMMENDED DECISION AND ORDER

Statement of the Case

.....
 In the Matter of :
 :
 GENERAL SERVICES ADMINISTRATION :
 NATIONAL ARCHIVES AND RECORDS SERVICE :
 :
 Activity :
 :
 and : Case No. 22-07748 (CA)
 :
 AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES :
 LOCAL 2578, AFL-CIO :
 :
 Complainant :

James A. Friedman, Esquire
 Thomas N. Gasque, Esquire
 Office of the General Counsel
 General Services Administration
 18th and F Streets, N. W.
 Washington, D. C. 20405

For the Respondent

Mr. Carmen R. Delle Donne, President
 Mr. William McHugh, Vice-President
 Local 2578, American Federation of Government
 Employees
 National Archives and Records Service
 Washington, D. C. 20408

For the Complainant

Before: LOUIS SCALZO
 Administrative Law Judge

This case arises under Executive Order 11491 as amended (hereinafter referred to as the Order). It was initiated by the filing of an unfair labor practice complaint on January 26, 1977, by Mr. Carmen R. Delle Donne, President of the Complainant labor organization (herein also referred to as the Union). The Complainant alleges that the National Archives and Records Service (herein also referred to as Activity, NARS, or Respondent) violated Sections 19(a)(1), (2) and (6) of the Order by bargaining in bad faith, unilaterally changing an established practice, threatening Mr. Delle Donne in the conduct of union business and discriminating against union officers in the administration of NARS parking regulations.

On May 2, 1977, Acting Regional Administrator Hilary M. Sheply dismissed those portions of the complaint other than allegations that Respondent violated Sections 19(a)(1) and (2) of the Order by discriminating against union officials in the administration of parking regulations. The union thereafter filed a request for review of that part of the Acting Regional Administrator's decision which dismissed portions of the Complaint. On November 2, 1977, the Assistant Secretary affirmed in part, and remanded to the Regional Administrator for hearing, those previously dismissed portions of the Complaint dealing with a possible violation of Section 19(a)(1) arising out of allegedly threatening actions taken against Mr. Delle Donne on December 1, 1976.

Thereafter, on November 23, 1977 the case was noticed for hearing for the purpose of determining whether Respondents violated Sections 19(a)(1) and (2) of the Order by discriminatively

denying parking space to union officials, and whether certain actions taken against Mr. Delle Donne on December 1, 1976, constituted an attempt to interfere with, restrain, or coerce him in the conduct of business as a union official, in violation of Section 19(a)(1) of the Order. ^{1/} Pursuant thereto, a hearing was held in Washington, D. C. on January 18, 1978. Both parties were afforded full opportunity to be heard, adduce evidence, and to examine and cross-examine witnesses. Thereafter the parties filed briefs. For good cause shown Complainant was allowed an additional three days in which to file a post-hearing brief. A motion to disallow the Complainant's untimely filed brief is denied. In this regard special consideration has been given to circumstances presented by the fact that Complainant is not represented by skilled counsel, and to the relative complexity which the facts of this particular case would present to one unskilled in litigation. Moreover, no showing of prejudice to the Respondent by such late filing was established.

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 recommendation.

Findings of Fact

The allegations outlined may not be entirely understood without an awareness of their relationship to aspects of a pattern of collective bargaining negotiations which commenced in November of 1974, and finally terminated with the signing of an agreement by the Union and Respondent on August 23, 1977.

^{1/} The November 23, 1977, notice of hearing (LMSA 1122) erroneously omits reference to Section 19(a)(2) of the Order. However, a letter of the same date accompanying the notice of hearing accurately sets forth the sections of the Order involved, and a telegram dated January 12, 1978 addressed to the Respondent corrects the omission. (Assistant Secretary Exhibits 1, 2 and 3).

After commencing negotiations in November of 1974, negotiations were held until the summer of 1975, at which time efforts to negotiate ended. Both sides thereafter filed unfair labor practice complaints charging a failure to consult, confer or negotiate as required by Sections 19(a)(6) and 19(b)(6) of the Order. ^{2/}

An element in the negotiations had involved efforts on the part of the Union to acquire reserved parking privileges at the National Archives Building, and at a NARS facility in Suitland, Maryland. The Respondent took the position that it could not legally provide parking, and has always refused to provide permanent parking space to the union.

During a pre-hearing conference held prior to the trial of the two unfair labor practice complaints arising out of the breakdown of negotiations, the parties discussed the possibility of reviving efforts to reach a binding agreement. A continuance was granted to permit the parties to make such efforts. Union negotiators took the position that bargaining after working hours at the National Archives Building made it difficult to secure public transit, and further that since public parking lots located nearby closed early, Union negotiators found parking in such lots inconvenient. Because of these considerations the Union requested that parking spaces be provided at the National Archives Building on days when negotiations extended after normal working hours. The record also reflected that the Union had previously requested management to arrange for bargaining sessions to be held after hours to conserve official time. Since the official time provided was thereafter consumed, Union negotiators were faced with the prospect of having to utilize annual leave or leave without pay to continue negotiations held during working hours.

The parties took several weeks to reach agreement on Ground Rules designed to revive negotiations. Much of the discussion centered around the Union's request for parking spaces based upon convenience arguments associated with after hours negotiating. Ground Rules were approved on October 5, 1976. With respect to parking the Rules provided the following:

^{2/} Both complaints were subsequently dismissed. American Federation of Government Employees, Local 2578, AFL-CIO, and National Archives and Records Service, A/SLMR No. 965 (January 11, 1978).

Up to two parking spaces at the National Archives Building may be used by members of the Union Negotiating Team, on those days on which negotiating sessions are to be held, if spaces are available. If one or both of the aforesaid spaces are not available on such occasions then the members of the Union Team may leave up to two cars in the parking area with the cars inside, with the understanding that such cars might need to be moved periodically during the day in order to accommodate the arrival and departure of other vehicles.

The Ground Rules also provided that negotiations would be held daily from 3:15 p.m. until 6:15 p.m. A specially arranged tour of duty for those members of the Union negotiating team who had used their official time was provided. It was determined that the special tour of duty would run from 7:45 a.m. to 4:15 p.m., and that Union Team members would be charged with annual leave or leave without pay for one hour on days on which negotiations began at 3:15 p.m. in the afternoon. Other elements of the Ground Rules dealt with provisions pertaining to cancellation of negotiation sessions, the submission of proposals, the establishment of an agenda, and the method to be employed to indicate tentative agreement on proposals.

Following agreement on the October 5, 1976, Ground Rules a total of five negotiating sessions were held in the National Archives Building. These occurred on October 20, 21, 22, 26 and 27, 1976. Parking privileges were extended in accordance with the Ground Rules on these dates, with the possible exception of some minor, but immaterial, misunderstanding on the part of NARS personnel during the initial use of the Union's parking privilege.

Following these five negotiating sessions, the Union requested and received the assistance of the Federal Mediation and Conciliation Service. A mediator called the parties together and new ground rules were negotiated under the guidance of the mediator. It was agreed that the parties would begin by having negotiations from 10:00 a.m. to 4:30 p.m., and that negotiations would be conducted in an entirely new location some distance from the National Archives Building. Neither side objected to the new hours and the new location. Negotiating sessions were held during normal working hours at the new location on November 17 and 30, 1976, and December 1, 1976.

A fundamental issue arose concerning the effect to be given the provisional parking privilege agreed to by the parties on October 5, 1976. The Respondent took the position that the parking privilege was not intended to be made available to Union negotiators on days when negotiating sessions were conducted during normal working hours, that parking privileges in the October 5, 1976 Ground Rules were applicable only when negotiating after hours, and that since other elements of the October 5, 1976 Ground Rules were not in effect, the obligation to supply parking spaces terminated. The Union, adopting a different view of the October 5, 1976 rule on parking, argued that their parking privileges should have remained intact.

Evidence introduced by the Respondent indicated surprise that Union officials utilized parking spaces on November 17 and 30, 1976, as negotiations on these days were held out of the National Archives Building and totally within working hours. Respondent assumed the existence of a misunderstanding in this regard, and further that the misunderstanding would be cleared up.

The record reflects that Mrs. Claudine Weiher, NARS Deputy Executive Director, and then a member of the NARS bargaining team, notified Lewis M. Robeson, Director of Respondent's Administrative Services Division, after November 17, 1976, and prior to November 30, 1976, that the Union should not be allowed to utilize parking space because she thought negotiations would be taking place during normal working hours.

On the morning of November 30, 1976, Mr. Robeson phoned Mrs. Weiher to advise that the two spaces were being utilized. Mrs. Weiher explained to Mr. Robeson that Union representatives should not be using parking facilities, and further that she would remind Mr. Delle Donne so that there would be no misunderstanding on December 1, 1976, the date of the next scheduled negotiating session.

At the close of bargaining on November 30, 1976, Mrs. Weiher made inquiry of Mr. Delle Donne in substantially the following terms:

I spoke to Carmen and asked him (sic) didn't he realize that he should not be parking because we were negotiating during duty hours and that he shouldn't park there again until such time as we were negotiating after hours. And the discussion became a little bit heated. At no time, however, did Carmen in that discussion say...that the ground rules were still applicable.

The conversation centered on the convenience to him; the hardship traveling back and forth...; how nice it would be and how unfair in his eyes I was being, but nothing to do with the fact that the ground rules were still applicable. (Tr. 139).

A heated exchange followed between Mr. Delle Donne and Mrs. Weiher as a result of Mr. Delle Donne's refusal to accept Respondent's position that parking privileges extended under the October 5, 1976 Ground Rules, did not apply when negotiations were not being conducted after normal working hours. The discussion ended with Mr. Delle Donne intimating that he would use the parking facilities the next day, (December 1, 1976) regardless of Respondent's position. Mrs. Weiher informed Mr. Delle Donne that unauthorized parking would result in his car being ticketed.

Shortly after 5:00 p.m. on November 30, 1976, Mrs. Weiher phoned Mr. Robeson, and explained the situation in order to avoid any misunderstanding the next day. Mr. Robeson was apprised of the negotiating hours scheduled for December 1st, and of the fact that parking should not be allowed.

On the morning of December 1, 1976, William McHugh, an officer of the Union and a member of the Union's negotiating team made an effort to obtain parking space from employees charged with supervision of NARS parking. When refused he did not question the action taken. Mr. McHugh acknowledged that at the time the October 5, 1976 Ground Rules were approved, the Union anticipated negotiating after normal working hours, and further that the parties did not address the question of the procedure to be followed if negotiations occurred entirely during normal working hours. (Tr. 30).

Shortly after Mr. McHugh's unsuccessful attempt to park, Mr. Delle Donne drove into a parking place in the NARS parking garage. A guard on duty at the entrance advised him that he would not be allowed to park. Another guard also informed Mr. Delle Donne that he could not park in the space appropriated, at which time Mr. Delle Donne stated, "Well, I'm going to park there today." When the guard explained that Mr. Robeson would be called, Mr. Delle Donne stated, "Well, go ahead and tell him. Help yourself. I'm going to park there." (Tr. 157). Mr. Delle Donne then left his car and walked away.

A guard advised Mr. Robeson that Mr. Delle Donne had appropriated a parking space without authority. Mr. Robeson then phoned Mrs. Weiher and informed her that Mr. McHugh had attempted to park, and that Mr. Delle Donne had parked despite instructions to the contrary. She again confirmed that Union negotiators had no authority to park in NARS facilities that day. Mr. Robeson then requested the Federal Protection Service to ticket Mr. Delle Donne's car. 3/

Late in the afternoon of December 1, 1976 Mr. Delle Donne informed Mrs. Weiher that he had used a parking place at the NARS garage and that he intended to park there the next day. Mrs. Weiher advised Mr. Delle Donne that she was aware that he had parked in the garage, and that it would be unwise to park illegally on December 2, 1976, because in most instances second offenders were towed away. Upon returning to the NARS parking garage after negotiations on December 1, 1976, Mr. Delle Donne found that a fifteen dollar parking ticket had been issued by a Federal Protection Service officer.

NARS Parking regulations require the ticketing of unauthorized vehicles parked in NARS parking areas. Towing is also authorized in such instances. It was a regular practice to ticket for illegal parking, and an attempt on the part of Mr. Delle Donne to show that ticketing in his case was an unusual procedure, was unsuccessful.

3/ The record reflects prior disobedience of instructions given by a gate guard to Mr. Delle Donne during the summer of 1976, although in the latter case it appeared that the gate guard may not have been aware that Mr. Delle Donne had previously received actual authority to park. (Tr. 47-48, 63).

The record disclosed that the Administrative Services Division of NARS has responsibility for the administration of NARS parking regulations. 4/ A total of seventy-two parking places are provided for approximately nine hundred employees in the main National Archives Building. Under the provisions of the mentioned regulations spaces are provided for division directors and above, and for employees at or above the GS-15 level. Spaces are also provided for carpools under a point system. A limited number of spaces are reserved for official use. 5/

A major portion of the complaint of anti-Union discrimination in the administration of parking regulations pertained to Respondent's policy of allocating carpool parking space when not used by individuals regularly assigned such parking spaces. The record disclosed that when such space is to be vacant for several days or more, an effort is made to assign the space to the next qualified carpool based on the mentioned point system. However, carpool spaces not used for one day, are assigned on a "first come first serve" basis to employees not regularly assigned spaces and who request parking on the days involved. Except for the period when the October 5, 1976 Ground Rules were in effect, Union representatives took advantage of parking privileges under this contingency system.

4/ Functions relating to parking were just one aspect of the work of the Division as the unit also handled work pertaining to contracting, procurement, building alterations and repair, property management and space management.

5/ In this instance the parking places provided by the October 5, 1976 Ground Rules were permitted under the authority of a regulatory provision which reflected Respondent's duty to reserve spaces for official use. (Joint Exhibit 3). However, there was no regulatory obligation to provide such space to the Union.

It is a regular procedure for those charged with the administration of parking facilities to wait until 9:30 a.m., to check carpool parking places to determine which spaces appear to be available. 6/ People wanting to compete for such parking places are required to check with Miss Dotie Carpenter, or Mr. Leroy Talley, in Mr. Robeson's office to ascertain if space is available. 7/ Since carpool captains are required to advise Mr. Robeson's office of anticipated tardiness prior to 9:30 a.m., vacant spaces are considered available after 9:30 a.m. in the absence of a message to the contrary. Efforts on the part of employees to obtain parking prior to 9:30 a.m. usually result in a refusal unless someone reports in earlier that a space will not be utilized and the person seeking space is otherwise entitled to it on a "first come first serve" basis. Gate guards are not authorized to allocate carpool parking spaces available without obtaining the permission of Miss Carpenter or Mr. Talley.

As noted, it is the policy of Mr. Robeson's office to check availability of space at about 9:30 a.m. It was presumed that those leaving assigned parking spaces after the 9:30 a.m. check would return in the absence of information to the contrary. Evidence disclosed that many employees with parking permits frequently leave and return during the course of the day. Those not returning often fail to notify Miss Carpenter or Mr. Talley; nevertheless, Mr. Robeson's office has an obligation to appropriate parking spaces for such permanently assigned parkers under uncertain circumstances involving their return. The responsibility for ascertaining the accuracy of information relating to the availability of parking places not being used rested with Mr. Robeson's office, as it was the duty of his office to insure the integrity of NARS Parking policies for the purpose of providing parking in accordance with regulations.

6/ The workday at the National Archives begins at 8:45 a.m. and ends at 5:15 p.m.

7/ This was but one aspect of their work. As noted, Mr. Robeson's office was assigned responsibility in a number of other important areas of concern.

With respect to Section 19(a)(1) allegations relating to the ticketing of Mr. Delle Donne's car, the record clearly discloses that actions taken on December 1, 1976, arose primarily over a good faith dispute relating to interpretation of the October 5, 1976 Ground Rules. The Assistant Secretary has adopted the position that he will not police or interpret side agreements absent evidence that they constitute independent violations of the Order. Army and Air Force Exchange Service, Kessler Consolidated Exchange, A/SLMR No. 144 (March 28, 1972). Since the entire ticketing episode was the outgrowth of differing and arguable interpretations of the October 5, 1976 Ground Rules, rather than a clear unilateral breach of the Ground Rules, the episode should not have been made the basis of an unfair labor practice complaint. Department of Transportation, Federal Aviation Administration, Western Region, A/SLMR No. 930 (November 7, 1977); Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, A/SLMR No. 912 (October 4, 1977); Puget Sound Naval Shipyard, U.S. Department of the Navy, A/SLMR No. 829 (April 20, 1977); Watervliet Arsenal, U.S. Army Armament Command, Watervliet, New York, A/SLMR No. 726 (October 8, 1976); Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark, Ohio A/SLMR No. 677 (July 23, 1976); General Services Administration, Region 5, Public Buildings Service, Chicago Field Offices, A/SLMR No. 528 (June 30, 1975). Here there was no showing that the October 5, 1976 Ground Rules were breached by the Respondent, nor was there any showing that an alleged breach constituted an independent violation of the Order.

The facts fail to show that Mr. Delle Donne's car was ticketed because of anti-Union animus, or that he was singled out for unjust treatment. He was tactfully warned repeatedly that parking privileges related exclusively to days on which negotiations extended after normal working hours. He parked despite these repeated warnings. With regard to the extension of parking privileges on November 17 and 30, 1976, dates on which the mediation sessions concluded during normal working

hours, it must be observed that these two episodes did not mature into an established practice. Mrs. Weiher acted with reasonable promptness to terminate such practice and to achieve compliance with Respondent's interpretation of the Ground Rules as soon as she became aware that Union negotiators had parked at NARS facilities on November 17 and 30, 1976.

Regardless of the interpretation which Mr. Delle Donne attributed to the Ground Rules, Mr. Delle Donne's position did not immunize him from the penalties that all NARS employees faced for willful violations of the parking regulations. The Respondent was not ticketed because of his Union affiliation, but rather because he was deemed illegally parked. The ticketing followed his taking the law into his own hands. It was the direct result of his willful refusal to respond to admonitions designed to preclude him from falling into violation of the parking regulations. In the light of these considerations the ticketing was justified. His infraction was not shielded by any legitimate Union duties that he performed. Veterans Administration, Veterans Benefits Office, A/SLMR No. 296 (August 15, 1973).

Turning to the general allegation of discrimination with respect to parking and correlative charges of a violation of Section 19(a) (1) and (2) of the Order, it must be concluded that an effort to show anti-Union discrimination in the assignment of parking space on a "first come first serve" basis was unsuccessful. There was no evidence of discriminatory treatment of Union members or others. Similarly, an effort to show anti-Union discrimination in the assignment of permanent carpool parking places, or space for official purposes also failed. No evidence was introduced to establish the existence of such discrimination in either case, and no proof was adduced to show that Union officials were subjected to different standards than other employees.

Moreover, even assuming uneven treatment of those applying for parking privileges under the terms of NARS regulations, the record revealed no disparity which may be attributed to Union activity, and no evidence of anti-Union animus. Such a showing is essential in the factual context presented. Veterans Administration Canteen Service, VA Hospital, Phoenix, Arizona, A/SLMR No. 883 (August 26, 1977); Department of Defense, U.S. Navy, Norfolk Naval Shipyard, A/SLMR No. 908 (September 23, 1977); Department of the Treasury, Internal Revenue Service, Indianapolis, Indiana, A/SLMR No. 909 (September 23, 1977).

The Complainant's case rested upon the testimony of four members of the Union negotiating team. These were Mr. Delle Donne and Mr. McHugh, previously mentioned, and Mr. Thomas Lipscomb and Mr. Arthur West.

The testimony of Union witnesses was vague and non-specific in important areas of concern. It clearly appeared that they did not agree with the established policy of requesting such space through Miss Carpenter or Mr. Talley. Instead, they would endeavor to arrange for a direct assignment of unused spaces through a parking lot guard who had no authority to permit them to park. Occasionally, Mr. McHugh and Mr. Delle Donne were successful in frustrating procedure by obtaining unused space directly from a guard on duty.

The testimony of Union witnesses reflects the erroneous belief that the mere existence of vacant space in the NARS parking area meant actual space availability. Reported difficulties encountered by Mr. Delle Donne and Mr. McHugh in their dealings with Mr. Robeson's office appear to have emanated entirely from what appeared as misunderstanding of procedure used to assign unused carpool space, or disagreement

June 6, 1978

over the method of administering parking regulations rather than anti-Union discrimination. 8/ However, despite the foregoing, the record established that Mr. McHugh, received on request, parking permission under the "first come first serve" policy on numerous occasions before and after the days on which the October 5, 1976 Ground Rules were operative. Mr. McHugh made it a habit to arrive before 9:30 a.m. to request that his name be put on a list used in the allocation of available carpool space. In some instances he was phoned by Mr. Robeson's office and advised that space was available for him.

Facts adduced relating to actions taken on December 1, 1976, and with regard to the administration of National Archives policy, clearly reflect an absence of proof tending to show violations of Section 19(a)(1) or 19(a)(2). Under the Rules of the Assistant Secretary, a complainant has the burden of proving allegations of an unfair labor practice complaint by a preponderance of the evidence. 29 C.F.R. §203.15. This burden has not been met.

RECOMMENDATION

Based upon the foregoing findings and conclusions, I recommend that the complaint herein be dismissed.

 LOUIS SCALZO
 Administrative Law Judge

Dated: March 14, 1978
 Washington, D. C.

LS:jp

 8/ The record contains some evidence that a guard serving in the NARS parking area possessed a poor disposition. Hostile confrontations with this guard were described. There was no showing of any relationship between this guard's disposition and policy implemented by the Respondents.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION,
 REGION IX
 A/SLMR No. 1056

This case involved an unfair labor practice complaint filed by the International Federation of Federal Police, Local 41 (Complainant) alleging two separate incidents wherein the Respondent's supervisors made certain statements to the Complainant's president and another employee which interfered with, restrained, or coerced these employees in the exercise of their rights in violation of Section 19(a)(1) of the Executive Order.

The Administrative Law Judge recommended that the complaint be dismissed. In this regard, he found, based on his credibility resolution, that the Respondent's supervisor did not make the statement to the Complainant's president as alleged in the complaint. With respect to the other allegation in the complaint, he found that the Complainant failed to sustain its burden of proof that the statement, even if made by Respondent's supervisor to an employee, violated Section 19(a)(1) of the Order.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



GENERAL SERVICES ADMINISTRATION,
REGION IX

Respondent

and

Case No. 70-5624 (CA)

INTERNATIONAL FEDERATION OF FEDERAL
POLICE, LOCAL 41

Complainant

DECISION AND ORDER

On March 27, 1978, Administrative Law Judge Randolph D. Mason issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-5624 (CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 6, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

.....
In the Matter of
GENERAL SERVICES ADMINISTRATION
REGION IX
Respondent
and
INTERNATIONAL FEDERATION OF
FEDERAL POLICE, LOCAL 41
Complainant
.....

Case No. 70-5624 (CA)

Stephan P. Saunders
Labor Relations Specialist
General Services Administration
525 Market Street
San Francisco, California 94105
For the Respondent

Jerome H. Klein
240 Golden Gate Avenue
San Francisco, California 94102
For the Complainant

Before: RANDOLPH D. MASON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding was heard in San Francisco, California, on November 1, 1977, and arises under Executive Order 11491, as amended. Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter called the Assistant Secretary), a Notice of Hearing on Complaint was issued on August 24, 1977. Additional orders rescheduling the hearing were issued on September 26 and October 14, 1977. This case was initiated by a complaint filed on January 21, 1977 by the International Federation of Federal Police, Local 41 (hereinafter the "Union").

The only issues present in this case were raised for the first time in an amended complaint dated June 9, 1977.

The issues presented are (1) whether Respondents' supervisors made certain statements to the Union president and another employee, and (2) whether such statements interfered with, restrained, or coerced these employees in the exercise of their rights in violation of Section 19(a)(1) of the Executive Order.

At the hearing, all parties were represented and were afforded full opportunity to be heard, adduce evidence, examine and cross-examine witnesses, and argue orally. Thereafter, both parties were given the opportunity to file briefs. Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions, and recommendation.

Findings of Fact and Conclusions of Law

At some time prior to April of 1976, two of the Respondent's Federal Protective Officers (FPO) and a supervisor were allegedly caught gambling on duty. One of the FPO's was Daniel Jaimez, president of the Union. Removal action was taken against all three men, and on April 27, 1976, Jaimez received a final notice of termination from Alfred Rego, a supervisory FPO with the rank of lieutenant.

The Union's first contention is that Rego told Jaimez, upon handing him the notice, that the "real reason" that Jaimez was being terminated was because of his "radical union activities." For the reasons set forth below, I find that Rego did not make this statement.

In the first place, Rego denied making this statement. I found his testimony both forthright and credible. At the time of the hearing he no longer worked for the Government. Furthermore, Rego's version of his conversation with Jaimez differs from the latter's recollection of it. He told Jaimez that, in his opinion, the disciplinary action was "a little severe" considering the nature of the alleged infraction. He did not say that union activities had anything to do with it. However, Jaimez was personally convinced that he was being fired due to his union activities. This conviction is probably the underlying reason for Jaimez' mistaken recollection of the conversation.

It is true that during the course of their conversation, Rego mentioned in a friendly manner, that he considered Jaimez to be "radical." However, this in no way referred to the president's union activities but referred to his personal conduct as a Federal Protective Officer. In this regard he indicated that Jaimez had a reputation for failing to adhere to office hours and for disregarding personal appearance and dress rules established by the Respondent. In the context of this conversation, I conclude that the word "radical" referred to Jaimez' history of disciplinary problems.

The next issue presented for decision concerns a statement allegedly made by Frank Zabrowski, Chief of Respondent's Support Branch to Robert Weathers on April 27, 1976. Weathers was also a Federal Protective Officer. Weathers testified that during a casual conversation with Zabrowski, the latter had stated that he was screening applications for FPO positions. According to Weathers, Zabrowski then said "We just got three more positions. We got rid of the troublemakers, especially Jaimez who has been a thorn in our side since the day he's been on board." Zabrowski denies that he made this statement.

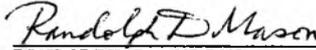
It is possible that Zabrowski made a statement of this nature. ^{1/} However, I am constrained to conclude and hold that the Union has failed to sustain its burden of proving that any statement made by Zabrowski violated Section 19(a)(1) of the Executive Order. The alleged statement clearly refers to the three men who were fired for gambling while on duty. One of these three men was a supervisor; therefore, it is unlikely "troublemakers" would have referred to any union activity. Zabrowski had been a local police chief only six months before, and probably valued employee discipline highly. The alleged statement emphasizes Jaimez as a particularly bad troublemaker. Even if words to this effect were used, I do not find a violation of Section 19(a)(1). I recognize that any negative statements made to an employee about the union president should be scrutinized closely. The evidence presented on this issue is meager. Zabrowski had been working for the Respondent for only a short period of time and did not have any significant knowledge of Jaimez' union activities. Presumably, Zabrowski, like Alfred Rego, was referring to Jaimez' reputation for disciplinary problems in his capacity as an FPO. In any event, I conclude that the Union has failed to sustain its burden of proof on this issue.

^{1/} It is hard to believe that Weathers could remember the exact words uttered about one and half years prior to the hearing.

June 7, 1978

RECOMMENDATION

Having concluded that the Respondent did not violate Section 19(a)(1) of the Order, I hereby recommend that the complaint filed in this case be dismissed in its entirety.



RANDOLPH D. MASON
Administrative Law Judge

Dated: March 27, 1978
Washington, D. C.

RM/lp

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE AIR FORCE,
GRISSOM AIR FORCE BASE,
PERU, INDIANA
A/SLMR No. 1057

On June 9, 1977, the Assistant Secretary issued his Decision and Order in A/SLMR No. 852, in which he found that the Respondent had violated Section 19(a)(3) and (1) of the Order by virtue of the publication in the newspaper, the Grissom Contact, of an advertisement by Local 3254, American Federation of Government Employees, AFL-CIO (AFGE). He concluded that such publication constituted the furnishing of services and facilities by the Respondent to a labor organization (AFGE) not in equivalent status with the Complainant, Local 1434, National Federation of Federal Employees, the exclusively recognized representative. In this regard, he found that the Respondent exercised control over the Grissom Contact and that the newspaper was, in effect, an instrumentality of the Respondent irrespective of specific contractual arrangements entered into with the publisher.

On May 2, 1978, the Federal Labor Relations Council (Council) issued its Decision on Appeal in FLRC No. 77A-77, in which it held that the Assistant Secretary's finding of a violation of Section 19(a)(3) and (1) of the Order, in the circumstances of the case, was inconsistent with the purposes of the Order. Accordingly, the Council set aside the Assistant Secretary's decision in A/SLMR No. 852 and remanded the case to him for appropriate action.

Based on the Council's holding in FLRC No. 77A-77, and the rationale contained therein, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
GRISSOM AIR FORCE BASE,
PERU, INDIANA

Respondent

and

Case No. 50-13120(CA)
A/SLMR No. 852
FLRC No. 77A-77

LOCAL 1434, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Complainant

and

LOCAL 3254, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Interested Party

SUPPLEMENTAL DECISION AND ORDER

On December 20, 1976, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding, among other things, that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action. Thereafter, on June 9, 1977, in A/SLMR No. 852, the Assistant Secretary agreed with the Administrative Law Judge's conclusion that the Respondent had violated Section 19(a)(3) and (1) of the Order by virtue of the publication in the newspaper, the Grissom Contact, of an advertisement by Local 3254, American Federation of Government Employees, AFL-CIO (AFGE). In the Assistant Secretary's view such publication constituted the furnishing of services and facilities by the Respondent to a labor organization (AFGE) which was not in equivalent status with the Complainant, Local 1434, National Federation of Federal Employees, the exclusively recognized representative of the employees of the Respondent. In this regard, he found that the Respondent exercised control over the Grissom Contact and that the newspaper was, in effect, an instrumentality of the Respondent irrespective of specific contractual arrangements entered into with the publisher.

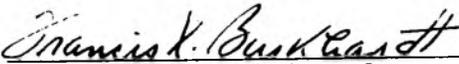
On May 2, 1978, the Federal Labor Relations Council (Council) issued its Decision on Appeal in the subject case, finding that the Assistant Secretary's decision that the Respondent violated Section 19(a)(3) and (1) of the Order was, in the circumstances of the case, inconsistent with the purposes of the Order. Accordingly, pursuant to Section 2411.18(b) of its Rules, the Council set aside the Assistant Secretary's decision and remanded the case to him for appropriate action consistent with its decision.

Based on the Council's holding in the instant case, and the rationale contained therein, I shall order that the complaint herein be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-13120(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 7, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

-2-

Department of the Air Force
Grissom Air Force Base
Peru, Indiana

and

Local 1434, National Federation
of Federal Employees

A/SLMR No. 852
FLRC No. 77A-77

and

Local 3254, American Federation
of Government Employees, AFL-CIO

DECISION ON APPEAL FROM
ASSISTANT SECRETARY'S DECISION

Background of Case

This appeal arose from a decision and order of the Assistant Secretary, based upon an unfair labor practice complaint filed by Local 1434, National Federation of Federal Employees (NFFE) against the Department of the Air Force, Grissom Air Force Base, Peru, Indiana (the activity). The Assistant Secretary found that the activity violated section 19(a)(3) (and based on the same conduct section 19(a)(1)) of the Order^{1/} by permitting the publication of an advertisement in a newspaper over which the activity exercised control by a union which was not in equivalent status with NFFE, the exclusively recognized representative of certain of its employees.

1/ Section 19(a) of the Order provides in pertinent part:

Sec. 19. Unfair labor practices. (a) Agency management shall not--

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status[.]

The pertinent factual background of this case, as found by the Assistant Secretary and based upon the entire record, is as follows: Local 3254, American Federation of Government Employees, AFL-CIO (AFGE)^{2/} placed an advertisement, promoting the benefits of AFGE membership, in the Grissom Contact (hereinafter referred to as the "Contact"). a weekly unofficial newspaper published in the interests of personnel at the activity by a private Publisher not connected with the Air Force. Publication is governed by a contract between the Publisher and the activity. The advertisement appeared prior to the expiration of the negotiated agreement between the activity and NFFE, the exclusive representative of a unit of the activity's employees. The advertisement appeared at a time when a representation petition could have been timely filed, but no such petition had yet been filed by AFGE.^{3/}

The activity furnishes the news content, headlines, editorials, captions and pictures of the Contact; the Publisher solicits and sells advertising and prepares advertising copy. The Publisher's sole revenue is derived from the sale of advertisements. Copies of the Contact are deposited at various places on the base where personnel may, without charge, pick up a copy. The editor of the Contact is an airman detailed by the activity for such duty.

2/ AFGE was designated an "Interested Party" by the Assistant Secretary in this proceeding.

3/ The relevant provisions of the Assistant Secretary's regulations state:

§ 202.3 Timeliness of petition.

(c) When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows:

(1) Not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three (3) years or less from the date it was signed and dated by the activity and the incumbent exclusive representative[.]

As noted by the Assistant Secretary, the advertisement appeared during the 30-day "open period" specified in the above-quoted regulation, and subsequently during the same open period AFGE did file a petition seeking to represent the activity's employees.

The contract between the activity and the Publisher provides certain specified limitations on the type of advertisements permitted to be published in the Contact.^{4/} The contract between the activity and the Publisher further provides that each edition of the Contact must contain a statement that "[t]he appearance of advertisements . . . in this publication does not constitute an endorsement by the Department of the Air Force of products or services advertised."^{5/} All dealings which led

4/ The contract between the activity and the Publisher provides, in part, in Paragraph III, ADVERTISING, as follows:

c. "Control." The Publisher shall not accept for publication advertisements that are in conflict with the principles of the Air Force character guidance program. The Publisher shall not solicit advertising or publish advertisements from establishments that have been declared to be "Off Limits" to military personnel by the Base Commander or by the Armed Forces Disciplinary Control Board In addition, the Publisher may request the Information Officer or designated representative(s) to advise him if the contents of any advertisement would cause the Base Commander to bar the paper's circulation on the base. Advertisements which are essentially political in nature or which have political connotations will not be carried in the GRISSOM CONTACT. No advertisement will be carried that is unlawful, detrimental to discipline, that undermines loyalty, or is otherwise contrary to the best interests of Grissom Air Force Base, to the United States Air Force or any part thereof, or to the United States of America. All advertisements shall conform to principles of good taste. In this regard, the Publisher shall not advertise any motion picture or other form of film entertainment which is rated "X" In the event of disagreement over advertising content, the commander of Grissom Air Force Base shall have the final authority for determination.

5/ The edition of the Contact at issue herein contained the following statement as required by the contract:

The Contact is an unofficial newspaper published weekly in the interests of personnel at Grissom AFB of the Strategic Air Command. It is published by James Bannon, an individual, in no way connected with the Air Force. Opinions expressed by publishers and writers are their own and are not to be considered an official expression by the Department of the Air Force. The appearance of advertisements, including supplements and inserts, in this publication does not constitute an endorsement by the Department of the Air Force of products or services advertised. Everything advertised in this publication must be made available for purchase, use or patronage without regard to the race, creed, color, national origin or sex of the purchaser, user or patron. A confirmed violation of this policy of equal opportunities by an advertiser will result in the refusal to print advertising from that source.

to the purchase and preparation of the advertisement here involved were between AFGE officials and a sales representative of the Publisher. The advertisement was solely the product of AFGE and was paid for by AFGE. And, as already indicated, it promoted AFGE membership; and it did not mention NFFE in any manner.^{6/}

The Assistant Secretary, in agreement with the Administrative Law Judge, held that the activity violated section 19(a)(1) and (3) of the Order. In reaching this conclusion, the Assistant Secretary stated as follows:

[T]he publication in the newspaper, the Grissom Contact, of an advertisement by the AFGE constituted a violation of Section 19(a) (3) and (1) of the Order by the Respondent Activity in that its conduct, in permitting such publication, in effect, constituted the furnishing of services and facilities to a labor organization, the AFGE, which was not in equivalent status with the exclusively recognized representative of the Respondent Activity's employees, Local 1434, National Federation of Federal Employees, hereinafter called NFFE. In reaching this conclusion, it was noted particularly that the evidence established that the Respondent Activity exercised control over the Grissom Contact and that the newspaper was, in effect, an instrumentality of the Respondent Activity. In this regard, I view it as immaterial to the finding of a violation herein that the Respondent Activity's contract with the publisher of the Grissom Contact did not specifically forbid an advertisement such as that involved in the subject case. Thus, in my view, as Section 19(a)(3) of the Order prohibits agency management from providing assistance to a labor organization such as the AFGE, not in equivalent status, permitting the publication of an advertisement by the AFGE in a newspaper which it controls is violative of the Order irrespective of the specific contractual agreements entered into with the publisher.

The activity and AFGE appealed the Assistant Secretary's decision and order to the Council. The Council accepted the petitions for review, concluding that a major policy issue was raised as to the interpretation and application of section 19(a)(3) of the Order under the circumstances of the present case. The Council also granted requests by the activity and

6/ The activity had no knowledge of the AFGE advertisement until its airman editor saw the galley proofs containing the advertisement. The airman did not bring the advertisement to the attention of his superior because the airman concluded that it was not deemed in conflict with agency regulations or the contract.

AFGE for a stay, having determined that the requests met the criteria set forth in section 2411.47(e)(2) of its rules. The parties filed briefs with the Council as provided in section 2411.16 of the Council's rules.^{7/}

Opinion

As noted above, the Council concluded that the decision of the Assistant Secretary in this case raised a major policy issue as to the interpretation and application of section 19(a)(3) of the Order under the circumstances herein. More specifically the question is whether the Assistant Secretary's finding of a 19(a)(3) violation is consistent with the purposes of the Order or, to state it alternatively, whether a finding that the activity violated section 19(a)(3) of the Order by permitting the publication of an advertisement by the AFGE in a newspaper which it controls is consistent with the purposes of the Order.^{8/} For the reasons stated below, we conclude that the Assistant Secretary's finding of a violation, in the circumstances of this case, is not consistent with such purposes.

The proscription in section 19(a)(3), namely that agency management shall not sponsor, control or otherwise assist a labor organization, was an adoption of the identical wording of section 3.2(a)(3) of the Code of Fair Labor Practices, the antecedent of the current 19(a)(3) provision. (3 CFR, 1959-63, Comp. at 852.) Section 19(a)(3) was clearly intended,

^{7/} NFFE requested oral argument. Pursuant to section 2411.48 of the Council's rules, this request is denied because the positions of the participants in this case are reflected adequately in the entire record now before the Council.

^{8/} Section 19(a)(3) provides that agency management shall not sponsor, control or otherwise assist a labor organization. The remaining language contained in the section is a proviso to the otherwise absolute ban. That is, an agency may furnish customary and routine services and facilities when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status. In view of our conclusion herein that agency management has not sponsored, controlled or otherwise assisted AFGE in the circumstances of the case, it is unnecessary to apply the proviso permitting the furnishing of customary and routine services and facilities, under described conditions, to organizations having equivalent status.

as was stated with regard to the Code provision, to prevent agency management from dominating or controlling a labor organization by contributing financial or other support to it and to preserve the independence of such organizations from agency manipulation.^{9/} In the Council's view, this proscription was not intended to reach the conduct of agency management such as is at issue in the circumstances of the instant case.

The extent of management conduct here involved was a failure to prevent the selling of an advertisement by a private individual not connected with the Air Force to appear in an unofficial newspaper published in the interests of personnel at the activity. Agency management took no affirmative action in any manner beneficial to the AFGE in this endeavor. There was no agency management involvement in the sale, preparation or distribution of the advertisement. And all dealings which led to the purchase and preparation of the advertisement were between AFGE officials and a sales representative of the Publisher.

Moreover, not only was the advertisement totally free from any hint of management endorsement, but such endorsement was expressly disavowed by the clear policy statement contained in the newspaper, i.e., that "[t]he Contact is an unofficial newspaper published weekly in the interests of personnel at Grissom AFB of the Strategic Air Command. It is published by James Bannon, an individual, in no way connected with the Air Force. Opinions expressed by publishers and writers are their own and are not to be considered an official expression by the Department of the Air Force. The appearance of advertisements, including supplements and inserts, in this publication does not constitute an endorsement by the Department of the Air Force of products or services advertised. . . ."

Further, it is clear that NFFE, like AFGE, was completely free to buy an advertisement in the Contact and, if it had sought to do so, the advertisement would have been treated no differently from that purchased by AFGE. Likewise, there is no evidence whatsoever of any other conduct by agency management which might be perceived by employees as an indication of support for AFGE or opposition to NFFE.

In the Council's opinion, the proscription that agency management shall not sponsor, control or otherwise assist a labor organization was not intended to cover such circumstances as here involved. That is, a finding of a 19(a)(3) violation based merely on the failure to prevent

^{9/} See Explanation of Provisions of the Standards of Conduct for Employee Organizations and Code of Fair Labor Practices in Employee-Management Cooperation in the Federal Service, United States Civil Service Commission, Attachment to FPM Let. 711-2 (Aug. 30, 1963), at 16.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



the publication of the subject advertisement by AFGE is inconsistent with the purposes of the Order.^{10/}

Conclusion

Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and remand the case to him for action consistent with our decision herein.

Henry B. Frazier III
Henry B. Frazier III
Executive Director

Issued: May 2, 1978

.....
In the Matter of

LOCAL 3254, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO
Respondent

and

LOCAL 1434, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES
Complainant

and

DEPARTMENT OF THE AIR FORCE,
GRISSOM AIR FORCE BASE
PERU, INDIANA

Activity and
Interested Party

.....
DEPARTMENT OF THE AIR FORCE
GRISSOM AIR FORCE BASE
PERU, INDIANA

Respondent

and

LOCAL 1434, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Complainant

and

LOCAL 3254, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Interested Party

.....
Janet Cooper, Esquire
Staff Attorney, National Federation
of Federal Employees
1016 - 16th Street, N.W.
Washington, D.C. 20036

For Complainant

CASE NO. 50-13119 (CO)

CASE NO. 50-13120 (CA)

^{10/} Similarly, such conduct plainly does not constitute interference with, restraint or coercion of an employee in the exercise of the rights assured by the Order in violation of section 19(a)(1).

Captain William C. Walker
Office of the Staff Judge Advocate
Headquarters, Strategic Air Command
Offutt Air Force Base, Nebraska 68113
For Grissom Air Force Base

Raymond J. Malloy, Esquire
Assistant General Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005
For Local 3254

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

These cases arise under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). Separate charges were filed on, or about, January 8, 1976, by N.T. Wolkomir, President of National Federation of Federal Employees (Complainant), with the American Federation of Government Employees (AFGE), alleging a violation of Section 19(b)(1) of the Order, and with Grissom Air Force Base (Grissom), alleging a violation of Sections 19(a)(1) and (3) of the Order. A complaint against AFGE, alleging a violation of 19(b)(1), was filed February 11, 1976 (Case No. 50-13119(CO)); and a complaint against Grissom, alleging violations of 19(a)(1) and (3) was filed February 12, 1976 (Case No. 50-13120(CA)); an Order Consolidating Cases issued September 15, 1976; and a Notice of Hearing on the consolidated cases also issued on September 15, 1976 (Ass't. Sec. Exh. 4) pursuant to which a hearing was duly held before the undersigned on October 21, 1976, in Peru, Indiana. 1/

The alleged violations of the Order, both against AFGE and against Grissom, turn on a full page advertisement by AFGE which was published in the December 19, 1975, issue of the Grissom Contact, a weekly unofficial newspaper, privately published, pursuant to contract between Grissom and Hometown Publications.

1/ The Complainant's request to correct the transcript as set forth in its motion dated November 23, 1976, no opposition having been filed and as each correction requested appears wholly proper, Complainant's motion is hereby granted and the transcript is hereby corrected as more fully noted in "Appendix B", hereto.

All parties were represented by able counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved and briefs have been timely filed by the parties which have been carefully considered. Upon the basis of the entire record, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

1. Complainant has held exclusive recognition at Grissom since 1967. Its current contract was signed March 16, 1973, and was for a period expiring March 16, 1976. To be timely, a petition challenging Local 1434's right to represent civilian employees at Grissom would have to have been filed on or after December 17, 1975, but prior to January 16, 1976. AFGE filed a petition for Certification of Representatives on January 12, 1976 (Stipulation, Ass't. Sec. Exh. 3). 2/ Because of the unfair labor practice charges here involved, AFGE's petition for certification has been held in abeyance and Complainant's contract has been extended to March, 1977.

2. The Grissom Contact is a weekly unofficial newspaper published in the interest of personnel at Grissom by Hometown Publication, James Bannon, Publisher. Mr. Bannon is not connected with the Air Force. Publication of the Grissom Contact is governed by a contract between James Bannon and Grissom (Ass't. Sec. Exh. 3, Stipulation, Attachment 2) and by AFR 190-7 (Ass't. Sec. Exh. 3, Stipulation, Attachment 1).

3. Grissom furnishes the news content, headlines, editorials, captions and pictures; the Publisher solicits and sells advertising and prepares advertising copy. The Publisher's sole revenue is derived from the sale of advertisements. Copies of the Grissom Contact are deposited at various places on the

2/ Complainant and Grissom in Case No. 50-13120(CA) submitted a stipulation of facts and their request for a decision by the Assistant Secretary without a hearing pursuant to Section 203.5(b) of the Regulations; however, in view of the consolidation of Case No. 50-13120(CA) with Case No. 50-13119(CO) and the absence of a like stipulation of facts and a request for a decision by the Assistant Secretary without a hearing in the latter case, a Notice of Hearing issued as to both cases.

base, such as commissary, chow hall, post office, etc. (See, Ass't. Sec. Exh. 3, Stipulation, Attachment 3), where personnel may, without charge, pick up a copy. The editor of the Grissom Contact is an airman detailed by Grissom for such duty. Airman James D. Rosenberg was editor on December 19, 1975, and Sergeant Youngclause was the editor at the time of the hearing. Grissom's Office of Information, currently headed by Major Herbert Lubin, is responsible for the editorial copy of the Grissom Contact.

4. The contract between Grissom and James Bannon in Paragraph III, Advertising, provided, in part, as follows:

"c. 'Control.' The Publisher shall not accept for publication advertisements that are in conflict with the principles of the Air Force character guidance program. The Publisher shall not solicit advertising or publish advertisements from establishments that have been declared to be 'Off Limits' to military personnel by the Base Commander or by the Armed Forces Disciplinary Control Board ... In addition, the Publisher may request the Information Officer or designated representative(s) to advise him if the contents of any advertisement would cause the Base Commander to bar the paper's circulation on the base. Advertisements which are essentially political in nature or which have political connotations will not be carried in the GRISSOM CONTACT. No advertisement will be carried that is unlawful, detrimental to discipline, that undermines loyalty, or is otherwise contrary to the best interest of Grissom Air Force Base, to the United States Air Force or any part thereof, or to the United States of America. All advertisements shall conform to principles of good taste. In this regard, the Publisher shall not advertise any motion picture or other form of film entertainment which is rated 'X'... In the event of disagreement over advertising content, the commander of Grissom Air Force Base shall have the final authority for determination." (Ass't. Sec. Exh. 3, Stipulation, Attachment 2, pp. 3-4).

Air Force Regulations, provide, in part, as follows:

"12. Commercial Advertising:

"a. To be acceptable for on-base distribution through official channels, no advertising in commercial enterprise publications shall be worded or phrased to give the reader the impression that the Air Force in any way endorses, guarantees, or sponsors any product or service ...

...

"d. The publisher will request advertisers to observe the highest business ethics and applicable laws in describing goods, services, and commodities ...

"e. Active-duty Air Force military and civilian personnel are prohibited from soliciting or endorsing advertisements in commercial enterprise publications.

...

"h. Advertisements must conform to the principles of good taste. ..." (AFR 190-7, Ass't. Sec. Exh. 3, Stipulation, Attachment 1).

5. Chester Horning, Sr., then President of AFGE Local 3254 and now Chief Steward, contacted Mrs. Mildred Precourt, sales representative for Hometown Publication, about an advertisement which Mr. Horning, with the assistance of various members of Local 3254, had developed; and Mrs. Precourt, after receiving Mr. Horning's material, wrote the advertisement as it appeared in the December 19, 1975, issue of the Grissom Contact (Jt. Exh. 2, p. 13). The AFGE advertisement was solely the product of AFGE, was paid for by AFGE Local 3254, and Grissom had no knowledge of the advertisement until Editor Rosenberg saw the galley proofs containing the AFGE advertisement on, or about, December 15, 1975. Airman Rosenberg testified that he did not bring the AFGE advertisement to the attention of his superior, Major Lubin, because,

"I found it not to be in violation of any of our regulations or the contract." (Tr. 59)

Major Lubin testified that after publication he saw the AFGE advertisement and did not find that it violated the provisions of AFR 190-7 or the contract. Mrs. Precourt testified that she did not remember that Mr. Horning asked her whether an advertisement such as he sought was acceptable, but that if he had, she would have told him that we could accept it; that she saw absolutely nothing wrong with the advertisement.

6. The AFGE advertisement, of course, extols AFGE; suggests various reasons why Grissom Civilain employees should support AFGE; does not mention Complainant in any manner; and listed three telephone numbers to call for further details (Peru, Bunker Hill and Kokomo). The testimony of various Local 3254 officers indicated that no calls were received at the numbers listed; nevertheless, a petition was filed on January 12, 1976, supported by the requisite showing of interest.

7. Several newspapers serve the area including the Peru Tribune, the Kokomo Tribune, and two Indianapolis newspapers, and Mr. Horning testified that, while they (AFGE Local officers) had discussed placing an advertisement in either the Peru or Kokomo paper, they felt it would be too expensive and, in addition that coverage would be far less than through the Grissom Contact. Mr. Horning also testified that Local 3254 had tried personal contact but had been unable to make employees aware of AFGE's presence; that consideration had been given to passing out leaflets outside the Base as cars entered and left the Base, but that they thought the best avenue was to place an advertisement in the Grissom Contact.

8. No witness had any knowledge of any prior advertisement in the Grissom Contact by any labor organization.

CONCLUSIONS

A. Section 19(b)(1) Allegation (Case No. 50-13119(CO)).

Complainant asserts that AFGE's advertisement interfered with, restrained, or coerced employees in the exercise of rights assured by the Order. As the advertisement did no more than extol AFGE without mention of Complainant, obviously there was no threat so that the basis for the 19(b)(1) violation is, quite simply, that AFGE violated the Order by utilizing the Grissom Contact at a time that it did not have "equivalent status." It is recognized that under the National Labor Relations Act (NLRA) interference with organization rights by an employer has been premised on the violation of Sections 7 and 8(a)(1), see, for example, NLRB v. Babcock-Wilcox Co., 351 U.S. 105 (1956);

that the rights of employees to self-organization under Section 7 of the NLRA are essentially similar to the rights to self-organization under Section 1(a) of the Order; and that Section 19(b)(1) of the Order, in language essentially parallel to the language of Section 8(a)(1) of the NLRA, as to an employer, makes it an unfair labor practice for a labor organization to "interfere with, restrain, or coerce an employee in the exercise of his rights assured by the Order", while 19(b)(1) of the Order reaches any interference, restraint or coercion practiced by a labor organization, there is no provision prohibiting, for example, organization activity by a labor organization on an agency's or activity's premises at any time. Although Section 19(a)(3) of the Order makes it an unfair labor practice for an agency to furnish services or facilities except to organizations having equivalent status, an agency violation of Section 19(a)(3) does not make coercive, etc., in violation of 19(b)(1) of the Order, union conduct which, in itself, was wholly uncoercive and lawful, except that the agency or activity could not lawfully furnish such services or facilities until such organization achieved "equivalent status". Indeed, the realities of labor relations require that labor organizations have the fullest possible freedom of communication if the basic right of employees to self-organization, etc., is to have meaning. Consequently, in the absence of a clear and unambiguous restriction, I find no warrant in the Order for finding a labor organization guilty of an unfair labor practice even if it were unlawfully assisted as a result of an employer's violation of 19(a)(3) of the Order.

Thus, even if it is assumed that Grissom violated 19(a)(3) by permitting the advertisement to be carried in the December 19, 1975, issue of the Grissom Contact, I am aware of no precedent, and none has been called to my attention, that a union which solicits or distributes in violation of non-solicitation and non-distribution rules is guilty of an unfair labor practice even if the employer were guilty of an unfair labor practice by permitting or allowing such solicitation or distribution. Indeed, the only precedent called to my attention is to the contrary. In Complaint Against American Federation of Government Employees, Case No. 64-2513(CO), the Assistant Regional Director, Mr. Cullen P. Keough, dismissed the Complaint by letter dated January 27, 1975, stating, in part, as follows:

"... It is alleged that the American Federation of Government Employees (AFGE) violated Section 19(b)(1) and (2) of the Order by having its representatives conduct an organizational

drive among employees of the Veterans Administration Hospital, New Orleans, Louisiana, who are represented by Local 169, National Federation of Federal Employees (NFFE). It is also alleged that the AFGE representatives were not employees of the hospital, that they conducted the organizational drive on the hospital premises and contrary to the express instructions of agency management.

"Assuming the above allegations to be true, I find no violations of Section 19(b)(1) and (2) of the Order. It does not follow that the complained of conduct interfered with any employee rights assured under the Order (Section 19(b)(1)) or that it constituted an attempt to induce agency management to coerce an employee in the exercise of such rights (19(b)(2)).

"I am, therefore, dismissing the complaint in this matter." (AFGE Exh. 1b)

The Assistant Secretary of Labor, Mr. Paul J. Fasser, Jr., by letter dated May 29, 1975, denied the request for review, stating, in part, as follows:

". . .

"In agreement with the Assistant Regional Director and based on his reasoning, I find that dismissal of the instant complaint is warranted in that a reasonable basis for the complaint has not been established." (AFGE Exh. 1c).

The Federal Labor Relations Council, FLRC No. 75A-64 (September 30, 1975), denied the request for review, stating, in part, as follows:

"... As to the alleged major policy issue, the Council is of the opinion that in the circumstances presented, noting particularly that the cited Assistant Secretary's decisions all involved an allegation and a finding

that an agency had violated section 19(a) when it granted organizational rights to a labor organization (which were not present in the instant case), the decision of the Assistant Secretary does not appear inconsistent with prior decisions and does not raise a major policy issue warranting review." (AFGE Exh. 1a).

As AFGE's conduct did not interfere with any employee rights assured by the Order, I shall recommend that the complaint in Case No. 50-13119(CO) be dismissed.

B. Section 19(a)(1) and (3) Allegations (Case No. 50-13120(CA)).

In the circumstances of this case there is no independent 19(a)(1) violation. Rather, the controlling allegation is that Grissom violated Section 19(a)(3) of the Order by allowing publication of AFGE's advertisement at a time that AFGE did not have "equivalent status" and thereby assisted AFGE. If Grissom violated 19(a)(3) it also, derivatively, violated 19(a)(1). Army and Air Force Exchange Services, Pacific Exchange Systems, Hawaii Regional Exchange, A/SLMR No. 454 (1974); Secretary of the Navy, Department of the Navy, Pentagon and American Federation of Government Employees, AFL-CIO, Case No. 22-6787(CA) (decision of Administrative Law Judge, November 3, 1976).

Section 19(a)(3) provides that Agency management shall not -

"(3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status;"

Section 23 provides, in part, as follows:

"Agency implementation. No later than April 1, 1970, each agency shall issue appropriate policies and regulations consistent with this Order for its implementation. This includes but

is not limited to a clear statement of the rights of its employees under this Order; ... policies with respect to the use of agency facilities by labor organizations. ..."

The terms "an agency may furnish customary and routine services and facilities" (19(a)(3)) and "agency facilities" (23) are not defined. Complainant contends that: a) the Grissom Contact is an agency service or facility; b) that Grissom may furnish such services and/or facilities on an impartial basis only to labor organizations having equivalent status; c) that on December 19, 1975, AFGE had not filed a representation petition and, therefore, did not have equivalent status and, consequently, Grissom violated 19(a)(3) by furnishing services and/or facilities to AFGE, i.e., utilization of the Grissom Contact. Department of the Navy, Navy Commissary Store Complex, Oakland, A/SLMR No. 654 (1976), where Administrative Law Judge Sternburg, whose decision was adopted by the Assistant Secretary, stated:

"In Department of the Army, U.S. Army Natick Laboratories, Natick, Mass., A/SLMR No. 263 and U.S. Department of Interior, Pacific Coast region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143, the Assistant Secretary concluded that a union which has not raised a question concerning representation by virtue of its action in filing a representation petition ... does not enjoy 'equivalent status' within the meaning of Section 19(a)(3) of the Order. Further, in the absence of 'special circumstances' a labor organization not possessing 'equivalent status' with an incumbent exclusively recognized representative ... may not enjoy the use of the services and facilities of the Activity involved for purposes of organizational activities. Accordingly, in the absence of a showing that the employees involved are inaccessible to reasonable attempts by a labor organization to communicate with them outside the agency's or activity's premises, the granting of access to a union not enjoying 'equivalent status' is violative of Section 19(a)(3) of the Order. ..."

From the foregoing, it is clear that, as AFGE did not, on December 19, 1975, enjoy "equivalent status", if Grissom furnished services and/or facilities within the meaning of Sections 19(a)(3) and (23) it violated Section 19(a)(3).

In the private sector, the importance of freedom of communication to the free exercise of organization rights pursuant to Sections 7 and 8(a)(1) of the National Labor Relations Act (essentially comparable to Sections 1(a) and 19(a)(1) of the Order) has long been recognized and the guiding principle for adjustment of the conflict between §7 rights and property rights has been determined by the Supreme Court. NLRB v. Babcock and Wilcox Co., 351 U.S. 105 (1956); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972). In Central Hardware Co., supra, the Court stated,

"The principle of Babcock is limited to this accommodation between organization rights and property rights. This principle requires a 'yielding' of property rights only in the context of an organization campaign. Moreover, the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' §7 rights. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of organization activity. In short, the principle of accommodation announced in Babcock is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal." (407 U.S. at 543-545)

In further recognition of organization rights, the Board has long required an employer to provide names and addresses of employees in the unit within a specified time after an election agreement is executed or an election is directed. Excelsior Underwear, Inc., 165 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Under Executive Order 10988, the predecessor of E.O. 11491, and the Standards of Conduct for Employee Organizations and Code

Fair Practices promulgated pursuant thereto, 3/ it might have been argued with conviction that the private sector standards were reflected in E.O. 10988. Whether this was intended in E.O. 10988 is of little moment as it is perfectly apparent that the Order is vastly different. Thus, the Order in Section 19(a)(3) allows an agency to furnish "services and facilities" to organizations "having equivalent status" which uniformly has been interpreted by the Assistant Secretary to mean that only organizations having equivalent status may be furnished services and facilities. Department of the Treasury, Bureau of Customs, Boston, Massachusetts, A/SLMR No. 169 (1972); Department of the Navy, Navy Commissary Store Complex, Oakland,

3/ Executive Order 10988, the predecessor of E.O. 11491, contained the following:

Section 1(a) "... no interference, restraint, coercion or discrimination is practiced within such agency to encourage or discourage membership in any employee organization."

Section 10. "No later than July 1, 1962, the head of each agency shall issue appropriate policies, rules and regulations for the implementation of this order, including ... policies with respect to the use of agency facilities by employee organizations. ..."

Standards of Conduct for Employee Organizations and Code of Fair Labor Practices, published in the Federal Register May 23, 1963, provided, in part, as follows:

Section 3.2 Prohibited Practices.

"(a) Agency management is prohibited from:

. . .

"(3) Sponsoring, controlling or otherwise assisting any employee organization, except that an agency may furnish customary and routine services and facilities pursuant to section 10 of the Order where consistent with the best interests of the agency, its employees and the organization, and where such services and facilities are furnished, if requested, on an impartial basis. ..."

supra. In short, under the Order, an agency, not only is not required, but is affirmatively prohibited from giving aid to labor organizations prior to an organization attaining "equivalent status". The Assistant Secretary has very clearly stated that to allow an agency to furnish services or facilities at any time prior to attainment of "equivalent status" could place in jeopardy the labor-management relations stability sought to be achieved by the Order. Department of the Army, U.S. Army Natick Laboratories, supra.

There is no doubt whatever that the same advertisement in the Peru Tribune or Kokomo Tribune, for example, would have been protected under the Constitution, Thornhill v. Alabama, 310 U.S. 88 (1940); but the Grissom Contact was not a normal newspaper. Despite Grissom's assertion that the Grissom Contact was Mr. Bannon's publication, and it may very well be in some respects, the Grissom Contact is, nevertheless, very much Grissom's newspaper. Grissom writes all the news and editorial content, provides all pictures, captions and headlines, and retains absolute control over advertising which must be submitted to it in galley form prior to publication. Moreover, the publication bears the imprimatur of Grissom from its title to its content. Thus, the contract provides, inter alia, that Grissom's control over advertising includes:

1. Publisher shall not accept advertisements that are in conflict with the principles of the Air Force character guidance program.

2. Publisher shall not publish advertisements from establishments declared to be "Off Limits".

3. Publisher may request the Information Officer or designated representative to advise him if the contents of any advertisement would cause the Base Commander to bar the paper's circulation on the base.

4. Publisher will not accept advertisements which are essentially political in nature or which have political connotations.

5. Publisher shall not publish any advertisement that is unlawful, detrimental to discipline, that undermines loyalty, or is otherwise contrary to the best interests of Grissom Air Force Base, to the United States Air Force or to the United States of America.

6. In the event of disagreement over advertising content, the Commander of Grissom Air Force Base shall have the final authority for determination.

There cannot be the slightest doubt that Grissom retained absolute control over advertising and in the event of disagreement the Base Commander had final authority for determination. Because it had the right to bar any advertisement, exercise of that right would not have constituted a breach of its contract with Hometown Publication; and by its failure to bar AFGE's advertisement in the Base publication with full knowledge of the advertisement prior to its publication, at a time when AFGE did not enjoy "equivalent status", Grissom violated Section 19(a)(3) of the Order. It is with considerable regret that I reach this conclusion as the importance that the electorate be informed of relevant information so as to enable employees to make a reasonable choice seems as compelling in organizing as in the election itself. Nevertheless, in view of the limitation in the Order prohibiting the furnishing of services or facilities except to organizations having equivalent status, I am constrained to conclude that Grissom, with full knowledge of AFGE's advertisement, permitted publication and distribution on its premises of the advertisement in the Grissom Contact which it controlled.

RECOMMENDATIONS

Having found that Respondent AFGE Local 3254 did not violate Section 19(b)(1) of the Order, I recommend that the Complaint in Case No. 50-13119(CO) be dismissed.

Having found that Respondent Department of the Air Force, Grissom Air Force Base, engaged in conduct which was in violation of Section 19(a)(3) of the Executive Order and, derivatively, of Section 19(a)(1) of the Executive Order, I recommend that the Assistant Secretary adopt the following order.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Department of the Air Force, Grissom Air Force Base, Peru, Indiana, shall:

1. Cease and desist from:

(a) Assisting the AFGE, or any other labor organization, by permitting advertisements by any labor organization in the Grissom Contact or by otherwise furnishing customary and routine services and facilities to AFGE or any other labor organization at a time when such organizations are not party to a pending representation proceeding raising a question concerning representation and when the employees are represented exclusively by the National Federation of Federal Employees, Local 1434.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 20, 1976
Washington, D.C.

June 7, 1978

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT assist the American Federation of Government Employees, AFL-CIO, or any other labor organization, by permitting advertisements by any labor organization in the Grissom Contact, or by otherwise furnishing customary and routine services and facilities to the American Federation of Government Employees, AFL-CIO, or any other labor organization, at a time when such organizations are not party to a pending representation proceeding raising a question concerning representation and when the employees are represented exclusively by the National Federation of Federal Employees, Local 1434.

Dated _____ By _____
Commanding Officer

This Notice must remain posted for sixty (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 Administrator of the Labor-Management Services Administration, U.S. Department of Labor whose address is: Federal Building, Room 1060, 230 South Dearborn Street, Chicago, Illinois 60604.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE ARMY,
HEADQUARTERS, UNITED STATES
ARMY HEALTH SERVICES COMMAND,
KENNER ARMY HOSPITAL, DGSC
HEALTH CLINIC, RICHMOND, VIRGINIA
A/SILMR No. 1058

This case involved a petition filed by American Federation of Government Employees, Local 2047, AFL-CIO (AFGE Local 2047) seeking to represent a unit of employees assigned to the U. S. Army Health Clinic, Defense General Supply Center, Richmond, Virginia (DGSC Clinic). The Activity contended that the petitioned for unit was not appropriate for the purpose of exclusive recognition as it would result in needless fragmentation, and that such a unit would impede, rather than promote, effective dealings and efficiency of agency operations. It asserted also that because the DGSC Clinic is serviced by the Fort Lee, Virginia, reservation and is a satellite of the Kenner Army Hospital (Kenner), which is a component of the unit at Fort Lee represented exclusively by AFGE Local 1178, the employees in the petitioned for unit should be included in AFGE Local 1178's exclusively recognized unit. AFGE Local 1178 was not a party to the instant proceeding.

The Assistant Secretary found that the unit sought was not appropriate for the purpose of exclusive recognition. In this regard, he noted that while the petitioned for unit may contain all the unrepresented nonprofessional employees administratively assigned to Kenner, the record did not establish that the claimed employees constitute a residual unit of all the unrepresented employees of the Fort Lee unit exclusively represented by AFGE Local 1178, or that it is a residual unit of that component of AFGE Local 1178's unit--the U.S. Army Commander, Medical Department Activity (MEDDAC) Fort Lee--which includes Kenner. As the employees in the claimed unit share similar job classifications, skills and duties with the employees in the Fort Lee unit, and are subject to the same personnel policies, personnel practices and labor relations policies as the employees in the Fort Lee unit, the Assistant Secretary found that the petitioned for unit would not promote effective dealings and efficiency of agency operations but, rather, would lead to artificial fragmentation, and that the establishment of such a unit would be inconsistent with the objective expressed by the Federal Labor Relations Council of promoting more comprehensive bargaining unit structures in the Federal sector.

Accordingly, the Assistant Secretary ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
HEADQUARTERS, UNITED STATES
ARMY HEALTH SERVICES COMMAND,
KENNER ARMY HOSPITAL, DGSC
HEALTH CLINIC, RICHMOND, VIRGINIA

Activity 1/

and

Case No. 22-08021 (RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2047, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Daniel Francis Sutton. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Upon the entire record in the subject case, including the briefs filed by the parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, Local 2047, AFL-CIO, hereinafter called AFGE Local 2047, seeks an election in a unit composed of all employees assigned to the U.S. Army Health Clinic, Defense General Supply Center, Richmond, Virginia, hereinafter called DGSC Clinic, excluding all management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined by the Order.

The Activity contends that the petitioned for unit is not appropriate for the purpose of exclusive recognition as it would result in needless fragmentation which would be inconsistent with the policies of the Order, and that such a unit would impede, rather than promote, effective dealings and efficiency of agency operations. It also asserts that because the DGSC Clinic is serviced by the Fort Lee reservation and is a satellite installation of the Kenner Army Hospital, hereinafter called Kenner, with actual bargaining authority residing in Kenner, the employees

1/ The name of the Activity appears as amended at the hearing.

in the petitioned for unit should be included in a unit of nonprofessional employees at Fort Lee currently represented by AFGE Local 1178. 2/

Since April 16, 1970, AFGE Local 1178 has represented certain employees physically or administratively assigned to Fort Lee, Virginia. One of the components of AFGE Local 1178's exclusively recognized unit is the Medical Department Activity at Fort Lee, Virginia, hereinafter called MEDDAC, Fort Lee, which is a sub-element of the U.S. Army Health Services Command whose headquarters is located in San Antonio, Texas. Kenner is a department within the MEDDAC, Fort Lee, and its mission is to provide medical care for all personnel located on the Fort Lee reservation and at certain other locations. As part of this service, Kenner's Department of Primary Care and Community Medicine operates nine clinics, five of which are located on the Fort Lee reservation, and four of which are located elsewhere. One of the four clinics not on the Fort Lee reservation is the DGSC Clinic which contains the employees petitioned for by AFGE Local 2047 in this matter. The DGSC Clinic is located at Richmond, Virginia, some 23 miles from Fort Lee. 3/

The mission of the DGSC Clinic is to provide medical care to Defense General Supply Center employees in Richmond, Virginia, and to military personnel and their dependents who also are located at the Defense General Supply Center. Employed at the DGSC Clinic is a civilian doctor, who is the Chief of the Clinic, a military noncommissioned officer, and the three employees in the petitioned for unit, a medical technician, a medical radiology technician and an office administrative assistant (typist). 4/

2/ AFGE Local 1178 is not a party in this proceeding. Its unit of nonprofessional employees is currently described as: "All non-supervisory Class Act employees of the U.S. Army Quartermaster Center and Fort Lee under the jurisdiction of the Commanding General, Fort Lee, Virginia; all non-supervisory Class Act employees of the U.S. Army Communications Command (USACC) Agency, Fort Lee, Virginia; and all non-supervisory Class Act employees of the U.S. Army Commander, Medical Department Activity (MEDDAC) Fort Lee, Virginia, within the boundaries of the Fort Lee reservation, excluding management officials and supervisors, employees engaged in Federal personnel work except in a purely clerical capacity, guards, professionals and temporary employees."

3/ Kenner's three other clinics off the Fort Lee reservation also are located in Virginia. They are at Fort A.P. Hill, Fort Pickett and Charlottesville.

4/ The parties stipulated that these are the only unrepresented nonprofessional employees assigned to Kenner.

Prior to March 9, 1977, the Personnel Department of the Defense General Supply Center in Richmond provided personnel services to the DGSC Clinic, but since that date such services have been provided by the Personnel Department of the U.S. Army Quartermaster Center and Fort Lee. Although, the Chief of the Clinic has authority over the day-to-day operations of the Clinic, ultimate supervision and direction of the Clinic resides in Kenner. Thus, the employees of the Clinic perform essentially the same job functions as other components of Kenner, receive special training and telephonic technical assistance from Kenner, are in the same competitive area for the purposes of promotion as Kenner employees and, although, in a different competitive area for reduction-in-force procedures, are, in all other aspects, treated as Kenner employees with like benefits and services. Further, although the Chief of the Clinic has authority to authorize leave and to establish vacation schedules, such matters are granted pursuant to policies established by Kenner at Fort Lee. In addition, the record reveals that authority for the final resolution of grievances resides in the Commander of Kenner.

Based on the foregoing circumstances, I find that the petitioned for unit is not appropriate for the purpose of exclusive recognition. In this regard, it is noted that while the petitioned for unit may contain all the unrepresented nonprofessional employees administratively assigned to Kenner, the record does not establish that the claimed employees would constitute a residual unit of all the unrepresented employees of the components of the exclusively recognized unit currently represented by AFGE Local 1178, described in footnote 2 above, or that it is a residual unit of MEDDAC, Fort Lee, which is one of the components of the exclusively recognized unit that includes Kenner. As the employees in the claimed unit share similar job classifications, skills and duties with the employees in the exclusively recognized unit at Fort Lee, and are subject to the same personnel policies, personnel practices and labor relations policies as the employees in AFGE Local 1178's unit, established by the Fort Lee Civilian Personnel Office, I find that the petitioned for unit would not promote effective dealings and efficiency of agency operations but, rather, would lead to artificial fragmentation, and that the establishment of such a unit would be inconsistent with the objective as expressed by the Federal Labor Relations Council of promoting more comprehensive bargaining unit structures in the Federal sector. 5/

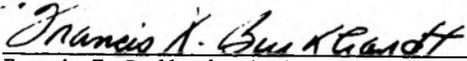
Accordingly, I shall order that the petition in the instant case be dismissed.

5/ See Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, FLRC No. 75A-14; Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, FLRC No. 75A-128; and Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, FLRC No. 76A-4 (1976).

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-08021(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 7, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

June 8, 1978

A/SLMR No.1059

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL 12-69-R
A/SLMR No. 1059

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL 12-69-R

Respondent

and

Case No. S-E-10 1/

This case involved a complaint filed by the Director, Office of Labor-Management Standards Enforcement (LMSE), against the National Association of Government Employees, Local 12-69-R, alleging that the Respondent labor organization violated Section 18(c) of the Order by failing to file certain required financial disclosure reports.

DIRECTOR, OFFICE OF LABOR-MANAGEMENT
STANDARDS ENFORCEMENT, UNITED STATES
DEPARTMENT OF LABOR

Complainant

The Administrative Law Judge concluded, in essence, that the Respondent had violated Section 18(c) of the Order by failing to file the reports at issue. In this regard, he noted that the Respondent had been appropriately notified of the hearing scheduled on this matter, but had failed to enter an appearance at the proceeding. In view of the Respondent's failure to appear, and on the basis of evidence introduced by the Complainant at the hearing, he found the allegations contained in the complaint to be true, and recommended that the Respondent be directed to file the delinquent reports.

DECISION AND ORDER

The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge, and issued an appropriate remedial order.

On March 17, 1978, Administrative Law Judge Thomas Schneider issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent labor organization had failed to file certain required financial reports, thereby, in essence, violating Section 18(c) of Executive Order 11491, as amended. No exceptions were filed with respect to the Administrative Law Judge's Recommended Decision and Order.

The Administrative Law Judge concluded that the Respondent failed to file Labor Organization Annual Report Form LM-3 for the fiscal years ending December 31, 1975, and December 31, 1976, thereby violating 29 CFR Part 403, as made applicable by Section 204.3 of the Assistant Secretary's Regulations

1/ This case was originally docketed in the San Francisco Area Office as Case No. 70-5369.

and Section 18(c) of the Executive Order. 2/ In reaching this conclusion, he noted that although the Respondent had adequate notice, it failed to appear at the hearing. He found the allegations of the complaint to be true based upon evidence introduced at the hearing and the fact that no answer or pleading was made by the Respondent. 3/ The Administrative Law Judge recommended that the Respondent be directed to file Labor Organization Annual Report Form LM-3 for the fiscal years ending December 31, 1975, and December 31, 1976.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, I hereby adopt the findings, conclusions and recommendation of the Administrative Law Judge, as modified herein.

ORDER 4/

Pursuant to Section 204.91 of the Assistant Secretary's Regulations implementing the Standards of Conduct provisions of Section 18 of the Order, the Assistant Secretary for Labor-Management Relations hereby orders that the National Association of Government Employees, Local 12-69-R, shall:

1. Cease and desist from:

Failing to file Labor Organization Annual Report Form LM-3 for the fiscal years ending December 31, 1975, and December 31, 1976.

2/ Section 18(c) of the Executive Order provides, in pertinent part: "A labor organization which has or seeks recognition as a representative of employees under this Order shall file financial and other reports...."

29 CFR Part 403 sets forth various requirements for the form and content of labor organization annual financial reports, including filing deadlines.

Section 204.3 of the Assistant Secretary's Regulations provides, in pertinent part: "The reporting provisions of Parts 402, 403, and 408 of Chapter IV of this title shall apply to labor organizations subject to Executive Order 11491, as amended...."

3/ Section 204.69(b)(2) of the Assistant Secretary's Regulations provides, in pertinent part: "Failure to file an answer to or plead specifically to any allegation in the complaint shall constitute an admission of such allegation."

4/ As noted by the Administrative Law Judge, the Respondent has made no effort to comply with the processes of the Executive Order in resolving this complaint. In this regard, it is noted that under Section 204.92 of the Assistant Secretary's Regulations, upon a failure to comply with an order to take remedial action, the Assistant Secretary may order cancellation of dues deduction, withdrawal of recognition, or referral to the Federal Labor Relations Council as appropriate.

-2-

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

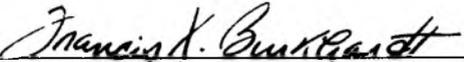
(a) File Labor Organization Annual Report Form LM-3 for the fiscal years ending December 31, 1975, and December 31, 1976, with the Office of Labor-Management Standards Enforcement, U.S. Department of Labor, as required by Section 18(c) of Executive Order 11491, as amended.

(b) In the future, file promptly all similar financial and other reports as they become due, as required by Section 18(c) of the Order.

(c) Post on bulletin boards, in normal meeting places, including all places where notices to members are customarily posted, and on bulletin boards provided for NAGE Local 12-69-R members at Hamilton Air Force Base, San Rafael, California, Point Arena Air Force Station, Point Arena, California, and at any other agency where National Association of Government Employees Local 12-69-R has been granted exclusive recognition, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the President of National Association of Government Employees, Local 12-69-R, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. The President shall take steps to insure that such notices are not removed, altered, defaced, or covered by any other material.

(d) Pursuant to Section 204.92 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
June 8, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

-3-

APPENDIX

NOTICE TO ALL MEMBERS

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our members that:

WE WILL NOT fail to file Labor Organization Annual Report Form LM-3 for the fiscal years ending December 31, 1975, and December 31, 1976.

WE WILL file these Labor Organization Annual Reports with the Office of Labor-Management Standards Enforcement, U.S. Department of Labor, as required by Section 18(c) of Executive Order 11491, as amended.

WE WILL, in the future, file promptly all similar financial and other reports as they become due.

Dated: _____ By: _____
President, National Association
of Government Employees, Local
12-69-R

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 members have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judge

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036

211 Main Street, Suite 600
San Francisco, California 94105



(415) 556-0555

In the Matter of

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL 12-69-R

Respondent

CASE NO. S-E-10

Mildred L. Wheeler, Esquire
U. S. Department of Labor
Office of the Solicitor
Room 10404
450 Golden Gate Avenue
San Francisco, California 94102
For the Government

Before: THOMAS SCHNEIDER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Findings of Fact and Conclusions

A complaint was filed herein on behalf of the Director, Office of Labor-Management Standards Enforcement, United States Department of Labor, (hereinafter "Director") on September 13, 1977. The complaint alleged that Respondent failed to file Labor Organization Annual Reports Form LM-3 for fiscal years ending December 31, 1975, and December 31, 1976.

Hearing on the complaint was first scheduled for December 8, 1977, and then rescheduled for January 19, 1978, and rescheduled again for February 23, 1978, at which time said hearing was held in San Francisco. Mrs. Winifred Murphy, President of Respondent, had actual notice of the hearing on February 23, 1978, in that the Administrative Law Judge, who held the hearing, gave her such notice by telephone on January 19, 1978, as well as notice having been sent later by certified and regular mail to 9 Alta Drive, Petaluma, California 94952, the mailing address of Respondent appearing in the Director's file.

June 8, 1978

Respondent failed to appear at the hearing on February 23, 1978. The Director appeared by his attorney, Mildred Lau Wheeler. No party filed any briefs. On the basis of the evidence introduced at the hearing and under 29 C.F.R. § 204.69(b)(2) the allegations of the complaint are found to be true, and in particular, it is found that Respondent failed to file Labor Organization Annual Reports Form LM-3 for the fiscal years ending December 31, 1975, and December 31, 1976, thereby violating 29 C.F.R. Part 403, as made applicable by 29 C.F.R. § 204.3 and § 18(c) of Executive Order 11491.

Recommended Order

The Respondent is directed to file Labor Organization Annual Reports Form LM-3 for the fiscal years ending December 31, 1975, and December 31, 1976.

Assistant Secretary

The foregoing is my Recommended Decision and Order.



THOMAS SCHNEIDER
Administrative Law Judge

Dated: March 17, 1978
San Francisco, California

TS:scm

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION ON GRIEVABILITY-ARBITRABILITY
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

MARSHALL SPACE FLIGHT CENTER,
MARSHALL SPACE FLIGHT CENTER, ALABAMA
A/SLMR No. 1060

This case involved an Application for Decision on Grievability or Arbitrability filed by the Marshall Engineers and Scientists Association, Local 27, International Federation of Professional and Technical Engineers (Applicant) challenging a determination by the Marshall Space Flight Center (Activity) that a grievance filed by the Applicant was not grievable or arbitrable under the parties' negotiated agreement.

The Applicant contended that the Activity violated the negotiated agreement when it filled two supervisory positions from outside the unit, although unit members had applied. The Activity maintained that the grievance could not be processed under the negotiated grievance procedure because the positions involved were management positions outside the Applicant's bargaining unit.

The Administrative Law Judge found that because the grievance involved a matter which arguably concerned the interpretation and application of the negotiated agreement, the dispute was over a matter within the scope of the negotiated grievance procedure and, therefore, should be referred to an arbitrator. In this regard, he also found that there was no prohibition in either the Order or the parties' agreement which would preclude the processing of a grievance on the filling of supervisory vacancies.

The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered the Activity to take appropriate action to implement his finding.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

MARSHALL SPACE FLIGHT CENTER,
MARSHALL SPACE FLIGHT CENTER, ALABAMA

Activity

and

Case No. 40-7474(GA)

MARSHALL ENGINEERS AND SCIENTISTS
ASSOCIATION (MESA), LOCAL 27,
INTERNATIONAL FEDERATION OF PROFESSIONAL
AND TECHNICAL ENGINEERS

Applicant 1/

DECISION ON GRIEVABILITY-ARBITRABILITY

On March 9, 1978, Administrative Law Judge George A. Fath issued his Recommended Decision and Order in the above-entitled proceeding, finding that the subject matter of the grievance herein was subject to the grievance-arbitration procedure under the parties' negotiated agreement. Thereafter, the Activity filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Activity's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation. Thus, I find that the issue raised by the grievance herein concerning whether

1/ In his Recommended Decision and Order, the Administrative Law Judge inadvertently stated that the parties herein jointly filed the instant application. In fact, the labor organization noted above was the applicant herein. This inadvertence is hereby corrected.

certain provisions of the negotiated agreement are applicable to supervisory positions involves a question of interpretation and application of the negotiated agreement and, therefore, is grievable and arbitrable.

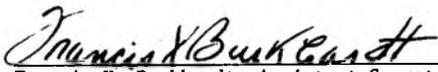
FINDING

IT IS HEREBY FOUND that the grievance in Case No. 40-7474(GA) is subject to the grievance and arbitration procedures under the terms of the parties' negotiated agreement.

ORDER

Pursuant to Section 6(a)(5) of Executive Order 11491, as amended, and Section 205.12(a) of the Regulations, it is hereby ordered that the Marshall Space Flight Center shall notify the Assistant Secretary of Labor for Labor-Management Relations, in writing, within 30 days from the date of this order as to what steps have been taken to comply with the above finding.

Dated, Washington, D. C.
June 8, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



RECOMMENDED DECISION AND ORDER

.....
In the Matter of

MARSHALL SPACE FLIGHT CENTER
MARSHALL SPACE FLIGHT CENTER, ALABAMA
Activity

and

MARSHALL ENGINEERS AND SCIENTISTS
ASSOCIATION (MESA)
LOCAL 27, INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL ENGINEERS
Applicants
.....

Case No. 40-7474 (GA)

Richard A. Reeves, Esquire
Marshall Space Flight Center
Office of the Chief Counsel
Marshall Space Flight Center, Alabama 35812

Lawrence F. Watson, Esquire
Associate Counsel
Office of Chief Counsel
Marshall Space Flight Center, Alabama 35812

For the Activity

James E. Lyons, Esquire
1126 - 16th Street, N.W.
Washington, D.C. 20036

For the Applicants

Before: GEORGE A. FATH
Administrative Law Judge

This is a proceeding on an application for Decision on Grievability or Arbitrability, filed pursuant to Section 13(d) of the Executive Order 11491, as amended (hereinafter referred to as the Order), and the provisions of Section 205 of the Regulations (40 Fed. Reg. 89 (1975) by Marshall Engineers and Scientists Association (MESA) and Marshall Space Flight Center (hereinafter called the Activity).

After timely notice a formal hearing on the application was conducted at Huntsville, Alabama. The parties, who were represented by counsel, were given full opportunity to present evidence, oral argument, and briefs on the issues. The hearing was stenographically reported. Briefs were submitted and filed with the record. This decision follows termination of the hearing and it is based on the entire record.

Statement of Proceedings

The Regional Administrator, Atlanta Region, conducted an investigation into the grievance matters alleged in the application for decision. In a Report and Findings on Grievability, dated October 6, 1976, the Commissioner concluded "that the matters grieved are not subject to the Articles cited by the Appellant in its grievance".

The Assistant Secretary granted a request for review of the Regional Administrator's determination and after review remanded the case for hearing to resolve questions of fact and intent of the parties by taking a record of testimony.

Accordingly, the Regional Commissioner issued a notice of hearing and advised the parties that evidence should be adduced at the hearing as to: (1) the collective bargaining agreement between the parties in effect at the time of incident giving rise to the application, including the effective date and duration of this agreement, the grievance procedure contained therein, and the scope of his procedure; (2) the factual circumstances surrounding the incident giving rise to the grievance generating the application, including the dates of the announcements and filling of the vacancies in question; (3) the filing and the processing of the grievance at a issue, including the date the grievance procedure was

invoked, those provisions of the parties' negotiated agreement alleged to have been violated, and the position of the Activity at each step in the processing of the grievance; (4) the relevant provisions of the negotiated agreement including the bargaining history of these provisions, the intentions of the parties in their negotiations, and the past practices of the parties regarding their application; especially relevant is the intention of the parties regarding to what extent Article 23 applies to positions outside the bargaining unit for which bargaining unit employees may apply; (5) the denial of the grievability or arbitrability of the matter by the Activity and the rationale behind this denial; and (6) the grounds upon which the Applicant asserts the matter to be grievable or arbitrable.

Agreement

The following are excerpts from the Agreement between the parties effective February 5, 1974 are pertinent to a determination of the issue:

ARTICLE 2

RECOGNITION AND UNIT DESIGNATION

Section 2.02. The Unit to which this Agreement shall apply is composed of all professional engineers and scientists (NASA Classification Code Series 200 and 700) employed by Marshall Space Flight Center and excluding all management officials, non-professional employees, all other professionals employees, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors and guards as defined in Executive Order 11491, as amended, and as certified by the United States Department of Labor, Case Number 40-4261(RO).

ARTICLE 3

PROVISIONS OF LAW AND REGULATIONS

Section 3.01. In the administration of all matters covered by the Agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published NASA and MSFC policies and regulations in existence at the time the Agreement was approved; and by subsequently published agency policies and regulations

required by law or by the regulations of appropriate authorities; subject to the provisions of Articles 8 and 46 of this Agreement.

ARTICLE 11

GRIEVANCE PROCEDURE

Section 11.01. The purpose of this Article is to provide a mutually satisfactory procedure for the settlement of grievances of the parties and the Unit employees involving the interpretation or application of this Agreement. The EMPLOYER and the UNION agree every effort shall be made to settle all grievances at the lowest possible level.

Section 11.02. This shall be the exclusive procedure available to employees in the bargaining unit for grievances which arise over the interpretation or application of this Agreement. It is not applicable to, nor does it cover, any other matters, including those for which statutory appeals procedures exist.

ARTICLE 12

GRIEVANCE ARBITRATION

Section 12.01. The purpose of this Article is to provide for arbitration of unresolved grievances resulting from an employee's dissatisfaction, or that of the UNION, concerning the interpretation or application of this Agreement. Such arbitration shall only be invoked by the EMPLOYER or the UNION.

ARTICLE 23

PROMOTIONS AND ASSIGNMENTS

Section 23.01. The purpose of this plan is to assure selection from among the best qualified persons available to fill vacancies on the basis of merit, fitness, and qualifications and without regard to race, color, religion, national origin, marital status, sex, age, physical handicap, union affiliation, personal favoritism or political affiliations. The merit promotion plan does not guarantee promotion but rather is intended to assure that all qualified employees receive fair and equitable consideration for promotional opportunities.

Section 23.02. The EMPLOYER agrees to implement the promotion plan in accordance with all applicable existing or future rules or regulations and directives issued by the Civil Service Commission and the Agency.

Section 23.03. The EMPLOYER agrees to consult with the UNION on modifications of the NASA Merit Promotion Plan proposed by NASA or MSFC.

Section 23.04. The EMPLOYER agrees to post all vacancies for promotion on all official bulletin boards 10 days prior to the closing date of the announcement. The EMPLOYER agrees to distribute a weekly Manpower Bulletin listing open promotion announcements to all supervisors with the request that the bulletin be circulated to all employees. Copies of the Manpower Bulletin will also be furnished.

Section 23.08. The EMPLOYER agrees to adopt adequate procedures to ensure that promotions are not based on personal relationship or other types of personal favoritism or patronage. In addition, no official may, in recommending or selecting candidates for promotion or in operating a promotion program, show or give preference to any candidate based upon factors not pertinent to the candidate's qualifications for performing work of a higher level, including personal friendship or political connections.

Section 23.10. During the period from announcement of a position to final selection, the UNION President will be provided upon request with:

- a. The position and its location
- b. The name of the selecting official
- c. The number and names of qualified applicants
- d. The weighted evaluation criteria
- e. The number of highly qualified applicants

After final selection, the UNION President will be provided, upon request, with the names of the highly qualified top 10, the name of the selectee, and the names of the panel members.

Section 23.11. It is recognized by the parties that supervisory positions are outside the bargaining unit; however, if bargaining unit employees apply for a supervisory position, Section 23.10 above will be followed.

Section 23.13. In the event a selecting official fails to select a Highly Qualified candidate who is entitled to consideration for repromotion, he will document his reasons for non-selection. Upon request this documentation will be furnished the employee and/or the UNION President.

ARTICLE 25

DETAILS

Section 25.01. A detail is the temporary assignment of an employee to a different position for a specified period, with the employee returning to his regular duties at the end of the detail. The EMPLOYER may detail employees where such action will relieve a temporary shortage of personnel, will reduce an exceptional volume of work, or will enable more effective administration by permitting necessary flexibility in assigning the work force. All details will be made in conformity with appropriate law and regulations set forth in the Federal Personnel Manual.

Section 25.08. The EMPLOYER will control the duration of details and assure that the details do not compromise the open-competitive principle of the merit system or the principles of job evaluation.

ARTICLE 28

REDUCTION IN FORCE

Section 28.06. Demotions resulting from positions being downgraded other than by correction of a classification error or from a change in classification standards will be accomplished in accordance with reduction-in-force procedures. An employee demoted in NASA without personal cause is entitled to special consideration for repromotion to any vacancy for which he is qualified and in the area of consideration at his former grade (or any intervening grade) before any attempt is made to fill the position by other means. Lists of employees

demoted during reduction in force will be established by the EMPLOYER to avoid overlooking them when promotion opportunities occur.

Section 28.07. Employees eligible for repromotion will be given special consideration for promotion vacancies prior to announcement of such vacancies under the Merit Promotion Plan. A file of repromotion consideration memoranda will be maintained in the Labor Relations Office for UNION reference. In the event the vacancy is subsequently announced, repromotion eligibles will be notified by a copy of such announcement.

UNION PROPOSALS REJECTED BY MANAGEMENT

The following proposals, made by the Union during the negotiations leading up to the Agreement, were rejected by the Activity:

ARTICLE XXI

PROMOTIONS AND ASSIGNMENTS

Section 1. All promotional and other job opportunities which are covered by the merit promotion plan and for which Unit employees may be qualified, including supervisory positions, will be advertised by posting on official bulletin boards within the Center and by publication in at least one (1) issue of the Marshall Star (or any subsequent Center newspaper). Announcements will owmain (sic) open a minimum of ten (10) working days. The Employer will furnish the Union a copy of each such announcement prior to the time that it is posted on the official bulletin boards.

Section 2. The minimum area of consideration for GS-14 and GS-15 positions and all supervisory positions for which Unit members may be qualified will be Center-wide. For other positions the area of consideration may be restricted to a major organizational element but it is desirable to have this area of consideration Center-wide also. The area of consideration may be extended or limited as set forth by the merit promotion plan only with the concurrence of the Union Representative on the rating panel or the Union President.

Section 19. The Employer will provide a career development plan, including supervisory and management positions, for the

advancement of all Unit employees. The Union will assist management in establishing a career development plan.

Findings of Fact

At all times pertinent hereto, there was a collective bargaining agreement between the parties effective February 5, 1974, covering a term of two years. 1/

Article 11, Grievance Procedure, of the Agreement provides a procedure for the settlement of grievances of the parties and the Unit employees involving the interpretation or application of the Agreement through the procedure contained therein. Unresolved grievances are subject to arbitration under the provisions of Article 12, Grievance Arbitration, of the Agreement.

On forms captioned "Job Opportunities - Merit Promotion Plan", the Activity announced the filling of two supervisory positions, Grades GS-15, for Deputy Director of the Systems Dynamics Laboratory, and Chief Manager of the Engineering Management Office in the Shuttle Projects Office. The opening and closing dates for applications for both positions were April 21, 1976 and April 30, 1976. These positions, outside the bargaining unit, were filled by management from outside the unit though members of the unit had applied.

In a letter to the Activity dated May 28, 1976, the Union charged violations of Articles 3, 6, 23, 25, and 28 of the Agreement, and suggested meeting to resolve the grievance pursuant to the grievance procedure contained in the Agreement. The charges underlying the Union grievance over the selections are set out in the letter: preselection; special consideration not given Repromotion Eligibles; reasons for non-selection of repromotion eligible not persuasive; improper promotion panel membership; ranking procedure by panel improper; application of provisions of MESA-MSFC contract agreement not applied; some repromotion eligibles not sent notice of promotion announcement at time of distribution in accordance with Article 28.07.

The response of the Activity is contained in a letter of

1/ Effective March 25, 1977, the parties entered into a successor agreement for a term of three years.

June 8, 1976, in which it informed the Union that the grievance could not be accepted for processing under the provisions of Article 11, Grievance Procedure because the positions are MSFC management positions and not in the MESA bargaining unit.

The evidence produced by the parties relative to the negotiations leading up to the agreement, the meaning of the provisions relative to supervisory positions, and the intended coverage of the grievance procedure is in conflict.

Mr. Richard J. Persons, International Representative for the International Federation of Professional and Technical Engineers, who was the Chief Negotiator for the Union during the contract negotiations, was called by and gave testimony for the Union. With reference to the extent to which the Union wanted to represent the employees, he testified "We said, 'All promotional and other job opportunities which are covered by the merit promotion plan and for which unit employees may be qualified including supervisory positions'." He said that Section 23.10 was written into the contract in response to the Union's proposal that it have access to certain data in order to intelligently represent the employees in the Unit who might be aggrieved in the selection process for filling vacancies. The Union did not assert the right to represent supervisors applying for supervisory or managerial positions. He quoted management as stating "... you have got to recognize that you do not represent supervisors, however, if a Bargaining Unit employee applies for a supervisory position, we will agree to give you what is necessary in 23.10 in order for you to intelligently represent that employee" (T. 26). It was the Union's intention that this information would be used in the event an employee applied for a supervisory position and felt grieved because of nonselection (T. 27).

Mr. Robert Lewis, alternate spokesman for the Union in the negotiations, corroborated the testimony of Mr. Persons. He testified that the Union continuously expressed an intention to cover promotions in the bargaining unit into threshold supervisory positions, i.e. to be able to grieve the procedural aspects of the promotion process.

Lewis cited the Funderburk case as an example of the parties' accord on the coverage of the grievance procedure. That case involved a repromotion eligible who grieved his nonselection for a supervisory position. The matter was

processed pursuant to the grievance and arbitration provisions of the contract without objection from the Activity.

However, when the present grievance was discussed by the parties, the Activity took the position that it was not obligated to negotiate supervisory promotional procedures, and, therefore, it was not obligated to enter into grievance procedure over these supervisory positions.

Mr. Gerald D. Fox, Personnel Director, who was the Alternate Chief Spokesman for the Activity during negotiations stated that the Activity had no intention of including supervisory positions within the provisions of Article 23, Promotions and Assignments. He recalled that the original Union proposal on the subject, submitted as Article XXI, containing references to supervisory positions was rejected by the Activity. He said the reference to supervisory positions was consciously negotiated out of the Agreement, and therefore, no reference to supervisory positions appears in Article 23 of the Agreement. The Union explains that this proposal in Article XXI was withdrawn because management suggested that the use of the term supervisory positions in the proposal was a redundancy inasmuch as the article under discussion (Article 23) covered all positions.

Fox was questioned on the Funderburk case. He explained that the Activity accepted that grievance through administrative error. The Activity did not know that the position over which Funderburk grieved was a supervisory position.

The testimony of Fox dealt largely with interpreting the provisions of the Agreement to the effect that the Activity is not bound to the grievance procedure in this instance.

Mr. Arthur E. Sanderson, who was Chief Negotiator for the Activity during the negotiations, was called by the Activity. He had little recall of the negotiations relative to supervisory positions, and he did not recall that there was any discussion of the application of the grievance procedure to those positions. He testified without aids to memory and his testimony lacked detail. However, based on the feelings he had at the time, he was sure he was not going to let supervisory positions be included in any part of the contract.

Issue

Whether the grievance of the Union, the manner of filling supervisory positions by the Activity, is on a matter subject to the grievance-arbitration procedure contained in their existing Agreement.

Conclusions of Law

Under the Order, as amended, questions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement are referable to the Assistant Secretary for decision.

Section 6(a)(5) provides that the Assistant Secretary shall "decide questions as to whether a grievance is subject to a negotiated grievance procedure or subject to arbitration under an agreement as provided in Section 13(d) of this Order".

Section 13(d) of the Order, as amended, provides:

(d) Questions that cannot be resolved by the parties as to whether or not a grievance is on a matter for which a statutory appeal procedure exists, shall be referred to the Assistant Secretary for decision. Other questions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, may by agreement of the parties be submitted to arbitration or may be referred to the Assistant Secretary for decision.

The parties do not contend that this is a matter for which a statutory appeal exists.

The responsibilities of the Assistant Secretary under the foregoing sections were addressed by the Federal Labor Relations Council in Department of the Navy, Naval Communications Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667, FLRC No. 74A-19 (Feb. 7, 1975), Report No. 63.

In Community Services Administration, Assistant Secretary Case No. 749, FLRC No. 76A-149 (Aug. 17, 1977), Report No. 124, the Council restated and clarified the principles of Crane.

The issue presented in that case is analogous to the one at hand. The Agency selected an outside applicant for a position over in-house applicants, one of whom was a member of the bargaining unit. There as here, the Union filed a grievance under the parties' negotiated grievance procedure contending that the agency did not adhere to the agreement in filling the vacancy. In the Community Services case, the Council found that the Assistant Secretary interpreted the substantive provisions of the agreement rather than simply whether the grievance involved the interpretation or application of the agreement when he determined that the position was a policy position and excluded from coverage of the grievance procedure of the agreement. In its decision, the Council repeated the conclusions of the Crane case, and further defined the Assistant Secretary's role in deciding whether a dispute is or is not subject to a particular negotiated grievance procedure:

... (1) where an issue is presented concerning the applicability of a statutory appeal procedure, the Assistant Secretary must decide that question; (2) where a dispute is referred to him as to whether a grievance is on a matter subject to a negotiated grievance procedure, the Assistant Secretary must decide such grievability dispute; and (3) in resolving the dispute referred to in (2), above, the Assistant Secretary must consider the relevant agreement provisions (including those provisions which describe the scope and coverage of the negotiated grievance procedure and any substantive provisions of the agreement which are being grieved) in light of related provisions of statute, the Order, and regulations, more particularly where special meaning is attached to words used in the relevant agreement provisions by such statute, regulation, or the Order and there is no indication that any other than the special meaning was intended by the parties.

In deciding whether a dispute is or is not subject to a particular negotiated grievance procedure, it is the responsibility of the Assistant Secretary to consider those "provisions which describe the scope and coverage of the negotiated grievance procedure," i.e., the general scope of such procedure as well as

any specific exclusions contained therein. That is, he must decide, just as an arbitrator would decide at the outset in the Federal sector (or as an arbitrator or the Federal court would in the private sector) whether the grievance involves a dispute which the parties intended to be resolved through their negotiated grievance procedure. The Assistant Secretary's consideration of "substantive provisions of the agreement being grieved" would be for the limited purpose of determining whether the grievance involves a claim which on its face is covered by the contract, i.e., involves a matter which arguably concerns the meaning or application of the substantive provision(s) being grieved and which the parties intended to be resolved under the negotiated grievance procedure.

In the same case, the Council noted that the description of the Assistant Secretary's responsibilities under Section 13 (d) of the Order is also in accord with the role of Federal Labor-Management Relations Act (29 U.S.C. 185) to compel specific performance of an arbitration agreement.

The Courts have declined to judge the merits and equities of grievances. The decisions favor arbitration where it is arguably within the scope of the agreement. Where the parties have agreed to submit all questions of contract interpretation to arbitration, the function of the court is confined to determining whether a claim of arbitrability on its face is governed by the contract. Whether a moving party is right or wrong is a question of contract interpretation for the arbitrator. "The Courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960). The grievance and arbitration provisions of the agreement give it life and are a part of the continuous collective bargaining process. Except for those matters which are specifically excluded from coverage, all questions on which the parties disagree must come within the scope of the grievance and arbitration provisions of the collective bargaining agreement. United Steelworkers v.

Warrior and Gulf Navigation Co., 363 U.S. 574 (1960).

The rules applicable to this case require consideration of the following: Is the subject matter grievable under the Order as amended? Is the subject matter of the grievance in this case excluded from coverage of the grievance procedure contained in the Agreement between the parties? Is there a dispute between the parties involving the interpretation and application of the Agreement?

The Activity contends that supervisors and management officials are excluded from the bargaining unit by Section 10(b) of the Order, as amended, and, therefore, it has a right to refuse to bargain on matters pertaining to the filling of supervisory positions. Inasmuch as Section 10(b) deals with recognition, this argument is inappropriate since there are no questions of recognition or composition of the unit presented by this case.

It argues that management has the recognized right to refuse to bargain on matters pertaining to the filling of supervisory positions. It cites Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71 (Mar. 3, 1976), Report No. 100, and correctly so, in support of the principle that under the Order an Agency has no obligation to bargain on procedures for the filling of supervisory positions outside the bargaining unit. However, that case also holds that the Agency may at its option bargain on such proposals. TANG is not in point and it is not applicable. This case is concerned with the interpretation of the grievance-arbitration provisions of an existing agreement, rather than with the appropriateness of the subject matter for negotiation. The time for raising an objection to the subject matter of bargaining is past. In short, the argument does not address the question as to whether or not the subject of the grievance in this case is a proper matter for processing under the grievance procedure of the parties' Agreement.

If the parties are not prohibited by the Order from negotiating procedures for the filling of supervisory positions, it follows as a corollary from TANG that the Order does not void such provisions in existing agreements. This reasoning, applied to this case, leads to the conclusion that the subject matter of the Union's grievance, the filling of supervisory positions, is not barred by the Order.

Section 11.01 of Article 11, Grievance Procedure, of the Agreement between these parties states clearly that the purpose of the Article is to provide a mutually satisfactory procedure for the settlement of grievances involving the interpretation or application of the Agreement. Article 12, Grievance Arbitration, provides arbitration as the means of settling unresolved grievances resulting from dissatisfaction of the employees or the Union. The text of these Articles indicates an intent, on the part of the drafters to make the grievance-arbitration procedure the sole and exclusive means of resolving disputes over the meaning of the Agreement. Neither Article contains exceptions to coverage, and the language implies universality. The Articles applies to all grievances involving matters of interpretation and application of the Agreement.

The parties gave little attention to the meaning and scope of the grievance procedure contained in their agreement. Instead, they focused on Article 23, Promotions and Assignments. Each contended that its interpretation of that Article was dispositive of the issue in the case. The Union said it intended to include supervisory positions in the terms of the Article. The Activity stated that provisions affecting supervisory positions were consciously negotiated out of the agreement and pointed to its rejection of a Union proposal that would have included supervisory positions. The Union contended that Section 23.04 of the Agreement covers all vacancies. The Activity finds that all vacancies are not covered by the Article because Section 23.11 of the Agreement contains an express recognition by the parties that supervisory positions are outside the bargaining unit. The Activity finds it abundantly clear that the Union was not entitled to copies of supervisory promotion announcements under Section 23.04 of the Agreement.

With all respect due and accorded to the arguments of the parties, the Agreement is not abundantly clear as to what vacancies must be posted, and which supervisory positions, if any, are included within the meaning of the Article on Promotions and Assignments. Section 23.11 places the Union in a position of being able to obtain selection criteria where a unit member applies for a supervisory position. Section 28.07 requires the Activity to give special consideration to repromotion eligibles irrespective of whether they are being considered for supervisory positions. The handling of the Funderburk

case, which involved arbitration of a grievance over the selection to fill a supervisory vacancy by a repromotion eligible, seems to belie the Activity's present position. But, to go beyond simply posing these questions is to interpret the substantive provisions of the Agreement. For purposes of this decision, it suffices to find that the parties are in dispute on a matter involving the interpretation and application of the Agreement.

In summary, therefore, it is found: that the Order does not prohibit the processing of a grievance on the matter of filling supervisory vacancies under the provisions of an existing agreement; that the Agreement between the parties does not exclude the matter of filling supervisory positions from the operation of the grievance procedure; and, that the parties are in dispute involving the interpretation and application of the Agreement.

The Union's grievance involves a matter, which, at least, arguably concerns the meaning or application of the contract. Under these circumstances, and, in the absence of a prohibition in the Order or in their Agreement, the parties are bound to follow the procedures established by their contract for settling disputes involving the interpretation and application of the Agreement.

The purposes of the Order and the effectuation of the Agreement will be best served by the continuing collective bargaining opportunity afforded the parties by their contract.

For the reasons stated, it recommended that the case be returned to the parties for further proceedings.

Recommended Order

In consideration of the foregoing, it is recommended that the Assistant Secretary find that the subject matter of the Union's grievance is subject to the grievance-arbitration procedure in the Agreement in effect between the parties at the time the grievance arose, and that the matter be returned to the parties for processing in accordance with that Agreement.


 GEORGE A. FATH
 Administrative Law Judge

Dated: March 9, 1978
 Washington, D.C.

GAF:le

June 9, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE, REGION VI,
HOUSTON, TEXAS
A/SLMR No. 1061

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU), and NTEU Houston Chapter 163, alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when it restricted certain types of overtime work and pay for employees in Customs Region VI without negotiations regarding the impact upon the employees involved.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (6) of the Order and recommended that the complaint be dismissed. He found, in this regard, that the NTEU had failed to request bargaining on the impact of some of the overtime restrictions proposed by the Respondent, and that the Respondent did, in fact, bargain in good faith regarding the impact of those changes about which it was requested to negotiate.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

A/SLMR No. 1061

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE, REGION VI,
HOUSTON, TEXAS

Respondent

and

Case No. 63-6902(CA)

NATIONAL TREASURY EMPLOYEES UNION (NTEU),
and NTEU HOUSTON CHAPTER 163

Complainant

DECISION AND ORDER

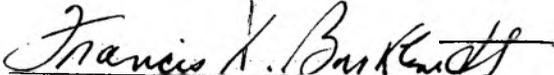
On March 20, 1978, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed with respect to the Administrative Law Judge's Recommended Decision.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-6902(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 9, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



..... :
 In the Matter of :
 :
 Treasury, U.S. Customs, :
 Region VI, Houston, Texas :
 Respondent :
 and :
 : Case No. 63-6902(CA)
 National Treasury Employees :
 Union (NTEU) and Houston :
 Chapter 163 :
 Complainant :

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Before: RHEA M. BURROW
 Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

This is an Unfair Labor Practice proceeding in which a formal hearing of record was held in Houston, Texas on August 16, 1977, pursuant to Executive Order 11491, as amended, (hereinafter referred to as the Order). In a complaint dated July 21, 1976, the Complainant alleged violations of Section 19(a)(1) and (6) of the Order. It was also alleged that the Regional Commissioner on January 20, 1976 issued a memorandum restricting certain types of over-time work and pay for employees in Customs Region VI that

was to be effective on February 1, 1976 and April 1, 1976. Specifically, it was stated in the complaint that: "The union field representative, J. Thornton, in Austin was notified telephonically by management of this proposal. Upon the insistence of Mr. Thornton, on February 18, 1976, a meeting was held in Houston with management and amongst other business, Mr. Thornton notified the representatives of management that NTEU's position was that the policy concerning uncontrollable overtime for Custom Patrol Officers was not being implemented on a fair and equitable basis, and further, outlined at that time the minimum requirements to which the union could subscribe. Management made no response at that time to the proposal. On February 25, 1976, an additional letter BUD-4-02-0 over the signature of Shelby L. White was sent to the District Director in Houston advising him that the requirements of the original letter of January 20, 1976 were to be implemented or scheduled as of April 1, 1976. The unilateral implementation of the policies in the letter are a gross violation of the principle of good faith bargaining in that no meaningful negotiations were ever undertaken between NTEU and Customs Management concerning actions that have severe impact on the employees involved."

The employees concerned in this proceeding are Customs Patrol Officers and Customs Inspectors. The memorandum of January 20, 1976 concerning overtime pay in Customs' Region VI restricted Customs Inspectors and Customs Patrol Officers overtime pay effective February 1, and April 1, 1976. The types of overtime pay effective February 1, 1976 were: (1) the Federal Employees Pay Act overtime, referred to herein as FEPA; and (2) non-reimbursable overtime, referred to as 1911; overtime effective April 1, 1976 is known as Administrative Uncontrollable Overtime, referred to herein as AUO, and applied to Customs Patrol Officers and not Custom Inspectors.

Upon the basis of the entire record, including the evidence adduced, the timely submitted briefs, and my observation of the witnesses and judgment as to their credibility, I make the following findings, conclusions and recommendation.

Findings of Fact

1. The National Treasury Employees Union (hereafter referred to as NTEU) is, and was at all times material herein, the exclusive bargaining representative for Custom Patrol Officers and Customs Inspector employees of Region VI,

also known as the Houston Region of the United States Customs Service. There was pending however at the time Notice and restriction of overtime pay was effected a rival union RO petition challenging the status of NCSA's certification. 1/

2. On January 16, 1976, John S. Williams, Chief, Labor Employee Relations Branch, Region VI, U.S. Customs Service, Houston, Texas called James W. Thornton, NTEU Field Representative and advised him of forthcoming restrictions on overtime for Custom Patrol officers and Custom Inspectors in Region VI that would soon take place. The restrictions affecting the employees overtime included FEPA and 1911 to be effective February 1, 1976 and AUO effective April 1, 1976.

3. On January 20, 1976 the Regional Commissioner issued a memorandum to all District Directors regarding the "Budget for the remaining Fiscal Year 1976:", and it provided that effective February 1, 1976:

"1. The Customs Patrol - No FEPA will be used except in emergency situations.

2. All other divisions will cut FEPA overtime by 10 per cent.

"Administratively Uncontrollable Overtime

Effective April 1, 1976, the following restrictions will be observed:

(1) The following positions will be removed from AUO rolls

- (a) Regional Customs Patrol Office
- (b) All Houston District Patrol positions
- (c) At El Paso and Laredo, the Director and his principal assistants for Patrol.

1/ NTEU was certified by the Department of Labor in 1975 as exclusive representative of Region VI employees after National Customs Service Association (NCSA), affiliated with NTEU. The election to resolve the certification petition was completed April 8, 1976 and NTEU was certified as the victor on April 30, 1976. (Respondent's Exhibit No. 1).

(2) Custom Patrol positions located at Rio Grande City, McAllen and Brownsville will be reduced to 15 per cent. All other Customs Patrol positions will be reduced to 10 per cent.

"1911 - Non Reimbursable Overtime. All overtime in this category will be cut 33 1/3 per cent.

For border stations working vehicular traffic, it is directed that as many vehicles and passengers be worked in primary as possible. It is important that we keep all primary lanes open during peak traffic periods.

"Repairs - All repairs will be cut 33 1/3 per cent."

4. The AUO, FEPA and 1911 - Non Reimbursable Overtime provisions contained in the January 20, 1976 memorandum were implemented on February 1 and April 1, 1976 as stated in the memorandum.

5. NTEU Representative Thornton along with Jerry Klepner from NTEU headquarters met with Regional Commissioner of Customs Cleburne Maier, John Biondi, Director of the Personnel division, and John Williams, labor management chief on February 5, 1976 and among the topics discussed were the various restrictions relating to overtime work and pay.

6. On February 18, 1976, NTEU National Field Representative Thornton and Inspector Roger Rogers of Houston NTEU Chapter 163 met with Respondent Officials Assistant Regional Commissioner Modesto Canales, John Williams and John Biondi and overtime restrictions were again discussed. At the meeting the NTEU conceded or agreed with the overtime restrictions and action implemented as to FEPA and 1911 - non-reversible overtime 2/ but disagreed as to the proposed

2/ At the February 18, 1976 conference, Thornton testified:

Q. At that meeting did the union make a proposal?

A. Yes. Yes, we did. We -- our primary concern -- well, at this particular time, this stage of the procedure we knew that regarding 1911 overtime and 1945 FEPA overtime that if money did not exist, and we - we've made the expression several times to members of the unit and members of management (continued on next page)

AUO restrictions on the basis that the cut was not applied evenly throughout the entire region.

7. The Union made no request to bargain with respect to FEPA and 1911 non Reimbursable overtime after having been timely informed of the restrictions on January 16, 1976 before implementation on February 1, 1976.

8. The NTEU did make timely request to bargain as to Administratively Uncontrollable Overtime and this matter was discussed with management officials at bargaining sessions on February 5 and February 18, 1976.

9. The Respondent did not accept the recommendation or proposal made by Complainant Union with respect to AUO and the program was implemented on April 1, 1976.

10. The Respondent did in fact bargain with Complainant Union at its request regarding administratively uncontrollable overtime.

Principal Arguments

In its post-hearing brief the Complainant advanced argument that the Respondent (1) "Customs failed to bargain in good faith as required by Section 11(a) of Executive Order 11491, as amended, and therefore violated Sections 19(a)(1) and (6) of the Order" and (2) "During the period in question, the mere pendency of a representation petition alone was insufficient basis for discontinuing recognition of the Complainant."

2/ (continued) that we were not in the money printing business and could not produce money, so it was a matter of getting it allocated otherwise, and if the money was not available it simply could not be paid.

"So in general we agreed with the 33 percent cut and the 10 per cent cut for those two particular types of overtime.

"That -- Our most immediate concern at that particular meeting was what to do about the CPO pay."

Later Thornton stated that while the matter of agreement was not discussed with management... "we felt that there was no other reasonable alternative. The fact that the funds did not exist, they could not be paid, and their proposal in this was fair and equitable because they cut for employees evenly throughout the entire region."

The Respondent advances three major points supporting its position: (1) "The proposal to restrict overtime for employees in Customs Region VI was transmitted to the National Field Representative of NTEU prior to the proposed effective date." (2) "That after being notified on January 16, 1976, of the proposed restrictions in overtime NTEU did not request impact and implementation bargaining until February 10, 1976, and then only on the proposed restrictions in AUO." (3) "Management of Customs Region VI did bargain in good faith with NTEU on the impact and implementation of the proposal to restrict Administratively Uncontrollable Overtime."

The Complainant charges in effect that the Respondent violated Section 19(a)(1) and (6) of the Order by its action in unilaterally reducing overtime work hours and pay of its custom inspectors and Custom Patrol Officers in the Houston, Texas area without negotiation with the Complainant as to impact and implementation resulting from changed working conditions of bargaining unit employees.

Section 19(a)(1) and (6) of Executive Order 11491 provides that "Agency management shall not (1) interfere with, restrain or coerce an employee in the exercise of rights assured by this Order; and (6) refuse to consult, confer or negotiate with a labor organization as required by this Order."

Discussion and Conclusions

1. Neither at the hearing or in its brief did the Respondent seriously contend that the pendency of a rival labor organization petition was a basis for not recognizing the Complainant Union. I conclude from the record that NTEU was at all times material herein, the exclusive bargaining representative for Custom Patrol Officers and Customs Inspector employees in Region VI (Houston), of the United States Customs Service.

2. The record supports Respondents position that NTEU was notified of management's January 16, 1976 proposal to restrict FEPA and 1911 - Non reimbursable overtime effective February 1, 1976, and Administrative Uncontrollable overtime on April 1, 1976. While the importance or significance of the FEPA and 1911 restrictions may not have been fully apparent, there was more than two weeks notice before their implementation without any request for bargaining. There is no dispute between the parties that the proposed decision to cut overtime was management's prerogative under

Section 12(b) of the Order and the Union's right to bargain was limited to impact and implementation. There was no timely request to bargain after Notice and even after the FEPA and 1911 overtime restrictions were made effective, it was conceded in effect that NTEU had no quarrel with the manner, method and fairness of management's decision in effectuating the FEPA and 1911 restrictions. I conclude that, management in Customs Region VI did not violate Section 19(a)(1) and (6) of the Order by unilaterally implementing the proposed cuts in FEPA and 1911 overtime on February 1, 1976, after notifying NTEU of this proposal on January 16, 1976 and having received no request to bargain on impact and implementation by NTEU. See, Department of Air Force, Norton Air Force Base, A/SLMR 261; Bureau of Medicine and Surgery, Great Lakes Naval Hospital, A/SLMR 289; Albany Metallurgy Research Center, U.S. Bureau of Mines, A/SLMR 408; United States Air Force Electronics Systems Division (AFSC), Hanscom Air Force Base, A/SLMR 571, In Social Security Administration, Bureau of Hearings and Appeals, Dallas, Texas, A/SLMR 816, the Assistant Secretary held where the Agency notified the Union of its decision to establish a new program, and the union failed to request bargaining concerning the impact and implementation of the institution of the new program, management did not violate Sections 19(a)(1) and (6) of the Order by failing to negotiate on impact prior to implementation.

3. There is no dispute that advanced notice of proposed restrictions in Administrative Uncontrollable Overtime was furnished the Union on January 16, 1976 and was briefly discussed by NTEU Representative Thornton with Management officials on February 5, 1976. Thereafter, Complainant on February 10, 1976 made a written demand to bargain on impact. On February 18, 1976 Union representatives met with management officials and expressed the opinion that the proposed AUO cuts in overtime were inequitable. The union proposed equalized cuts regionwide. Respondent replied that certain border cities such as Rio Grande City, McAllen and Brownsville, Texas were allotted the greatest percentage of CPO overtime because of the greater need for surveillance in these areas since they were hot spots for introduction of drugs into the country. It was not felt by management that a city like Houston, which was not on the border required the amount of AUO as the border cities. Other than the equalized regionwide cut that was unacceptable to management, no counterproposals were offered by the Complainant union and the meeting concluded without an agreement on the subject. There was no further request by the Complainant Union to bargain and the AUO restrictions were implemented by the Respondent and became effective April 1, 1976.

An agency is not required to succumb or agree to a complainant union's demands so long as it bargains on the unresolved issues in good faith. I conclude from all the evidence and circumstances in this matter that the Respondent did in fact bargain in good faith with the Complainant and did not refuse to consult, confer or negotiate with the Complainant union as required by the Order. 3/

I further conclude that the Respondent did not interfere with, restrain or coerce an employee in the exercise of rights assured by this Order; and, that Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of Section 19(a)(1) and (6) of the Order.

RECOMMENDATION

Having found from the record 4/ that the Respondent has not engaged in certain conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended; I recommend that the Assistant Secretary of Labor for Labor Management Relations enter an Order dismissing the complaint. herein in its entirety.

Rhea M. Burrow
 RHEA M. BURROW
 Administrative Law Judge

Dated: March 20, 1978
 Washington, D.C.

3/ I find it unnecessary to discuss the pendency of a rival union's petition in view of the fact that Respondent did not discontinue recognition of the Complainant union in this matter and in fact bargained with it in good faith.

4/ Having announced at the hearing that I would accept briefs if postmarked before the filing date, I consider them to have been timely received.

RMB:dmb

June 13, 1978

A/SLMR No. 1062

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
METROPOLITAN WASHINGTON AIRPORT SERVICE,
DULLES INTERNATIONAL AIRPORT; and
DIRECTOR, METROPOLITAN WASHINGTON AIRPORTS,
FEDERAL AVIATION ADMINISTRATION
A/SLMR No. 1062

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
METROPOLITAN WASHINGTON AIRPORT SERVICE,
DULLES INTERNATIONAL AIRPORT; and
DIRECTOR, METROPOLITAN WASHINGTON AIRPORTS,
FEDERAL AVIATION ADMINISTRATION

Respondents

and

Case No. 22-07517(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2303, AFL-CIO

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2303, AFL-CIO, (Complainant) alleging that the Respondents violated Section 19(a)(1) and (6) of the Order by refusing to negotiate over a change in parking permit fees for employees represented exclusively by the Complainant.

On October 28, 1977, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondents had engaged in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondents filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the Director, Metropolitan Washington Airport Service (Respondent Director) violated Section 19(a)(1) and (6) of the Order by directing the Airport Manager, Dulles International Airport (Respondent Dulles) to impose new employee parking permit fees on employees in the unit exclusively represented by the Complainant. In this regard, the Assistant Secretary agreed with the Administrative Law Judge that the change in employee parking permit fees is a matter affecting working conditions within the meaning of Section 11(a) of the Order. Furthermore, he found that the terms of the negotiated agreement between the Complainant and Respondent Dulles did not constitute a clear and unmistakable waiver of the Complainant's right to bargain with Respondent Dulles on any such change in the parking permit fees merely because such change was instituted by a new policy developed at a higher agency level, i.e. by Respondent Director. In making such finding, he concluded that it would be inconsistent with the purposes and policies of the Order to permit a higher level of agency management to unilaterally change matters affecting working conditions established by a negotiated agreement when such a change is not required by law or regulations of an appropriate authority.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions filed by the Respondents, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations, only to the extent consistent herewith.

However, the Assistant Secretary found, contrary to the Administrative Law Judge, that the Respondent Dulles did not violate Section 19(a)(1) and (6) of the Order. In this regard, he concluded that Respondent Dulles, in refusing to negotiate on the change in employee parking permit fees, was engaging in a ministerial act in compliance with the order of higher agency management, i.e. Respondent Director, regardless of the reasons it gave the Complainant for refusing to negotiate on the matter.

The American Federation of Government Employees, Local 2303, AFL-CIO, hereinafter called Complainant, was granted exclusive recognition in 1964 for a unit of all nonsupervisory Wage Grade employees assigned to Dulles International Airport. Dulles International Airport is a subordinate activity of the Metropolitan Washington Airport Service which is a non-national Federal Aviation Administration subdivision.

Accordingly, the Assistant Secretary ordered appropriate remedial action by the Respondent Director for the Section 19(a)(1) and (6) violations he had found and further ordered that those portions of the complaint alleging violations of Section 19(a)(1) and (6) of the Order by Respondent Dulles be dismissed.

On April 16, 1976, the Director of the Metropolitan Washington Airport Service, hereinafter called Respondent Director, advised the Airport Manager of Dulles International Airport, hereinafter called Respondent Dulles, that the parking permit fees for employee parking at the Airport would be increased. Subsequently, Respondent Dulles advised the Complainant of the increase in the fee and the Complainant requested that Respondent Dulles negotiate in this regard. Respondent Dulles refused to negotiate with the Complainant, contending that the matter was not negotiable; however, it offered to "consult" with the Complainant on the matter.

The Administrative Law Judge found that the change in parking permit fees was a change in a working condition which constituted an appropriate subject for bargaining under Section 11(a) of the Order. He concluded also that there was no clear and unmistakable waiver in the negotiated agreement between the Complainant and Respondent Dulles with respect to the right to bargain over this matter. Consequently, he determined that the Respondent Director's order to the Airport Manager of Dulles violated Section 19(a)(1) and (6) of the Order. He also found that Respondent Dulles violated Section 19(a)(1) and (6) of the Order by unilaterally changing employee parking permit fees. In this regard he noted, among other things, that its stated reason for refusing to negotiate the change with the Complainant was that the matter was non-negotiable, rather than that it was ministerially implementing an order from higher agency management.

I agree with the Administrative Law Judge that the change in employee parking permit fees herein constituted a unilateral change of a negotiable working condition within the meaning of Section 11(a) of the Order. Further, it is noted that Article 3, Section 1, of the parties' negotiated agreement obligated Respondent Dulles to consult or negotiate on "...the development and application of personnel policies and practices related to working conditions which are within the discretion of the employer." ^{1/} In this regard, there is no evidence that at the time the negotiated agreement was entered into there were any outstanding regulations or policies of higher agency management, or of any appropriate authorities, which removed from the discretion of Respondent Dulles the authority to negotiate on employee parking permit fees. Nor does the record reflect that, subsequent to the time the negotiated agreement was entered into, any laws were passed, or policies or regulations of any appropriate authorities were adopted, circumscribing or limiting the authority of Respondent Dulles with respect to the matter of employee parking permit fees. Thus, in my view, under the provisions of the Executive Order and under the terms of the parties' negotiated agreement, Respondent Dulles was obligated to negotiate with the Complainant before changing employee parking permit fees. In this context, I find that when the Respondent Director ordered the imposition of the new parking permit fee he, in effect, improperly removed this previously negotiable matter from bargaining at the level of recognition.

^{1/} The term "Employer" is defined in the preamble of the negotiated agreement as "Airport Manager, Dulles International Airport."

Moreover, in my judgment, the terms of the negotiated agreement between the Complainant and Respondent Dulles did not constitute a clear and unmistakable waiver of the Complainant's right to bargain with Respondent Dulles on any proposed change in employee parking permit fees merely because such change was instituted by a new policy developed at a higher agency level, i.e. by Respondent Director. In this regard, the evidence does not establish that the phrase "within the discretion of the employer," as used in Article 3, Section 1, of the negotiated agreement meant other than that Respondent Dulles would negotiate on those Section 11(a) matters that had not been already prescribed by laws or controlling regulations at the time the negotiated agreement was entered into. Thus, the evidence herein does not show that the parties' to the negotiated agreement agreed to any diminution of the bargaining obligation at the level of recognition as a result of any subsequently published higher agency policies and regulations, other than those agency policies or regulations required by law, or by the regulations of appropriate authorities.

To permit a higher level of agency management to unilaterally change conditions of employment established by a negotiated agreement, when such a change is not required by law or regulations of an appropriate authority, would, in effect, permit higher levels of agency management to change the relationship of the parties at the level of recognition, as established by the negotiated agreement, whenever such higher level of agency management so desires, without recourse by the exclusive representative. In my view, this would be inconsistent with the purposes and policies of the Order, absent express agreement by the parties at the level of recognition to permit such conduct. ^{2/} Accordingly, I find that Respondent Director violated Section 19(a)(1) and (6) of the Order by directing that Respondent Dulles impose new employee parking permit fees without first affording the Complainant the opportunity to meet and confer on the decision to effectuate such a change. ^{3/}

However, in the particular circumstances herein, I do not find that Respondent Dulles violated Section 19(a)(1) and (6) of the Order. Thus, in its Pensacola decision in FLRC No. 76A-37, cited above in footnote 3,

^{2/} See Small Business Administration, Richmond, Virginia, District Office, 1 A/SLMR 350, A/SLMR No. 674 (1976), and Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, 4 A/SLMR 324, A/SLMR No. 390 (1974). It is noted also that the Federal Labor Relations Council (Council) has held that an agency head or his designee in reviewing a negotiated agreement pursuant to Section 15 of the Order may not modify an otherwise proper matter agreed upon at the level of negotiation. See AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48, 3 FLRC 396 (1975).

^{3/} The Council has stated that no distinction exists between alleged violations of 19(a)(6) and alleged violations of the remainder of Section 19(a) when the acts and conduct are attributable to agency management at a higher organizational level within the agency than the level of exclusive recognition. Thus, it held that the acts and conduct of agency management at the higher level may provide the basis for a finding of a violation of any part of Section 19(a). See Naval Air Rework Facility, Pensacola, Florida, FLRC No. 76A-37 (1977).

the Council held that the acts of higher agency management may not, standing alone, be the basis for finding a separate violation by agency management at a lower level where a unit of exclusive recognition exists. This conclusion was predicated upon the actions of the agency management at the higher level in initiating the conduct found violative of the Order, rather than upon the ministerial conduct of agency management at the level of recognition in implementing the higher level directive. Based on this Council rationale, I find that Respondent Dulles, in ordering the increase in employee parking permit fees pursuant to the direction of Respondent Director, did not violate Section 19(a)(1) and (6) of the Order as it is evident that Respondent Dulles acted in accordance with the Respondent Director's order, regardless of the reasons it gave the Complainant for refusing to negotiate on the matter.

Under the foregoing circumstances, I shall order the Respondent Director to institute appropriate remedial actions and shall dismiss the instant complaint insofar as it alleges a violation of the Order by Respondent Dulles. 4/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Director, Metropolitan Washington Airport Service, Federal Aviation Administration, Department of Transportation, shall:

1. Cease and desist from:

(a) Changing terms and conditions of employment at Dulles International Airport by directing the Airport Manager, Dulles International Airport, to increase employee parking permit fees for employees represented exclusively by the American Federation of Government Employees, Local 2303, AFL-CIO, at Dulles International Airport.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Direct the Airport Manager, Dulles International Airport, to rescind, in writing, the increase in employee parking permit fees unilaterally implemented after July 1, 1976, for employees represented exclusively by the American Federation of Government Employees, Local 2303, AFL-CIO, at Dulles International Airport.

4/ In reaching the disposition herein, I find it unnecessary to pass on the Administrative Law Judge's findings on pages 14, 15, and 16 of his Recommended Decision and Order concerning the March 12, 1971, Letter of Understanding between the Respondent Dulles and the Complainant on parking matters.

(b) Direct the Airport Manager, Dulles International Airport, to meet and confer, upon request by the American Federation of Government Employees, Local 2303, AFL-CIO, on the increase in employee parking permit fees imposed after July 1, 1976, and not to implement any further increase therein unless such implementation is mutually agreed to by the Airport Manager and the American Federation of Government Employees, Local 2303, AFL-CIO, or there is an impasse in bargaining and appropriate notice is given to the exclusive representative in order to afford such representative ample opportunity to invoke the services of the Federal Service Impasses Panel.

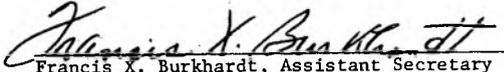
(c) If, following negotiations with American Federation of Government Employees, Local 2303, AFL-CIO, in accordance with Paragraph 2(b) above, it is determined that any employee was adversely affected by the unilateral increase in employee parking permit fees implemented after July 1, 1976, the Director, Metropolitan Washington Airport Service, shall direct the Airport Manager, Dulles International Airport, to make whole such employees, to the extent consistent with applicable law, regulations, and decisions of the Comptroller General.

(d) Post at the Dulles International Airport copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, Metropolitan Washington Airport Service, and they shall be posted and maintained at the Dulles International Airport for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(e) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that those portions of the complaint in Case No. 22-07517(CA) alleging violations of Section 19(a)(1) and (6) of the Order by the Airport Manager, Dulles International Airport, be, and they hereby are, dismissed.

Dated, Washington, D. C.
June 13, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT change terms and conditions of employment at Dulles International Airport by directing the Airport Manager, Dulles International Airport, to increase employee parking permit fees for employees represented exclusively by the American Federation of Government Employees, Local 2303, AFL-CIO, at Dulles International Airport.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL direct the Airport Manager, Dulles International Airport, to rescind, in writing, the increase in employee parking permit fees unilaterally implemented after July 1, 1976, for employees represented exclusively by the American Federation of Government Employees, Local 2303, AFL-CIO, at Dulles International Airport.

WE WILL direct the Airport Manager, Dulles International Airport, to meet and confer, upon request by the American Federation of Government Employees, Local 2303, AFL-CIO, on the increase in employee parking permit fees imposed after July 1, 1976, and not to implement any further increase therein unless such implementation is mutually agreed to by the Airport Manager and the American Federation of Government Employees, Local 2303, AFL-CIO, or there is an impasse in bargaining and appropriate notice is given to the exclusive representative in order to afford such representative ample opportunity to invoke the services of the Federal Service Impasses Panel.

WE WILL, following negotiations by the Airport Manager, Dulles International Airport, with the American Federation of Government Employees, Local 2303, AFL-CIO, if it is determined that any employee was adversely affected by the unilateral increase in employee parking permit fees

implemented after July 1, 1976, direct the Airport Manager, Dulles International Airport, to make whole such employees, to the extent consistent with applicable law, regulations, and decisions of the Comptroller General.

By: _____
(Agency)

Dated: _____ By: _____
Director, Metropolitan Washington
Airport Service, Federal Aviation
Administration, Department of
Transportation

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



RECOMMENDED DECISION AND ORDER

Statement of the Case

In the Matter of :

DEPARTMENT OF TRANSPORTATION, :
FEDERAL AVIATION ADMINISTRATION, :
METROPOLITAN WASHINGTON AIRPORT :
SERVICE, DULLES INTERNATIONAL :
AIRPORT; and DIRECTOR, :
METROPOLITAN WASHINGTON AIRPORTS, :
FEDERAL AVIATION ADMINISTRATION :
Respondents :

and :

AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, AFL-CIO, LOCAL 2303 :
DULLES INTERNATIONAL AIRPORT :
Complainant :

Case No. 22-07517(CA)

William J. Mahannah, Esquire
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American Federation of Government
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Office of Chief Counsel
Mr. William J. Murphy
Labor Relations Branch
Office of Personnel and Training
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591
For the Respondents

Before: WILLIAM B. DEVANEY
Administrative Law Judge

This case arises under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). It was initiated by a charge filed on July 6, 1976 (Asst. Sec. Exh. 1) and a complaint filed on September 28, 1976, which was amended, pursuant to motion of Complainant granted by the Regional Administrator, on June 6, 1977.

Complainant, Local 2303, American Federation of Government Employees, AFL-CIO, has been the recognized exclusive bargaining representative for non-supervisory, wage-board employees (about 200 in number) of Respondent at Dulles International Airport since 1964. The Airport Manager, Dulles International Airport, and Complainant are parties to a collective bargaining agreement. On April 16, 1976, the Director of Metropolitan Washington Airport Service, a non-national Federal Aviation Administration subdivision with overall responsibility for Dulles International Airport and Washington National Airport, advised each airport manager, i.e. National and Dulles, that, effective July 1, 1976, the permit charge for employee parking at each airport would be increased from \$7.00 per year (initial decal charge) to \$13.00 per year (initial decal charge) (Jt. Exh. 3). On April 21, 1976, the Airport Manager at Dulles advised Complainant of the increase in parking fees (Jt. Exh. 4). By letter dated April 27, 1976 (Comp. Exh. 3) Complainant requested negotiations on the parking fee charged wage grade employees at Dulles and Respondent Airport Manager (Dulles) by letter dated May 11, 1976 (Jt. Exh. 5) refused, asserting that the matter was not negotiable; however, Respondent Airport Manager offered to "consult". The increase was implemented on July 1, 1976, and the charge was filed by Complainant on July 6, 1976. Respondent Airport Manager on July 30, 1976 (Comp. Exh. 5) again declined to negotiate on the issue of the parking fee charged wage grade employees but again offered to "consult".

The charge alleged a violation of Sections 19(a)(1) and (6), as did the complaint. The complaint named as the activity Dulles International Airport, Metropolitan Washington Airport Service and as the agency The Federal Aviation Administration of the Department of Transportation. Notice of Hearing issued February 11, 1977, for a hearing on April 14, 1977 on the alleged violations of Sections 19(a)(1) and (6) of the Order (Asst. Sec. Exh. 3); on April 14, 1977, at the joint request of the parties and for good cause shown, the hearing was postponed until June 13, 1977; on June 6, 1977, the Regional

Administrator granted Complainant's motion to amend the complaint to include as an additional Respondent the "Director, Metropolitan Washington Airports, Federal Aviation Administration"; and on June 7, 1977, upon joint motion of the parties, an order Rescheduling Hearing for July 26, 1977, in Washington, D.C. issued (Asst. Sec. Exh. 4), pursuant to which a hearing was duly held before the undersigned.

All parties were represented by able counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved and excellent briefs have been timely filed by the parties which have been carefully considered. Upon the basis of the entire record, I make the following findings of fact, conclusions and recommendations:

FINDINGS OF FACT

1. On October 8, 1970, Dulles International Airport, Employer, and Local 2303 entered into a collective bargaining agreement (Comp. Exh. 1) which was to remain in full force and effect for a period of one year from the date of its approval, January 7, 1971.

2. The agreement of October 8, 1970, did not cover two items, namely, merit promotion policy and parking, as to which the parties had bargained to impasse; a contract, without these items was executed as noted above, and the two issues at impasse were submitted to the Federal Service Impasses Panel. On January 13, 1971, a fact-finding hearing was held, at the commencement of which the parties announced that mutual agreement had been reached on the issue of merit promotion policy and that issue was withdrawn, and the hearing proceeded on the parking issue. The Panel Report and Recommendations For Settlement, In the Matter of: Federal Aviation Administration (Dulles International Airport Washington, D.C. and American Federation of Government Employees, AFL-CIO, Local Union #2303, Case No. 70 FSIP 12, issued on February 26, 1971. The recommendation of the Panel was:

"1. The Union's proposal for reserved parking space for bargaining unit employees be withdrawn.

"2. The parties enter into a joint letter of understanding which will permit the Union to reopen the current labor agreement on the sole matter of 'bargaining unit

employee reserved parking space' if the Employer later determines to establish reserved employee parking spaces for non-bargaining unit employees." (70 FSIP 12, p. 8)

The Panel had concluded, inter alia, that:

"The parking spaces now available for bargaining unit employees are adequate.

"The increased charge for decals (permits) is reasonable and was justified in light of the showing of a need to recover some of the cost of providing and maintaining a parking space." (70 FSIP 12, p. 8)

3. On March 22, 1971, the parties executed the following Letter of Understanding:

"LETTER OF UNDERSTANDING BETWEEN AFGE LOCAL 2303 AND AIRPORT MANAGEMENT, DULLES INTERNATIONAL AIRPORT

"The Federal Service Impasses Panel has concluded that existing employee parking areas and procedures at Dulles International Airport are adequate. AFGE Local 2303 agrees to abide by the recommendations of the Federal Service Impasses Panel and withdraw its proposal for reserved parking spaces for bargaining unit employees as presented to the Panel on 13 January 1971. If management should change the parking costs for any group of FAA employees or change the parking arrangement for bargaining unit employees, the union reserves the right to reopen the issue of parking.

Employer

Union

(s) _____

(s) _____

Date: 3/22/71

Date: 3/22/71
(Comp. Exh. 2)

4. The October 8, 1970, agreement contained an automatic renewal provision and, presumably, was automatically renewed as the next agreement (Jt. Exh. 1) was signed September 28, 1973.

5. Article III, entitled "Matters Appropriate for Consultation or Negotiation", Sections 1 and 2, of the 1970 and 1973 agreements are identical. Section 1 of Article III of

each Agreement provides, in part, as follows:

"Section 1

"It is agreed and understood that matters appropriate for consultation or negotiation between the Parties are the development and application of personnel policies and practices related to working conditions which are within the discretion of the employer. ...

Section 2 of Article III of each Agreement provided:

"Section 2

"It is further agreed that in the absence of compelling circumstances to the contrary the Employer will consult the Union concerning contemplated changes of benefits, practices, understandings, and Employer originated directives."

6. Article III of the 1973 Agreement contains a section 3, not present in the 1970 Agreement which provided as follows:

"Section 3

"The matters appropriate for consultation are not limited to those covered by this agreement."

7. Article XXVII of the 1970 Agreement (Comp. Exh. 1) and Article XXV of the 1973 Agreement (Jt. Exh. 1) are, in all material respects, identical; each is entitled "Parking"; and each relates to parking by the Union President when meeting with management. Although a "parking" matter, this was not an issue on which the parties bargained to impasse in 1970, was not an issue submitted to the Impasses Panel, nor was this item covered by the March 22, 1971 Letter of Understanding.

8. The Management Bargaining Committee's chief spokesman at the 1973 negotiation, Mr. Van Der Veer Smith, testified that the general subject of parking was discussed at all of the negotiation meetings and the subject of parking fees was discussed at least at one of the meetings and came about as a result of

the Union's chief negotiator, Mr. Charles W. Cordell, asking why have parking fees, although no formal proposal was made by the Union on parking fees. ^{1/}

9. Mr. Van der Veer Smith further testified that the 1971 Letter of Understanding was not discussed during the 1973 negotiations; but the record is clear that no change in parking arrangements, or the fee charged employees, was contemplated in 1973, indeed the fee remained unchanged until 1976 when it was increased to \$13.00, effective July 1, 1976.

10. On April 16, 1976, the Director of Metropolitan Washington Airport Service advised the Manager of Dulles International Airport (as well as the Manager of Washington National Airport) that, effective July 1, 1976, the permit charge for employee parking would be increased to \$13.00 per year (Jt. Exh. 3); On April 21, the Airport Manager at Dulles advised Complainant of the increase in parking fees (Jt. Exh. 4); Complainant on April 27, 1976, requested bargaining on the parking fee charged wage grade employees at Dulles (Comp. Exh. 3); and on May 11, 1976, Respondent Airport Manager (Dulles) refused Complainant's request asserting that the matter was not negotiable; but Respondent Airport Manager offered to "consult" (Jt. Exh. 5). Following the filing of the charge on July 6, 1976, Respondent Airport Manager on July 30, 1976, again declined to negotiate but again offered to "consult". (Comp. Exh. 5)

11. Mr. Cordell, President of Local 2303, and Complainant's Chief Negotiator in 1973, a member of Complainant's negotiating team in 1970, and a participant in the impasse

^{1/} Prior to October, 1969, employees enjoyed reserved parking spaces immediately adjacent to the buildings or locations where they worked and management charged 75 cents for a decal or sticker. On October 2, 1969, management changed the space arrangement and raised the fee to \$7.50 per year, without negotiating with the Union, which led to the Union raising the matter in the negotiations which, ultimately, led to the bargaining impasse of 1970. (70 FSIP 12, page 5). Mr. Cordell's testimony, largely in reliance on a statement by Respondent's counsel, that the parking fee was increased to \$7.50 after the recommendation of the Impasses Panel, was incorrect as shown by the Report of the Panel, as the Report of the Panel shows the increase to \$7.50 on October 2, 1969, it necessarily follows that this increase, to \$7.50, occurred prior to the bargaining impasse of 1970.

flows from the requirement of Section 11(a) of the Order, the refusal to bargain, at Complainant's request, was a violation of Section 19(a)(6) and, derivatively, of Section 19(a)(1), Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 454, 4 A/SLMR 790 (1974); Secretary of the Navy, Department of the Navy, Pentagon, A/SLMR No. 924 (1977), wholly apart from the Letter of Understanding entered into by the parties on March 22, 1971. Indeed, the Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, as amended, which Recommendations were adopted by Executive Order 11838 (February 6, 1975), with respect to the obligation to negotiate, stated, in part, as follows:

"Section 11(a) comprehends an obligation to 'negotiate' with respect to midcontract changes in established personnel policies and practices and matters affecting working conditions. 'Consultation' is required only with respect to those labor organizations accorded 'national consultation rights' under section 9. The term 'meet and confer,' as used in the Order, is intended to be construed as a synonym for 'negotiate.' ... However, the question is raised as to whether the Order requires, in addition, that a party must meet its obligation to negotiate prior to making changes in established personnel policies and practices and matters affecting working conditions during the term of an agreement.

"The Assistant Secretary, when faced with this issue in a case, concluded that the Order does require adequate notice and opportunity to negotiate prior to changing established personnel policies and practices and matters affecting working conditions during the term of an existing agreement unless the issues thus raised are controlled by current contractual commitments, or a clear and unmistakable waiver is present. We believe that the Assistant Secretary's conclusion on this matter is correct and, therefore, no change in the Order is warranted in this regard.

* * * *

"... the fact that changes in established personnel policies and practices and matters affecting working conditions during the term

of an agreement are often the result of changes in circumstances which were not foreseen by either party during the period of contract negotiations makes it appear likely that employee participation at such junctures may be even more important than during the regular negotiation period. . . ." (Labor-Management Relations In The Federal Service (1975), pp. 41-43) (Emphasis by the Council.)

Respondents rely heavily on the phrase "which are within the discretion of the employer" in Section 1 of Article III of both the 1970 and 1973 Agreements. That inclusion of this phrase was not, and is not,

"a clear and unmistakable waiver"

is apparent from the fact that this language was incorporated in the Agreement signed on October 8, 1970, and approved January 7, 1971, at which time the parties had bargained to impasse on essentially the same issue - parking - and had submitted the issue to the Federal Service Impasses Panel.

Moreover, Respondents' position that "employer", as defined in the Preamble means "the Airport Manager, Dulles International Airport" who had no discretion because the Director of Metropolitan Washington Airport Service ordered the increase in parking fees, is the familiar Catch 22 argument which the Council laid to rest in Naval Air Rework Facility, Pensacola, Florida, FLRC No. 76A-37 (1977), where the Council held:

"Section 19(a) of the Order provides a list of specified unfair labor practices in which 'agency management' may not engage, including 19(a)(6) which prohibits 'agency management' from refusing to consult, confer, or negotiate with a labor organization as required by the Order. The phrase 'agency management' is specifically defined in section 2(f) of the Order:

"'Agency management' means the the agency head and all management officials, supervisors, and other representatives of management having authority to act for the agency on any matters relating to the implementation of the labor-management relations program established under this order[.]

"Accordingly, it is clear that the acts and conduct of any individual found to be agency management, as defined in section 2(f), may provide the basis for a section 19(a) violation. Of course, pursuant to section 19(a) (4) of the Order, it is the responsibility of the Assistant Secretary to decide whether the labor acts and conduct constitute an unfair or conduct practice. Where he finds that an act or conduct constitutes an unfair practice and that the individuals who committed the act are agency management, there is no basis in the Order to draw artificial distinctions between organizational levels of such agency management so as to relieve them of the responsibility for their acts which the otherwise be violative of the Order.

"... when the obligation to negotiate is breached by the acts and conduct of agency management, such a breach may properly provide the basis for a 19(a) (6) finding regardless of the location of that agency management in the agency chain of command.

"... where ... agency management at the activity level complied with such direction from agency management at a higher level because the activity had no choice but to do so, a separate finding of a violation would not lie against the activity as such, solely on the basis of its ministerial actions in implementing the direction from the higher agency authority.

"Accordingly, ... we conclude that the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of any part of section 19(a) of the Order by 'agency management,' but may not, standing alone provide the basis for finding a separate violation by 'agency management' at a lower organizational level of the agency where a unit of exclusive recognition exists." (Emphasis by the Council.)

A change relating to employee parking, including a change in established fees, is a change in working conditions; the Director, Metropolitan Washington Airport Service, was agency management and as Director was the immediate superior of the Airport Manager, Dulles International Airport which was a constituent part of Metropolitan Washington Airport Service (Comp. Exh. 6); the Director, by his memorandum dated April 16, 1976 stated that effective July 1, 1976, the permit charge for employee parking would be \$13.00 (initial decal charge) and further stated:

"It is requested that each airport issue an O&I to replace that document currently in effect and, for sake of uniformity, a copy of each O&I must be transmitted to AMA-50 [Financial Management Staff, Comp. Exh. 6] and my approval prior to issuance."

The Airport Manager, Dulles, Mr. Dexter P. Davis, by memorandum dated April 21, 1976, a copy of which was sent to Complainant, advised that effective July 1, 1976, the permit charge for employee parking at Washington National and Dulles would be \$13.00 per year and further stated:

"I am sure many of you will be justifiably concerned about this large increase in the parking decals. I am also convinced that the new fee is a reasonable one and can be fully justified. I will be happy to try and answer any questions that arise."

(Jt. Exh. 3)
On June 1, 1976, Mr. Davis issued his O&I (Jt. Exh. 2) which increased the parking fee to \$13.00 in accordance with the Director's memorandum of April 16, 1976, but without reference thereto. Both the Director, in his memorandum of April 16, 1976, and Mr. Davis, in his memorandum of April 21, 1976, presented that the \$13.00 fee was "based on actual costs incurred during FY 1975".

On April 27, 1976, Complainant requested negotiation on the parking fee (Comp. Exh. 3) which request Mr. Davis refused on May 11, 1976, because "we do request the fee charged for employee parking decals is not negotiable under our existing labor agreement" (Jt. Exh. 5). Complainant's request to negotiate was repeated in its charge of July 6, 1976 (Comp. Exh. 4) and was again refused by Mr. Davis on July 30, 1976

(Comp. Exh. 5). Clearly, agency management breached its obligation under the Order to negotiate when it refused Complainant's request for negotiations prior to changing an established working condition. The order of the Director to the Airport Managers, including the Manager of Dulles to increase the employee parking fee effective July 1, 1976, constituted a violation of 19(a)(6) and (1) by agency management; however, the refusal of the Airport Manager, Dulles, to negotiate was not, for the reasons set forth hereinafter, solely the result of the Airport Manager, Dulles', ministerial action in implementing the direction from higher authority and, as set forth herein-after, a separate violation of the unit of exclusive organizational level of the agency where the unit of exclusive recognition exists (Dulles International Airport) has also been found.

As noted above, negotiation on parking fees is not precluded in any manner by Section 11(b) or 12 of the Order. In addition, in reaching this conclusion, careful consideration has been given to 31 U.S.C. § 483a and to Office of Management and Budget Circular No. A-25, dated September 23, 1959, and nothing contained in either affects in any manner agency management's obligation to negotiate on the issue of parking fees in this case. Nor is the Assistant Secretary's decision, affirming the Regional Administrator's dismissal of 19(a)(1) and (6) charges, in Warner Robins Air Logistics Center and American Federation of Government Employees Local 987, Case No. 40-7581(CA), July 7, 1977, either to the contrary or determinative, as the issue therein concerned traffic regulations and the Assistant Secretary stated:

"Thus the policy concerning driver suspension privileges only incidentally affected the employees in the unit represented by AFGE. Under the circumstances, I do not view the change of policy dealing with revocation of driver privileges as matter which the employer was obligated to consult and confer with AFGE. Accordingly, there is no reasonable basis for the complaint."

Here, of course, unit employees were required to park in designated areas (Jt. Exh. 2, Par. 4 B. and were prohibited from parking elsewhere when in an on-duty status, Jt. Exh. 2, Par. 7 D.) for which a permit was required (Jt. Exh. 2, Par. 5). Moreover, as set forth hereinafter, the agency and Complainant in 1971 had entered into a Letter of Understanding whereby it had been agreed, inter alia, that if management should change the parking costs for any group of FAA employees, Complainant reserved the right to reopen the issue of parking.

2. Letter of Understanding Remained Fully Effective.

The Letter of Understanding entered into by Respondent Airport Manager and Complainant on March 22, 1971, differs in material and significant respects from the Recommendation of the Federal Service Impasses Panel. For example, the Panel merely recommended a letter of understanding to permit reopening of the current [1970] agreement on the sole matter of "bargaining unit employee reserved parking space", whereas the parties entered into an agreement which, by its terms, was not limited to reopening the sole matter of "bargaining unit employee reserved parking space". Thus, after reciting that the Panel had concluded that existing parking areas and procedures at Dulles were adequate, Complainant agreed to abide by the recommendations of the Panel and withdraw its proposal for reserved parking spaces as presented to the Panel on January 13, 1971. The Letter of Understanding then provided:

"If management should change the parking costs for any group of FAA employees or change the parking arrangement for bargaining unit employees, the union reserves the right to reopen the issue of parking." (Comp. Exh. 2)

As noted, the Letter of Understanding made no reference to the October 8, 1970, agreement and contained no expiration date. In view of the recommendation of the Panel that reopening be limited to this regard, as well as in other regards, quite parties in this regard, it is obvious that the Letter of Understanding intentionally entered into an agreement which was neither keyed to any "current labor agreement" nor made a part of any "current labor agreement". Rather, the Letter of Understanding was "tied to": a) management changing parking costs; and or b) management changing the parking arrangement for bargaining unit employees. Insofar as the then current negotiations were concerned, Complainant withdrew the only issue not already resolved by the October 8, 1970, Agreement.

President Cordell testified that the Recommendation of the Federal Service Impasses Panel had determined Complainant's reserved employee parking demand and that the Letter of Understanding precluded ("took care of") negotiation of any fee unless and until management should change the parking costs or change the parking arrangement for bargaining unit employees. Of course, in 1973, agency management neither proposed nor made any change in parking fees or parking arrangements for bargaining unit employees.

Respondents' argument that the Letter of Understanding was an "institutional benefit" which expired when the 1970 Agreement expired is wholly without merit and is rejected. First, the argument is based on the erroneous assertion that the parties adopted the Recommendation of the Panel. Clearly, the Letter of Understanding executed by the parties on March 22, 1971, did not adopt the Recommendation of the Panel. To the contrary, the Letter of Understanding differed in all material respects from the Recommendation of the Panel. Second, the Letter of Understanding was not incorporated by reference as a part of the 1970 Agreement and the Letter of Understanding contained no expiration date; but, rather, was keyed solely to future management action, i.e., "If management should change the parking costs ... or change the parking arrangement for bargaining unit employees, the union reserves the right to re-open the issue of parking." Third, as the obligation to bargain concerning a change in working conditions flows from the Order, the Letter of Understanding which memorialized the obligation was not, in any event an "institutional benefit" based solely on the existence of a written agreement which terminated with the expiration of a negotiated agreement. Internal Revenue Service, Ogden Service Center, et al. and National Treasury Employees Union, NTEU Chapter No. 066, et al., A/SLMR No. 806 (1977); Department of the Treasury, Internal Revenue Service, Brookhaven Service Center and National Treasury Employees Union and Chapter 099, NTEU, A/SLMR No. 859 (1977); Internal Revenue Service and National Treasury Employees Union, Chapter 8, et al., Case No. 22-7717(CA) (ALJ, October 6, 1977). Agency management in the 1973 negotiations did not seek to terminate the Letter of Understanding and, as there was no bargaining whatever on the matter, obviously no impasse was reached and agency management could not unilaterally change an existing condition of employment established by a collective bargaining agreement, if it were assumed that the Letter of Understanding constituted a condition of employment. U.S. Army Corps of Engineers Philadelphia District and American Federation of Government Employees, Local 902, AFL-CIO, A/SLMR No. 673, a A/SLMR 339 (1976). Indeed, as well stated by Judge Kramer, in Internal Revenue Service and National Treasury Employees Union, Chapter 8, supra,

"... very little contained in an expired agreement expires with the agreement automatically other than the dues withholding provisions. ..."

Fourth, the "institutional benefit" cases have involved the effect of rights and privileges accorded to exclusive representatives in a negotiated agreement when that agreement has been

terminated. Here, there was no period during which Complainant's agreement, however defined, had been terminated. To the contrary, the record shows renegotiation of the 1970 Agreement in 1973 without any hiatus so that, in any event, the "institutional benefit" theory does not appear under any interpretation to be applicable; and if applicable, the Letter of Understanding continued "in effect until such time as ... modified or eliminated pursuant to negotiation or changed after a good faith bargaining impasse has been reached." Internal Revenue Service, Ogden Service Center, supra.

Indeed, the primary significance of the Letter of Understanding concerns two considerations which would be applicable even if the Letter of Understanding had been terminated. When executed in 1971, the Letter of Understanding plainly demonstrated that the phrase "within the discretion of the employer" of Section 1 of Article III was not a waiver by Complainant of its right to negotiate an increase in parking fees by agency management and retention of the same language in the 1973 Agreement, without further discussion, certainly does not afford any basis for assertion that "a clear and unmistakable waiver is present". The obligation to negotiate prior to a change in an established working condition flows from Section 11(a) of the Order. An agreement to negotiate concerning such a change would be significant only if the matter concerned a non-mandatory subject of bargaining about which the parties could lawfully negotiate but were not required to negotiate. If, contrary to my conclusion that negotiation of a change in policy concerning employee parking was a mandatory subject of bargaining, and the matter of parking was a permissive, but not mandatory, subject for negotiation, then the conduct of agency management in 1970, when it bargained on the issue to impasse, and entered into a Letter of Understanding in 1971 whereby it agreed to negotiate any change in parking fees or any change in the parking arrangement for bargaining unit employees, constituted an agreement by agency management, whether or not such "agreement" constituted a collective bargaining contract, that it would negotiate any such change in established policy.

3. Remedy

The Council, in Naval Air Rework Facility, supra, stated that,

"... acts and conduct of agency management at a higher level ... may provide the basis for finding a violation of any part of section 19(a) of the Order by 'agency management,' but may not, standing

alone, provide the basis for finding a separate violation by 'agency management' at a lower organizational level of the agency where a unit of exclusive recognition exists." (Emphasis by the Council.)

The Council had further stated that a violation would not lie against the activity as such, "solely on the basis of its ministerial actions in implementing the direction from higher agency authority." In the instant case, the record does not show that the Airport Manager, Dulles, ever advised the Director of the Letter of Understanding. Indeed, in his response of May 11, 1976, to Complainant, the Airport Manager asserted that the change in parking fees was not negotiable (Jt. Exh. 5); and in his response of July 30, 1976, the Airport Manager, while asserting that the Letter of Understanding had been superseded, wholly ignored the language of the Letter of Understanding and, erroneously, represented that the Letter of Understanding "was reached ... with the assistance of the Federal Service Impasses Panel concerning ... reserved parking spaces ... The issue was reserved parking spaces" (Comp. Exh. 5); whereas, as noted above, the Letter of Understanding executed by the parties on March 22, 1971, specifically dealt with parking fees.

The Director's memorandum of April 16, 1976, which instructed the Airport Managers at Dulles and at Washington National to increase employee parking charges effective July 1, 1976, and to issue an O&I carrying out such instruction which was to be submitted for his approval prior to issuance (Jt. Exh. 3), because it required a unilateral change in an established working condition constituted a violation of 19(a)(6) and (1) of the Order by the Director, Metropolitan Washington Airport Service.

Pursuant to the Council's decision in Naval Air Rework, supra, I am persuaded that the Airport Manager, Dulles International Airport, also violated 19(a)(6) and (1) of the Order. The record does not show that the Airport Manager advised the Director of the existence of the parties' Letter of Understanding; the record shows that the Airport Manager refused Complainant's request to bargain for the reason that the issue was not bargainable, but without reliance on the instruction of the Director; and the Airport Manager subsequently ignored the actual language of the Letter of Understanding and misrepresented the agreement entered into by the parties. Cf., U.S. Army, Europe and Seventh Army and American Federation of Government Employees, Local 2348, AFL-CIO, et al., Case Nos. 22-6599, 22-6601 (ALJ July 20, 1977). Unlike Respondent AAFES - Europe, in U.S. Army, Europe and Seventh Army, supra, the record does not show that the Airport Manager had no choice in implementing the increase in parking fees as to the bargaining unit

employees represented by Complainant and, in addition, Airport Manager by his own action acted in derogation of his obligation to negotiate, pursuant to Section 11(a), in violation of Section 19(a)(6) and (1) of the Order.

I am aware that after July 1, 1976, Respondents further increased the parking fee charged bargaining unit employees (to \$16.00); but as this action was not part of the charge or the complaint and Complainant did not seek to amend the complaint to include this action, it is not before me and may not be considered. Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, A/SLMR No. 878 (1977).

As established parking fees were unilaterally changed by agency management, complete effecuation of the purposes of the Order, consistent with the scope of the violations, would require that, in addition to withdrawing the increase in parking fees for bargaining unit employees, bargaining unit employees be made whole for the amount of the increase unlawfully made effective July 1, 1976; however, as such remedy would require the payment of monies by an agency in a situation that established precedent does not afford reasonable assurance as to the propriety of a monetary remedy, I shall recommend that the Assistant Secretary, unless he is satisfied that established precedent does afford reasonable assurance of the propriety of a monetary remedy, obtain an advance decision from the Comptroller General as to the legality of such a payment, as suggested by the Council in Naval Air Rework Facility, supra; or, in the alternative that Respondent agency be ordered to allow as a credit against each future employee parking charge the excess payment made by the individual employee.

Having found that Respondent Metropolitan Washington Airport Service engaged in conduct which was in violation of Sectons 19(a)(1) and (6) of the Executive Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of Executive Order 11491, as amended:

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, 29 C.F.R. § 203.26(b), the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Metropolitan Washington Airport Service, and its Director and the Airport Manager, Dulles International Airport, Federal Aviation Administration,, Department of Transportation, shall:

1. Cease and desist from:
 - a) Giving effect, as to wage grade employees at Dulles International Airport, or ordering or directing that the

Airport Manager, Dulles International Airport, implement or maintain in effect, as to wage grade employees at Dulles International Airport, the increase in parking fees unilaterally implemented on July 1, 1976, unless such implementation, as to wage grade employees at Dulles International Airport, is mutually agreed to by the agency and by the exclusive representative of such employees, or after good faith negotiations have exhausted the prospects of concluding an agreement and appropriate notice is given to the exclusive representative in order to afford the exclusive representative ample opportunity to invoke the services of the Federal Service Impasses Panel.

b) Refusing to consult, confer, or negotiate concerning any change in parking fees or parking arrangements for wage grade employees at Dulles International Airport, or refusing to negotiate prior to changing any other condition of employment which is a proper subject for collective bargaining negotiations under Section 11(a) of Executive Order 11491, as amended.

c) Refusing to consult, confer, or negotiate with Local 2303, American Federation of Government Employees, AFL-CIO, or any other exclusive representative of wage grade employees at Dulles International Airport, prior to changing established conditions of employment.

d) Interfering with, restraining or coercing members of Local 2303, American Federation of Government Employees, AFL-CIO in the exercise of rights assured by Executive Order 11491, as amended.

e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of Executive Order 11491, as amended:

a) Rescind, in writing, the increase in parking charges unilaterally implemented July 1, 1976, as to wage grade employees represented by Local 2303, American Federation of Government Employees, AFL-CIO, unless such implementation is mutually agreed to by the parties, or after good faith negotiations have exhausted the prospects of concluding an agreement and appropriate notice is given to the exclusive representative in order to afford the exclusive representative ample opportunity to invoke the services of the Federal Service Impasses Panel.

b) Reinstate for wage grade employees at Dulles International Airport the parking fee charged for the period ending June 30, 1976, until such time as a new parking charge, as set forth in b) above, may be lawfully implemented.

c) Bargain, after notice and upon request, with Local 2303, American Federation of Government Employees, AFL-CIO, prior to changing any established condition of employment.

d) Make whole the wage grade employees at Dulles International Airport represented by Local 2303, American Federation of Government Employees, AFL-CIO, for the unlawful increase in parking fees, unilaterally implemented on July 1, 1976, by one of the following actions as the Assistant Secretary shall direct:

i) Pay to each member of the bargaining unit the difference between the established parking fee charged for the period ending June 30, 1976, and the amount charged and paid by each bargaining unit employee pursuant to the unilateral increase implemented July 1, 1976; or

ii) Credit each member of the bargaining unit the difference between the established parking fee for the period ending June 30, 1976, and the amount unlawfully charged by Respondents and paid by each bargaining unit employee pursuant to the unilateral change implemented July 1, 1976, against future lawful parking charges until the individual bargaining unit employee has received full credit for the unlawful charges paid by him.

e) Post at Dulles International Airport copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, Metropolitan Washington Airport Service and by the Airport Manager, Dulles International Airport, and they shall be posted and maintained by them for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director and the Airport Manager shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

We hereby notify our employees that:

WE WILL NOT change parking fees charged wage grade employees at Dulles International Airport, or change any other condition of employment which is a proper subject for collective bargaining negotiations under Section 11(a) of Executive Order 11491, as amended, without prior notification and, upon request, bargaining in good faith with Local 2303, American Federation of Government Employees, AFL-CIO, or any other exclusive bargaining representative of wage grade employees at Dulles International Airport.

WE WILL rescind, as to wage grade employees at Dulles International Airport, the increase in parking fees unilaterally implemented July 1, 1976; and WE WILL reinstate for wage grade employees at Dulles International Airport the parking fee charged for the period ending June 30, 1976.

WE WILL NOT hereafter implement any increase in parking fees charged wage grade employees at Dulles International Airport unless such implementation is mutually agreed to by the parties, or after good faith negotiations have exhausted the prospects of concluding an agreement and appropriate notice is given to the exclusive representative in order to afford the exclusive representative ample opportunity to invoke the services of the Federal Service Impasses Panel.

WE WILL make whole the members of the bargaining unit by taking one of the following actions as the Assistant Secretary shall direct:

- i) Pay to each member of the bargaining unit the difference between the established parking fee charged for the period ending June 30, 1976, and the amount thereafter charged and paid by each bargaining unit employee pursuant to unilateral change implemented July 1, 1976.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: October 28, 1977
Washington, D.C.

Appendix (cont'd)

ii) Credit each member of the bargaining unit the difference between the established parking fee charged for the period ending June 30, 1976, and the amount there- after unlawfully charged by Respondents and paid by each bargaining unit employee pursuant to the unilateral change implemented July 1, 1976, against future lawful parking charges until the individual bargaining unit employee has received full credit for the unlawful charges paid by him.

WE WILL NOT in any like or related manner refuse to consult, confer, or negotiate with Local 2303, American Federation of Government Employees, AFL-CIO, or any other exclusive bargaining representative of wage grade employees at Dulles International Airport, or in in like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

Department of Transportation
Federal Aviation Administration
Washington Metropolitan Airport
Service

Dated: _____ By: _____
Director

Dated: _____ By: _____
Airport Manager
Dulles International Airport

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 Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ARMY AND AIR FORCE EXCHANGE SERVICE,
SHEPPARD AIR FORCE BASE, TEXAS
A/SLMR No. 1063

This case involved a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 3718 (AFGE) seeking an election in a unit of employees assigned to the motion picture theaters of the Army and Air Force Exchange Service at Sheppard Air Force Base. The AFGE sought to include the employees in its existing unit at the Activity. The Activity took the position that the petitioned for unit was inappropriate because no community of interest existed between the employees in the petitioned for unit and the employees in the AFGE's existing bargaining unit.

The Assistant Secretary found the petitioned for unit was inappropriate for the purpose of exclusive recognition. In this regard, he noted that the claimed employees have certain common skills which are interchangeable and are intermingled in various degrees throughout the Activity with employees who are both represented and unrepresented. He noted also that all personnel policies and practices are administered by the Activity's personnel section and that the proposed unit could not reasonably be expected to promote effective dealings and efficiency of agency operations, but, rather, would lead to the artificial fragmentation of the Activity's unrepresented employees.

Accordingly, the Assistant Secretary ordered that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
SHEPPARD AIR FORCE BASE, TEXAS

Activity

and

Case No. 63-7425(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3718

Petitioner

DECISION AND ORDER

Upon an amended petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Ramon P. Lopez. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject case, including the briefs filed by the parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 3718, hereinafter called AFGE, seeks an election in a unit of employees assigned to the two motion picture theaters of the Army and Air Force Exchange Service (AAFES) at Sheppard Air Force Base, Texas. In this connection, it seeks to include the claimed employees in its existing unit of Activity personnel. 1/ The Activity contends that

1/ The AFGE is currently the exclusive representative of employees in a unit described as:

All regular full-time and regular part-time hourly pay plan and commission paid civilian employees; all off-duty military personnel employed in either of the foregoing categories and all temporary employees in the above categories who are employed continuously for a period of more than 180 days, employed by the Sheppard AFB Exchange, excluding all temporary full-time and temporary part-time employees employed for a period of 180

(Continued)

the petitioned for unit is not appropriate for the purpose of exclusive recognition based on an asserted lack of community of interest between the claimed employees and the employees in the AFGE's existing unit. Further, it asserts that such a unit would impair efficiency of agency operations and would not promote effective dealings.

The Activity's mission is to provide military personnel and other authorized persons at the Sheppard Air Force Base with certain merchandise and services. The AAFES is headquartered in San Antonio, Texas, and is organized into seven geographic regions, among which is the Alamo Exchange Region. The Alamo Exchange Region is divided into five area exchanges, one of which is the Oklahoma Area Exchange. The Activity is one of six exchanges within the Oklahoma Area Exchange.

Headed by an Exchange Manager, the Activity is organized into the following components: Retail Main Store, Visual Merchandise, two Retail Branch Stores, three Food Activity facilities, Services/Vending, and Personnel. Each of these components is headed by a supervisor who is directly responsible to the Exchange Manager. The supervisor of the Services/Vending component, in addition to her other duties, is responsible for the operation of two motion picture theaters on the base. 2/ The unit sought herein consists of 13 employees classified as intermittent (regularly scheduled) employed at the two theaters. The record reveals that there are other unrepresented employees at the Activity.

The evidence establishes that most employees of the Activity are designated as regular full-time, regular part-time, temporary full-time, temporary part-time, or intermittent, 3/ and are employed in either

1/ days or less; on-call; casual; management officials; managerial trainees (who perform supervisory duties); professionals; personnel workers in other than a purely clerical capacity; watchmen; supervisors and guards as defined in E.O. 11491.

2/ About July 1975, the Army and Air Force Exchange Motion Picture Service (AAFMPs) merged with the AAFES. Thereafter, until January 1977, employees of AAFMPs were under the direction of military post/base theater officers. On January 1, 1977, the AAFMPs was fully integrated into the AAFES with the employees of the AAFMPs being placed directly under the control of the AAFES.

3/ Exchange Service Bulletin No. 412 (15-91), issued by AAFES Headquarters and dated August 8, 1977, states that intermittent employment covers three types of work situations:

a. Intermittent (casual). An intermittent (casual) employee is hired primarily to perform a nonrecurring job. Intermittent (casual) employees are not normally hired for a definite period nor assigned a regularly scheduled workweek. Intermittent (casual) employees are not eligible for any benefits other than overtime pay, shift differential and environmental differential.

civilian or off-duty military capacities. Employees with the above noted designations are intermingled in various degrees throughout the Activity's operational components and all employees are assigned Department of Defense/Nonappropriated Fund job classifications. Employees in similar job classifications have certain common skills which are interchangeable. All personnel policies and practices are administered by the Activity's personnel section under guidelines established by the AAFES. The record reveals that the Exchange Manager is authorized to approve all personnel actions, serves as a member of the Activity's negotiating team, and is the Activity's representative at the third step of the negotiated grievance procedure covering the Activity's employees in the existing bargaining unit.

Under the circumstances herein, I find that the petitioned for unit is not appropriate for the purpose of exclusive recognition as the claimed employees do not share a community of interest which is separate and apart from other represented and certain other unrepresented employees of the Activity. Thus, the evidence establishes that the claimed employees have certain common skills which are interchangeable and are intermingled in various degrees with employees throughout the Activity, who are both represented and unrepresented. Further, all personnel policies and practices are administered by the Activity's personnel section and the Exchange Manager is authorized to approve all personnel actions. Moreover, in my view, the proposed unit, which contains certain employees at two motion picture theaters on the base, could not reasonably be expected to promote effective dealings and efficiency of agency operations but, rather, would lead to the artificial fragmentation of the Activity's unrepresented employees.

Accordingly, I shall order that the petition herein be dismissed.

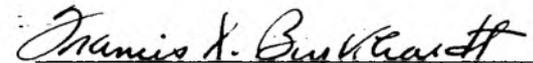
3/ b. Intermittent (on-call). An intermittent (on-call) employee is hired to perform a recurring job (including inventory), but is not hired for a definite period nor assigned a regularly scheduled workweek. Intermittent (on-call) employees are not eligible for any benefits other than overtime pay, shift differential and environmental differential.

c. Intermittent (regularly scheduled). An intermittent (regularly scheduled) employee is appointed to serve in a position with a regularly scheduled workweek of less than 20 hours, but is not hired for a definite period. Intermittent (regularly scheduled) employees are not eligible for any benefits other than overtime pay, shift differential, step advancements (except employees paid on a special wage schedule, i.e. commission and theater employees), environmental differential, and time off for holidays when the holiday falls on a scheduled workday.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 63-7425(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 21, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

- 4 -

- 3 -

June 21, 1978

A/SIMR No. 1064

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PENNSYLVANIA ARMY AND
AIR NATIONAL GUARD
A/SIMR No. 1064

PENNSYLVANIA ARMY AND
AIR NATIONAL GUARD

Respondent

and

Case No. 20-06155(CA)

This case involved an unfair labor practice complaint filed by the Association of Civilian Technicians, Pennsylvania State Council (ACT), alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to negotiate the impact and implementation of an impending reduction-in-force (RIF) at the Pittsburgh Air National Guard Base.

ASSOCIATION OF CIVILIAN TECHNICIANS,
PENNSYLVANIA STATE COUNCIL

Complainant

The Administrative Law Judge concluded that the complaint should be dismissed. In reaching this conclusion, he noted that, while the Respondent initially informed a local official of the ACT of the impending RIF instead of first informing the State Council of the ACT, which is the exclusive representative, the ACT's local official had immediately informed the State Council and thus this departure from protocol was without significance. As to the alleged refusal to negotiate, the Administrative Law Judge concluded that as a result of the parties' use of different terminology, the ACT never suggested a specific date for a meeting, and never made a specific proposal. Hence, he found that the Respondent did not refuse to discuss or refuse to consider and confer on any proposal.

DECISION AND ORDER

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that the complaint be dismissed.

On March 22, 1978, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions filed by the Complainant I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 20-06155(CA) be, and it hereby is, dismissed.

Dated, Washington D. C.
June 21, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



RECOMMENDED DECISION AND ORDER

Statement of the Case

.....
 In the Matter of :
 :
 PENNSYLVANIA ARMY AND AIR :
 NATIONAL GUARD :
 Respondent Activity :
 and :
 ASSOCIATION OF CIVILIAN TECHNICIANS :
 PENNSYLVANIA STATE COUNSEL :
 Complainant :

Case No. 20-06155 (CA)

Appearances:

John T. Hunter
 348-A Hungerford Court
 Rockville, Maryland 20850

Thomas J. Owsinski
 Pennsylvania State Council
 Association of Civilian Technicians
 RD #4, Box 4128
 Pottsville, Pennsylvania 17901
 For the Complainant

Maj. Marshall Messimer, Jr.
 Department of Military Affairs
 Adjutant General's Office
 Annville, Pennsylvania 19773

Col. Hugh S. Niles
 Personnel Officer
 Department of Military Affairs
 Adjutant General's Office
 Annville, Pennsylvania 17003
 For the Respondent

Before: MILTON KRAMER
 Administrative Law Judge

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated March 28, 1977 and filed March 29, 1977 alleging violations of Sections 19(a)(1), (5), and (6) of the Executive order. Under date of April 5, 1977, the Respondent filed a response to the complaint. On June 27, 1977 the Regional Administrator dismissed the complaint except with respect to the contention that the Respondent violated Sections 19(a)(1) and (6) of the Order by failing to meet and confer with the Complainant prior to implementing a reduction-in-force at the Pittsburgh Air National Guard Base. No appeal was taken from that partial dismissal. On July 22, 1977 the Regional Administrator issued a Notice of Hearing to be held September 27, 1977 in Philadelphia, Pennsylvania. Under date of August 31, 1977 the Respondent requested that the Regional Administrator reconsider his issuance of the Notice of Hearing. On September 1, 1977 that request was denied. On October 5, 1977 the Regional Administrator issued his Order Rescheduling Hearing scheduling it for November 3, 1977 in Pittsburgh, Pennsylvania. A hearing was held on that day in that City. Both sides were represented and presented witnesses who were examined and cross-examined, and offered exhibits which with one exception were received in evidence. Both parties waived closing argument and filed timely briefs.

Facts

The Pennsylvania State Council, Association of Civilian Technicians, is the certified exclusive representative of the Army and Air National Guards at the Pittsburgh Airport. It has been such representative of the technicians of the Army National Guard since March of 1971 and of the Air National Guard since March 1973. It is also the representative of the civilian technicians at the other National Guard units in Pennsylvania. Thomas J. Owsinski is the State Chairman of the Council and has been Chairman since October 1976. (He had also been Chairman from 1972 to 1974.) Major George Orndoff is the Labor-Relations Specialist for the Pennsylvania Adjutant General with respect to civilian technicians and the chief negotiator for the Respondent. Although the Council is the statewide representative of the technicians, it has local chapters where there are National Guard units. So far as the record shows, and I find, there are chapters at Pittsburgh and Philadelphia. The unit has the usual exclusions including the exclusion of supervisors.

After the Council was certified statewide, it and the Adjutant General tried to negotiate a statewide collective agreement. They reached agreement on all subjects proposed except two, the procedures when a reduction-in-force was to be made and the requirement of the technicians wearing the uniform of their military grade. The impasse on those two subjects was presented to the Federal Service Impasses Panel. The Panel recommended and then decided that the parties execute a written agreement on the subjects agreed on and upon appropriate notice resume negotiations on the two impasse subjects looking to separate agreements.

In the summer of 1976 the National Guard Bureau decided to convert certain operations at Pittsburgh from a KC-97 type of aircraft to KC-135 aircraft. This would affect the technician manning needs of the 171st Air Refueling Wing and the 112th Tactical Fighter Group. 1/

On October 29, 1976 Colonel Niles, the Adjutant General's Personnel Officer, wrote to the Commander of the 171st Air Refueling Wing at the Pittsburgh Airport advising him that there would be a Reduction-in-Force because of the conversion from the KC-97 to the KC-135, that the effective date for the conversion would be April 1, 1977, that affected technicians would not be terminated but some might be downgraded if they chose to accept lower-graded positions, that there would be no downgrading prior to April 1, 1977, and that specific notices would be issued to affected technicians by November 30, 1976.

Prior to that time, on October 13, 1976, Sgt. Michael Krepitch, President of the ACT Pittsburgh Chapter, was called to the Technician Personnel Office where he met with Col. Niles and Col. Paul Rosenberg, Chief of Support Services for the National Guard at the Greater Pittsburgh International Airport. Krepitch was told of the intended change in aircraft and the consequent change in manning requirements and RIF. Since the bargaining relationship was with the State Council, Krepitch called Owsinski, the State Chairman, who stated he had not had information about it before.

On October 15, 1976 Owsinski wrote to Orndoff as Chief Negotiator for the Respondent protesting the fact that

1/ The impact on the 112th appears to have been quite slight. The evidence in the record concerning it is extremely skimpy, and I make no separate findings concerning it.

Krepitch had been informed of the impending RIF before Owsinski was informed. 2/ Owsinski suggested an early meeting to "negotiate the circumstances and procedures of the upcoming reduction-in-force at Pittsburgh" to be followed immediately by directing their attention to RIF procedures statewide in general and the subject of military uniforms. Owsinski signed his name as Chief Negotiator for the Respondent.

On October 28 Orndoff replied and after explaining other details, including the fact that no technicians would be involuntarily separated but some might have different grades, stated that with respect to the request that the parties meet and "negotiate the circumstances and procedures of the upcoming reduction-in-force", his office was "willing to meet with you and discuss the conversion of this unit and the impact possibilities of the conversion which is at this time established as 1 April 1977." 3/

On November 11, 1976 Owsinski again wrote to Orndoff. In that letter he stated that he had asked for "negotiations on the impact, procedures and related circumstances brought about by the conversion" and that Orndoff had indicated a willingness to "meet and discuss the conversion." He stated also that telephone conversations with Orndoff's office had "implied" that a "meeting can be arranged to meet and discuss the conversion ... but that there can be no negotiations. ..." It continued with the statement that the Complainant was anxious to meet with Orndoff and his "negotiators ... on the matter of the ... conversion under the proper circumstances", and the letter dealt with other matters of protocol. 4/

On November 19 Col. Niles, the Respondent's Personnel Officer, replied to Owsinski's letter of November 11. Niles stated that Owsinski's request "to meet at the negotiating table for the purpose of negotiating the conversion ... is not appropriate. This conversion is a matter for discussion ... as relates to implementation and the impact it may have on currently employed Technicians. ..." 5/ He added that his office was available to "discuss" further the conversion to the different aircraft.

2/ Tr. 63; Exh. C-7.
3/ Exh. C-9.
4/ Exh. C-10.
5/ Exh. C-11.

In November 1976 the individual RIF notices were sent to the affected technicians. The notices stated that the RIF would be effective April 1, 1977. In fact the conversion was twice postponed and the RIF did not become effective until July 1, 1977. No technicians lost employment but some were downgraded. Some four or five of them appealed but the record does not indicate the result.

Beginning January 20, 1977 Owsinski and other representatives of the State Council met with Orndoff and other representatives of the Technician Personnel Office in resumption of the negotiations on a state-wide RIF procedure and the wearing of the uniform. These negotiations lasted for three or four months but did not produce agreement. Although mention was made of the two specific RIFs here involved, such mention was not "negotiation" or "discussion". The Complainant at no time made a specific proposal concerning the procedures or impact of these RIFs. 6/ Owsinski did not make any such proposal because he understood from the tenor of the letters described above and from telephone conversations with Orndoff's office that it would not "negotiate" about them but would only "discuss" them if he made a proposal. 7/ There was an agreement in effect between the parties that when meeting to negotiate an agreement the first items to be considered would be the Complainant's proposals. 8/

On November 8, 1976, shortly before the individual RIF notices were issued, Col. Rosenberg told Krepitch that there would be a meeting with the technicians affected by the RIF and that the stewards and chief steward would be invited. Such a meeting was held on November 11. Documents were distributed, including a statement that the RIF would be effectuated April 1, 1977, and a document containing the vacancy announcements for the new positions to be created by the conversion of the aircraft from the KC-97 to the KC-135. The record does not indicate what else, if anything, occurred at the meeting. As noted above, the conversion was repeatedly postponed and was finally effectuated July 1, 1977. Rosenberg kept the President of the Pittsburgh Chapter of ACT advised of the changes in scheduling. The RIF was carried out in accordance with the procedures of the National Guard Bureau's Technician Personnel Pamphlet 910 and local State supplements, the procedures prescribed in the absence of agreements to the contrary.

6/ Tr. 115-17.
7/ Tr. 117-18.
8/ Exh. R-1, p. 3, par. f.

Discussion and Conclusion

My initial conclusion is that this case arises more from the parties misunderstanding each other rather than from their disagreement over their respective obligations under Executive Order 11491 as amended.

Section 11(a) of the Executive Order imposes on the parties, both of them, the obligation to "meet ... and confer ... with respect to ... matters affecting working conditions, so far as may be appropriate under applicable laws and regulations. ..." It is well settled that although by reason of Sections 11(b) and 12(b) of the Executive Order an agency has no obligation to negotiate concerning its decision to have a RIF, it does have the obligation to notify the union and give it an opportunity to meet and confer on the procedures to be followed in reducing the work force and on the impact of the RIF on adversely affected employees. Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, 3 A/SLMR 375, A/SLMR No. 289 (1973).

In this case notice was first given on October 13, 1976 of a RIF intended to be effected April 1, 1977, five and a half months later. In fact it was not carried out until July 1, 1977, eight and a half months later. That afforded ample time for the parties to "meet and confer" on the method of implementation of the RIF and its impact. To be sure, the initial notification should have been given to Owsinski, the Chairman of ACT's Pennsylvania State Council, instead of to Krepitch, the President of the local chapter of ACT. But Krepitch immediately told Owsinski who almost immediately communicated with the Respondent about it, and the departure from protocol was without significance.

Prior to the Federal Labor Relations Council's Report and Recommendation in January 1975 on the 1975 amendments of Executive Order 11491, as amended, there was confusion concerning the intended meaning of the words "consult", "confer", and "negotiate" as used in the Executive Order. Unfortunately, despite that Report and Recommendation, much misunderstanding remains and parties quibble over the appropriate appellation to be applied to what they are doing or want to do. 8/ That Report appears lucidly to explain that "consult" refers to,

8/ See Department of the Treasury, Internal Revenue Service, Chicago District, 6 A/SLMR 492, 6 Supp. 191, A/SLMR No. 711 (1976).

let us say, "talking" pursuant to national consultation rights, while "negotiate" is synonymous with "meet and confer". 9/ But among many it appears to have been read quaquaversally.

In this case Owsinski advised Orndoff on October 15, 1976 that he wanted to "negotiate the circumstances" of the RIF scheduled for April 1, 1977. Orndoff replied that he was willing to "meet with you and discuss" the conversion to the new aircraft and the impact it would have on April 1, 1977, the then scheduled date of the conversion. On November 11 Owsinski wrote to Orndoff stating that telephone conversations with Orndoff's office "indicates" a willingness "to meet and discuss the conversion" but not to negotiate about it, and Owsinski was anxious to meet with the Respondent's "negotiator" on the matter of the conversion.

Orndoff, the Labor Relations Specialist, showed the letter to Niles, the Personnel Officer. Niles apparently understood Owsinski's last letter as requesting negotiations over whether there should be a conversion. And perhaps that is what Owsinski meant. Although at the hearing Owsinski testified that he did not question the right of the Respondent to have a RIF, 10/ in his posthearing brief he criticized the Respondent's reliance at the hearing on its rights under Section 11(b) as "belated". 11/ Niles replied that Owsinski's request "to meet at the negotiating table for the purpose of negotiating the conversion ... is not appropriate" but that the conversion was a "matter for discussion ... as relates to implementation and the impact ... on currently employed Technicians. ..." Owsinski took that reply, and the "tenor" of the correspondence, as a rejection of any negotiations and pursued the matter no further. In any event, no proposal was made concerning implementation or impact and the Respondent did not refuse to consider or talk about any proposal.

The obligation of the Respondent in the situation presented here was, upon request, to get together with the Complainant and talk with it about its concerns about implementation and impact of the coming RIF. It did not have an obligation to agree on the proper appellation to be applied to the nature of the talks. In Department of the Treasury, Internal Revenue Service, Chicago District, 6 A/SLMR 492, 6 A/SLMR Supp. 191, A/SLMR No. 711 (1976) the Complainant insisted on calling the

9/ Sec. V, 3, pp. 41-44.
10/ Tr. 66.
11/ Complainant's Brief, p. 5.

talks negotiating while the Respondent persisted on calling them consulting or conferring. But they did get together and talk, and even reached agreement on some matters. Here the Complainant insisted on proposing negotiations while the Respondent persisted in expressing a willingness to engage in discussions. The FLRC says the obligation is to "meet and confer". 12/ The difference between discussing and conferring is not readily apparent and whatever difference there may be should be insufficient to sustain an unfair labor practice under Section 19(a).

As a result of the parties' use of different terminology, the Complainant never suggested a specific date for meeting and talking and never made a specific proposal, and hence the Respondent did not refuse to meet and talk and did not refuse to consider and confer on any proposal. I conclude there was thus no violation of Sections 19(a)(6) and (1).

RECOMMENDATION

The complaint should be dismissed.


MILTON KRAMER
Administrative Law Judge

Dated: March 22, 1978
Washington, D.C.

12/ Webster's New International Dictionary, 2d Ed., includes in the definition of "discuss" the meanings "to argue by presenting various sides of, as a question" and "to discourse about; to treat".

MK/mml

June 21, 1978

A/SLMR No. 1065

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD,
PORTSMOUTH, VIRGINIA
A/SLMR No. 1065

This case involved an unfair labor practice complaint filed by the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when it refused to "negotiate" on the impact of a stagger work-week in Shop 03 of the Norfolk Naval Shipyard.

In recommending that the complaint be dismissed in its entirety, the Administrative Law Judge concluded that the Respondent's offer to consult and confer pursuant to the parties' negotiated agreement did not, on its face, constitute a refusal to negotiate within the meaning of Section 19(a)(1) and (6) of the Order. The Administrative Law Judge concluded that compliance with a contractual obligation to meet, to discuss and to work out mutually acceptable change in good faith may well constitute negotiation, without regard to what the procedure is called by the parties. He noted further that it was the Complainant's refusal to discuss the proposed change which precluded any negotiation.

The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD,
PORTSMOUTH, VIRGINIA

Respondent

and

Case No. 22-08051(CA)

TIDEWATER VIRGINIA FEDERAL
EMPLOYEES METAL TRADES COUNCIL,
AFL-CIO

Complainant

DECISION AND ORDER

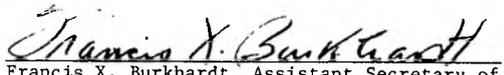
On February 8, 1978, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-08051(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 21, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1/ Cf. NASA, Kennedy Space Center, Kennedy Space Center, Florida, 2
A/SLMR 566, A/SLMR No. 223 (1972).

U.S. DEPARTMENT OF LABOR
 OFFICE OF ADMINISTRATIVE LAW JUDGES
 Suite 700-1111 20th Street, N.W.
 Washington, D.C. 20036



.....
 In the Matter of :

 NORFOLK NAVAL SHIPYARD :
 Respondent :

 and : Case No. 22-08051(CA)
 : :
 TIDEWATER VIRGINIA FEDERAL :
 EMPLOYEES METAL TRADES :
 COUNCIL, AFL-CIO :
 Complainant :

 Robert F. Haley II, Esquire
 Joannou & Haley
 506 Professional Building
 Portsmouth, Virginia 23704
 For the Complainant

Mr. Walter B. Bagby
 Labor Relations Advisor
 Southern Field Division
 Office of Civilian Personnel
 Department of the Navy
 Building A-67, Naval Station
 Norfolk, Virginia 23511
 For the Respondent

Before: WILLIAM B. DEVANEY
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended (hereinafter also referred to as the "Order") and was initiated by a charge dated May 9, 1977 (Asst. Sec. Exh. 5) and a complaint dated June 13, 1977, and filed on June 20, 1977 (Asst. Sec. Exh. 1), alleging violations of Sections 19(a)(1) and (6) of the Order because of the refusal of Respondent to negotiate on the impact of a stagger work week in Shop 03 of the Naval

Shipyards. Notice of Hearing (Asst. Sec. Exh. 2) issued September 20, 1977, for a hearing on November 1, 1977, and an Order Rescheduling Hearing (Asst. Sec. Exh. 4) issued October 26, 1977, rescheduling the hearing from November 1, 1977, to November 17, 1977, pursuant to which a hearing was duly held before the undersigned on November 17, 1977 in Norfolk, Virginia. At the close of the hearing December 19, 1977, was fixed by agreement of the parties as the date for the filing of briefs; however, Counsel for Complainant subsequently requested, and, for good cause shown, was granted an extension of time to December 27, 1977, and Respondent, which had already filed and served its brief, was allowed until January 6, 1978 to file a Reply.

Both parties were represented, all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to present evidence and testimony of the issues involved and each party has submitted a very helpful brief which has been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I hereby make the following findings of fact, conclusions and recommendation:

FINDINGS

1. The Tidewater Virginia Federal Employees Metal Trades Council (hereinafter also referred to as the "Council") is the exclusive representative, *inter alia*, of Respondent Norfolk Naval Shipyards' Public Works. The parties' current collective bargaining agreement (hereinafter also referred to as the "Agreement") was executed August 22, 1973 (Res. Exh. 3).
2. Article 15, entitled "Hours of Work" of the Agreement provides, in relevant part, as follows:

"Section 1. The parties agree that the Employer shall retain the right to establish, disestablish, schedule the starting and ending times, or change basic workweeks or shifts when such action is based on one or more of the following reasons hereto agreed as valid bases:

- "a. the requirement to eliminate inherent safety and/or health hazards.
- "b. continuous operational or surveillance functions
- "c. the requirement to meet scheduled major key event dates

"d. effective utilization of available manpower

"e. the full utilization of tools, equipment, and/or facilities

"It is agreed that the requirement to avoid or reduce overtime is valid basis when considered with one or more of the bases listed above. It is further agreed that before taking any of the actions listed above, the Employer will notify the Council and meet to discuss the proposed change. Such meetings will be to work out mutually acceptable change. Should the parties fail to reach agreement, the Employer shall have the right to effect the change, and any dispute therefrom as to whether the Employer had valid reason in terms of the bases listed herein shall be subject to the grievance and arbitration procedures. It is understood that basic workweek changes of this Section will involve the minimum number of employees possible and will terminate at the expiration of the particular work situation that effected such changes." (Res. Exh. 3, pp. 41-42).

3. Mrs. Lorraine Ratto, Civilian Personnel Manager, Naval Seas Systems Command, and until March, 1977, Director, Employee Relations, Labor Relations, Norfolk Naval Shipyard, was Respondent's chief spokesman at the negotiations for the Agreement, and presented various proposals and counterproposals which show, for example, that the Council, which first opposed any departure from the negotiated workweeks, proposed, in part, as follows:

"Should the parties fail to reach agreement [on change of established M - F workweek] the Employer shall have the right to effect changes, and dispute therefrom shall be subject to the grievance and arbitration procedures. ..." (Res. Exh. 4)

and later in slightly different language, that:

"Should the parties fail to reach agreement the Employer shall have the right to effect changes, and dispute therefrom shall be subject to the grievance to [sic] arbitration procedures. ..." (Res. Exh. 4).

In each of the above proposals there was, in addition, the further provision, among others,

"... basic workweek will not be changed to perform work that could reasonably be performed in any other manner or to avoid payment of overtime."

4. As set forth in Paragraph 2, above, Art. 15, Section 1, vis-a-vis grievance and arbitration reads:

"... any dispute therefrom as to whether the Employer had valid reason in terms of the bases listed herein shall be subject to the grievance and arbitration procedures. ..." (Res. Exh. 3) (Emphasis supplied.)

Of course, Art. 15, Section 1, contains the further provision that such changes will involve the minimum number of employees possible and will terminate at the expiration of the particular work situation that effected such changes.

5. In early April, 1977, Superintendent, Utilities, Mr. Leonard Mack Shelton, called Mr. Roy Pennington, Chief Steward of the Power Plant, to his office and told him that he was going to establish a stagger shift in the Power Plant because he was having difficulty getting outages during the week. Mr. Shelton told Mr. Pennington it would require a crew of about 15 men; that this would be a temporary change. Mr. Pennington told Mr. Shelton that, in his opinion, you could get more done Monday through Friday; but that he would advise Mr. Richard F. Lake, President of the Council, and would get back to him. Mr. Pennington did contact Mr. Lake and later told Mr. Shelton that Mr. Lake was going to get a meeting with Captain Trueblood, Public Works Officer. Mr. Pennington further told Mr. Shelton that it had been rumored for some time that there might be a stagger workweek; that a lot of people didn't want to work a stagger workweek; and that if he were going ahead with it, he thought Respondent should try and get volunteers. Mr. Shelton stated that he would do so.

6. Captain Trueblood, and other management officials, met with Mr. Lake, and other representatives of the Council, on April 13, 1977, and on May 5, 1977. At each meeting, Captain Trueblood stated that Respondent was there to discuss the proposed stagger workweek and to work out mutually acceptable change; and, at each meeting, Mr. Lake requested negotiation of the impact and stated that he wanted to discuss ground rules for formal negotiation of the impact of the stagger workweek.

Respondent refused to negotiate impact and the Council refused to discuss the proposed change and/or to attempt, pursuant to Article 15, Section 1, to "work out mutually acceptable change". On each occasion the meeting was of short duration.

7. Following the April 13, 1977 meeting, Mr. Lake wrote Admiral E.T. Westfall, Shipyard Commander, requesting "formal negotiations on the impact of the realignment of the work force as outlined in section 11(b) of Executive Order 11491 as amended." (Res. Exh. 2). Admiral Westfall responded by letter dated May 4, 1977 (Res. Exh. 7), in which he stated, in part, as follows:

"...

"The April 13 meeting was an effort on the part of Captain Trueblood to discuss with you all aspects of this change in order to reach mutual agreement in accordance with the terms of Article 15, Section 1, of our negotiated agreement. ... The conditions of proposed work week changes such as this are clearly set forth in the agreement, and is the procedure for attempting to reach mutual agreement and the resolution of any dispute arising therefrom.

"In view of the above, I have advised Captain Trueblood to meet with you again and fully explore this matter in an attempt to reach mutual agreement regarding this proposed change. ..." (Res. Exh. 7).

8. Mr. Lake testified that he was given the opportunity to meet and confer on the impact of the proposed change, which he declined to accept unless Respondent was willing to "enter into formal negotiations" (Complainant's Summary of May 5, 1977, meeting, Res. Exh. 8); and Respondent, while willing to discuss the impact of the proposed change and to work out mutually acceptable change, pursuant to Article 15, refused to negotiate on the impact of the proposed change (Complainant's Summary and Respondent's Summaries of May 5, 1977, meeting, Res. Exhs. 8 and 10).

9. After the meeting of May 5, 1977, Mr. Shelton sought and obtained volunteers (Res. Exhs. 5, 6); but since those employees had not been on board for an extended time and some were apprentices and helpers, Mr. Shelton concluded that he must assign a crew with use of the volunteers to the extent possible. Accordingly, the first stagger shift (Wednesday

through Sunday) was for May 11-15, 1977.

10. The charge herein was filed May 9, 1977, and a further meeting was held by Captain Trueblood on May 23, 1977, at which the parties adhered to their respective positions. This was further confirmed by Admiral Westfall's final decision on the charge dated June 6, 1977 (Res. Exh. 1).

CONCLUSIONS

I. Gravamen Of Complaint Is Not Breach Of Negotiated Agreement

Clearly, the complaint does not allege a violation of the negotiated agreement. To the contrary, Council asserts a violation of Sections 19(a)(1) and (6) because Respondent "refused to enter into formal negotiations concerning the impact of the realignment of the work force in Shop 03." On the other hand, Respondent asserts that the matter is governed wholly by the negotiated agreement which provides, in part, that:

"... It is further agreed that before taking any of the actions listed above, the Employer will notify the Council and meet to discuss the proposed change. Such meetings will be to work out mutually acceptable change. Should the parties fail to reach agreement, the Employer shall have the right to effect the change, and any dispute therefrom as to whether the Employer had valid reasons in terms of the bases listed herein shall be subject to the grievance and arbitration procedures. ..." (Res. Exh. 3).

Obviously, the parties agreed that a change of hours could be made for stated reasons; that before taking such action Respondent must notify the Council, which it did, and meet with the Council to discuss the proposed change and to work out mutually acceptable change, which Respondent tried to do; but which Council refused to entertain. The language of Article 15, Section 1, alone, makes it plain that "meet to discuss the proposed change" and "to work out mutually acceptable change" is broad and encompasses discussion of impact and agreement on impact by mutually acceptable change. Mrs. Ratto's testimony, which was not challenged or disputed, fully supports this construction, namely, that discussion of the proposed change included discussion of impact and implementation.

Council does not disagree in reality; but asserts that discussion without an obligation to negotiate impact is meaningless. Further, Council asserts that it did not waive, by its agreement to discuss, its right under the Order to negotiate impact. Thus, Council points to the fact that Article 15, Section 1, makes cognizable under the grievance and arbitration procedures only:

"... any dispute therefrom as to whether the Employer had valid reasons in terms of the bases listed herein shall be subject to the grievance and arbitration procedures. ..."

The various negotiation proposals and counterproposals, submitted by Respondent, fully support Council's position. That is, Council had proposed various limitations and very broad grievance and arbitration language which would have made any dispute subject to the grievance and arbitration procedures; but Respondent insisted on a provision shorn of most of Council's limitations, for example, "basic workweek will not be changed to perform work that could reasonably be performed in any other manner or to avoid payment of overtime"; and disputes subject to grievance and arbitration were specifically limited to

"any dispute therefrom as to whether the Employer had valid reasons in terms of the bases listed herein. ..."

The parties did, indeed, by the Agreement negotiate concerning proposed changes in the hours of work, including notice, discussion and effort to work out mutually acceptable change, which includes impact of such proposed change. Nevertheless, there was no clear and unmistakable waiver by Council, by its agreement to discuss impact, of its right to negotiate concerning impact. Cf., Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., A/SLMR No. 680, 6 A/SLMR 374 (1976); Internal Revenue Service, Omaha District Office A/SLMR No. 417, 4 A/SLMR 493 (1974), which hold, inter alia, that there is no withdrawal of jurisdiction where, as here, the issue is whether a party to an agreement has given up rights granted under the Order; and that in the absence of clear and unmistakable waiver the exclusive representative retains rights granted under the Order. That discussion of impact was not intended as a waiver of Council's right, and Respondent's obligation, to negotiate as to impact is supported by the limited grievance and arbitration provision of Article 15, Section 1. In addition, Article 6, entitled "MATTERS APPROPRIATE FOR CONSULTATION AND NEGOTIATION" provides, in part, as follows:

"Section 1. Appropriate matters include personnel policies and practices and matters affecting working conditions within the unit which are within the discretion of the Employer insofar as is required by applicable laws or regulations." (Res. Exh. 3, p. 10).

For the foregoing reasons, this case is not governed by Department of Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624, 6 A/SLMR 127 (1976); Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark, Ohio, A/SLMR No. 677, 6 A/SLMR 361 (1976); and similar decisions, since no remedy is provided within the grievance machinery of the negotiated agreement as to impact of a change in hours of work.

Respondent's assertion that the proposed change in hours of work was not a "realignment of work forces" is not persuasive. First, a change of work hours is a matter affecting working conditions and is a negotiable item within the meaning of Section 11(a) of the Order. Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656, 6 A/SLMR 237 (1976); U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673, 6 A/SLMR 339 (1976). Second, Section 11(b) of the Order removes from the obligation to negotiate of 11(a) a proposal relating to the basic workweek and hours of duty only when such proposal

"is integrally related to and consequently determinative of the staffing patterns of the agency, i.e., the numbers, types, and grades of positions of employees assigned to an organizational unit, work project or tour of duty of the agency." (Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36, Supp. Dec. 1975, Report No. 73). See, also, Southeast Exchange Region of the Army and Air Force Exchange Service, supra.

Fourth, even when the obligation to bargain does not, pursuant to Section 11(b), extend to the establishment or change of tours of duty, negotiations may be required on the impact of such actions on the employees involved. AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., FLRC No. 71A-11, 1 FLRC 100 (1971); Internal Revenue Service,

Philadelphia Service Center, Philadelphia, Pennsylvania. A/SLMR No. 771, 6 A.SLMR 719 (1976).

Of course, the instant case does not turn on the reserved right of management pursuant to either Sections 11(b) or 12(b) of the Order since the Agreement specifically provided for change of hours of work for stated reasons and Council did not, and does not, question that Respondent's proposed stagger shift was based on a basis stated in Article 15, Section 1. Accordingly, whether a change of hours of work is a "realignment of work forces", as clearly appears from the decisions, including those set forth hereinabove, or is a matter affecting working conditions and negotiable pursuant to Section 11(a) of the Order, such matter is a subject for negotiations except to the extent that such matter is removed from the obligation to negotiate by Section 11(b) or 12(b) of the Order and even when negotiation is not required on the decision, pursuant to Section 11(b) or 12(b), there is still an obligation to negotiate, upon request, on the impact of such action. The fact that the change is pursuant to a negotiated agreement, rather than as a reserved right of management, does affect the obligation that would attach to an action pursuant to Section 11(b) or 12(b).

II. Obligation To Meet And Confer

I am well aware that the Federal Labor Relations Council in its Report and Recommendation on the Amendment of Executive Order 11491, as amended, stated that:

"The parties to exclusive recognition have an obligation to 'negotiate' rather than to 'consult' on negotiable issues unless they have mutually agreed to limit this obligation in any way. ... The term 'meet and confer,' as used in the Order, is intended to be construed as a synonym for 'negotiate.'" (Pages 43-44).

The Agreement required that Respondent, before changing the hours of work, "notify the Council and meet to discuss the proposed change. Such meetings will be to work out mutually acceptable change. ..." Respondent did notify the Council; did agree to a suggestion of the Chief Steward in the Power Plant that volunteers be solicited; and did meet to discuss all aspects of the proposed change in order to reach mutual agreement pursuant to Article 15, Section 1, of the Agreement. Council refused to attempt to work out mutually acceptable change unless and until Respondent agreed to enter into formal negotiations on the impact of the change and that the Council wished to set up ground rules for negotiation. Respondent, while it was ready and willing to

discuss the proposed change and to attempt to work out mutually acceptable change, refused to enter into formal negotiations on impact.

I quite agree with Admiral Westfall's statement that:

"This procedure [Article 15, Section 1] provides opportunity for the parties to arrive at a mutually acceptable change encompassing both impact and procedure regarding such a change." (Res. Exh. 1, pp. 2-3)

However, for the reasons set forth above, there is nothing in Article 15, Section 1 of the Agreement which constitutes a clear and unmistakable waiver by Council of the right under the Order to negotiate concerning the impact of a change in the hours of work pursuant to Article 15, Section 1. Accordingly, Respondent was required to negotiate concerning impact.

The Council misconceives the obligation to negotiate on impact. The Record shows that Council was strongly opposed to the stagger workweek. Indeed, President Lake's insistence on meeting to discuss ground rules and on formal negotiations strongly suggest that President Lake sought this approach as a means to delay the proposed change. Good faith bargaining is not determined by formal trappings or even by how the parties may have characterized their conduct. United States Department of the Treasury Internal Revenue Service, Chicago District, A/SLMR No. 711 (1976) (The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation, 6 A/SLMR 492, but the decision of the Administrative Law Judge is not included in Volume 6).

Here, Respondent met twice with Council to discuss the proposed change and to work out mutually acceptable change. Respondent stated its need to assign 12 to 15 employees to the Wednesday through Sunday shift for the purpose of performing maintenance on its utility system; that it contemplated assignments to this shift on a 90 day basis with consideration to acceptance of volunteers; that such stagger shift would be temporary. On each occasion Council was requested to discuss the proposed change and to attempt to work out mutually acceptable change in accordance with the Agreement. Council refused to enter upon any discussion and refused to attempt to work out mutually acceptable change, as it had agreed to do in the Agreement.

With full recognition that Respondent refused to characterize its obligation as negotiating, Council refused to enter upon any

discussion whatever. This was not a situation where a party refused to discuss an item. To the contrary, Respondent sought to discuss the proposed change and sought to work out mutually acceptable change, which, in reality, is necessarily the beginning of bargaining. Whether Respondent, however it might characterize its conduct, would, or would not, have complied with its obligation to negotiate cannot be known because Council refused to enter upon any discussion. Because Council refused to discuss the proposed change, it cannot be said that Respondent has refused to negotiate since Council's own refusal to discuss precluded any negotiations. This is not to imply, however, that Respondent was correct in refusing to acknowledge its obligation to negotiate impact; but rather that Respondent's compliance with the terms of the Agreement to discuss the proposed change and to work out mutually acceptable change was not; without more, a refusal to bargain within the meaning of Section 19(a) (6) of the Order. Indeed, compliance with the contractual obligation, to meet, to discuss and to work out mutually acceptable change in good faith, may well constitute negotiation, as required by the Order, without regard to what the procedure is called by the parties.

Moreover, the negotiated agreement of the parties imposed the duty to meet, to discuss and to work out mutually acceptable change, which was, and is, a contractually agreed upon condition. Council's refusal to comply with the terms of its Agreement precludes a finding that Respondent refused to consult, confer, or negotiate with a labor organization as Respondent sought to discuss the proposed change and sought to work out mutually acceptable change. Where, as here, compliance with an agreed procedure requires discussion and attempt to work out mutually acceptable change, unless and until the discussion and efforts to work out mutually acceptable change, the essence of bargaining, demonstrates a refusal to bargain in good faith, a refusal to negotiate has not been established.

RECOMMENDATION

That the complaint should be dismissed.


WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 8, 1978
Washington, D.C.

WBD/mml

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. CUSTOMS SERVICE, REGION VII,
LOS ANGELES, CALIFORNIA
A/SLMR No.1066

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union, Chapter 103, (NTEU) alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order when it failed to provide the NTEU with the opportunity to negotiate concerning impact and implementation prior to conducting a special operation called Star Trek II. The Respondent contended, in part, that it was not obligated to negotiate concerning the procedures to be used or the impact and implementation of the operation since participation by employees in such operations was an established term and condition of employment, and there was no change in the procedures utilized in conducting the operation from those utilized in conducting many such operations in the past.

The Administrative Law Judge found that Star Trek II continued management's longstanding practice of conducting special operations, and that participation in such operations was a well-established condition of employment. However, the Administrative Law Judge found that the Respondent Activity had failed to prove that in the conduct of Star Trek II it had utilized established selection procedures and criteria. In essence, the Administrative Law Judge imposed on the Respondent an obligation to establish that no change had occurred from past operations. Hence, the Administrative Law Judge concluded that Respondent had violated 19(a)(1) and (6) of the Order when it implemented Star Trek II, without prior opportunity being given to the NTEU to negotiate concerning the impact and implementation of the selection procedure to be utilized in Star Trek II.

Contrary to the Administrative Law Judge, the Assistant Secretary concluded that the NTEU had not established by a preponderance of the evidence that Star Trek II constituted a change in personnel policies and practices, or matters affecting the terms and conditions of employment of unit employees. He noted that his regulations impose on a complainant the burden of proving by a preponderance of the evidence all allegations of the complaint. Under these circumstances he ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. CUSTOMS SERVICE, REGION VII,
LOS ANGELES, CALIFORNIA

Respondent

and

Case No. 72-6746(CA)

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 103

Complainant

DECISION AND ORDER

On February 28, 1978, Administrative Law Judge Steven E. Halpern issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain alleged unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed an answering brief to the Respondent's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief and the Complainant's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations, only to the extent consistent herewith.

The complaint herein alleged, in essence, that the Respondent violated Section 19(a)(1) and (6) of the Order when it failed to provide further information and an opportunity to negotiate concerning a special operation designated as Star Trek II. The essential facts of the case, which are not in dispute, are set forth, in detail, in the Administrative Law Judge's Recommended Decision and Order, and I shall repeat them only to the extent necessary.

During all times material herein, the Respondent and Complainant have been party to a negotiated agreement covering employees in the bargaining unit for which the Complainant is the exclusively recognized

bargaining representative. ^{1/} In the latter part of August or early September 1976, the U.S. Customs Service authorized the Respondent Activity to carry out a special enforcement operation designated as Star Trek II. As part of its preparation for Star Trek II, the Respondent solicited volunteers, furnishing non-specific information about the general nature of the operation, that TDY (temporary duty) assignment away from the regular duty station was involved, and that those selected would not be permitted to take leave until completion of the operation. On September 10, 1976, selections of those employees who were to participate in Star Trek II were made. The participating employees were then notified of their selection, and briefing sessions were held in mid-September.

Sometime prior to September 24, the Respondent's Director of Personnel approached the Complainant's national representative, who was attending a conference on another matter, and informed the latter that there was going to be a special confidential operation similar to Star Trek I, and that if there was any further information that could be made available, it would be given to the Complainant when possible. On September 24, the Complainant's national representative was approached again by the Respondent's Director of Personnel and given a list of employees who had been chosen to participate in Star Trek II. This document stated that the Respondent would conduct Star Trek II "in the very near future." The Complainant's national representative asked for more information, but was told nothing further was available and that when further information was available, it would be given to the Complainant. At this point, no request for negotiations was made by the Complainant and it awaited further information from the Respondent.

Star Trek II began on October 9 and continued until November 17. When the Complainant learned of the implementation from its membership after Star Trek II had begun, its national representative made several calls to the Respondent's labor relations office seeking a negotiating date. On November 3, the Complainant's national representative was informed that, since Star Trek II was confidential, negotiations at that time would jeopardize the success of the operation. The Complainant thereupon filed its unfair labor practice charge on November 9. Subsequent to the conclusion of Star Trek II, and in connection with the pre-complaint investigation procedures, the Respondent offered to negotiate with the Complainant. The Respondent asserted that earlier negotiations concerning Star Trek II had been precluded by security considerations necessary to the success of the operation.

The evidence establishes that since 1969 Respondent has conducted numerous special operations similar to Star Trek II, with 12 such operations having been conducted since April 1974, when the Complainant became the exclusive representative of the Respondent's employees.

^{1/} The Complainant became the exclusive representative in April 1974. The current negotiated agreement extends from November 14, 1975, to November 14, 1978.

The record fails to establish that the Complainant sought bargaining concerning the impact and implementation of such special enforcement operations in the past, although there is evidence of specific notification by the Respondent to the Complainant with respect to at least one special operation in the past, Star Trek I.

The Complainant contends, in essence, that the Respondent violated the Order by effecting Star Trek II without first notifying and affording it a reasonable opportunity to bargain concerning the impact and implementation of the special operation. The Respondent asserts, on the other hand, that it was not obliged to negotiate concerning the impact and implementation of Star Trek II because there was no change from the procedures utilized in the past in carrying out special operations and participation by employees in special operations is an established term and condition of employment.

The Administrative Law Judge found, among other things, that Star Trek II continued management's longstanding practice of conducting special enforcement operations, and that participation in such operations by employees on TDY assignments away from their regular duty stations was a well-established condition of their employment. However, he further found that in the previous special enforcement operations the Respondent Activity had failed to establish the criteria and specific procedures for the selection of employees. Thus, the Administrative Law Judge concluded that the Respondent was obligated to negotiate with the Complainant concerning implementing procedures for the selection of volunteers and selection of participants in Star Trek II and on the impact of its actions with respect to adversely affected employees. The Respondent's failure to negotiate with respect to these matters, in the Administrative Law Judge's view, constituted a violation of Section 19(a)(1) and (6) of the Order. In reaching this conclusion, the Administrative Law Judge rejected the Respondent's defense that it was not obligated to notify and negotiate with the Complainant because no change from the earlier operations had occurred in Star Trek II, noting the absence of evidence in the record as to the procedures utilized in the earlier special enforcement operations. In essence, the Administrative Law Judge imposed upon the Respondent the obligation to establish by a preponderance of the evidence that no change had occurred from its past operations.

Contrary to the Administrative Law Judge, I find insufficient evidence to establish that under the circumstances of this case the Respondent violated Section 19(a)(1) and (6) of the Order. Thus, as noted above, the evidence establishes that the Respondent conducted special enforcement programs similar to Star Trek II in the past. Further, the record is unclear as to the procedures utilized by the Respondent in the past in selecting participating personnel for past special enforcement programs, and whether or not the same procedures were utilized in staffing Star Trek II. It has been held previously that where agency management takes an action which alters established personnel policies and practices or working

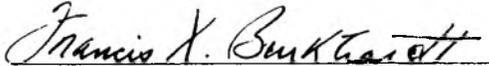
conditions which fall within the ambit of Sections 11(b) or 12(b) of the Order, it, nevertheless, must afford an exclusive representative reasonable notice and an opportunity to bargain concerning the impact and implementation of such action prior to its implementation. ^{2/} However, it has further been held that agency management's obligation arises only when its action effects a change in existing personnel policies and practices or working conditions of unit employees. ^{3/}

The Assistant Secretary's Regulations impose upon a complainant the burden of proving the allegations of its complaint by a preponderance of the evidence. ^{4/} In my view, the Complainant herein has failed to establish by a preponderance of the evidence that the implementation of the special enforcement operation known as Star Trek II constituted a change in past enforcement operations. Thus, the Complainant failed to present, and the record does not contain, sufficient evidence to establish that the procedures utilized by the Respondent in soliciting volunteers, the method of selecting volunteers, or the conditions of the operation of Star Trek II differed from previous enforcement operations and thereby constituted a change in established personnel policies and practices, or matters affecting the terms and conditions of employees in the exclusively represented unit. Consequently, I find that the evidence herein is insufficient to establish that the Respondent's conduct in this matter was in derogation of its bargaining responsibilities under the Executive Order. Accordingly, I shall order that the subject complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-6746(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 23, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

^{2/} Cf. Department of Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 814 (1977).

^{3/} See Department of Treasury, Internal Revenue Service, Brookhaven Service Center, cited above, and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, 6 A/SLMR 582, A/SLMR No. 736 (1976).

^{4/} Section 203.15 of the Assistant Secretary's Regulations provides: "A complainant in asserting a violation of the Order shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." See also Section 203.6(e) of the Regulations which provides that, "Uhe complainant shall bear the burden of proof at all stages of the proceeding regarding matters alleged in its complaint..."

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- 2 -

(415) 556-0555

In the Matter of)

U. S. CUSTOMS SERVICE, REGION VII,
LOS ANGELES, CALIFORNIA)

Respondent)

- and -)

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 103)

Complainant)

CASE NO. 72-6746(CA)

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#3305
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For the Respondent

Jane F. Davis, Attorney, and
Fred D'Orazio, Esquire
National Treasury Employees Union
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For the Complainant

Before: STEVEN E. HALPERN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on March 21, 1977, under Executive Order 11491, as amended, by the National Treasury Employees Union and NTEU Chapter 103, against the U. S. Customs Service, Notice of Hearing was issued

by the Regional Administrator, Labor-Management Services Administration, San Francisco Region, on August 9, 1977, and pursuant to his Order Rescheduling Hearing the matter was duly heard on November 28, 1977, in Los Angeles, California.

The complaint charges violations of section 19(a)(1) and (6) of the Executive Order and alleges the following:

NTEU is the exclusive representative of all bargaining unit employees in Region VII, U. S. Customs Service. On September 24, 1976, management gave the union an undated memorandum (Attachment A) announcing the proposed TDY assignment - Operation Star Trek II. Mr. George Candish, Region VII Director of Personnel, told Mike Gaide, NTEU National Field Representative, that an "operation" was being planned and more information would be furnished as soon as it became available so NTEU could negotiate if it so desired. No further information was furnished to NTEU. Operation Star Trek II was implemented and several bargaining unit employees were detailed to various posts of duty in October and November, 1976. Repeatedly throughout the latter part of October and early November, NTEU demanded additional information on the operation and a date to commence negotiations. Such requests were denied until November 3, 1976, when management announced that the nature of the operation was confidential and to negotiate on it would jeopardize the operation. No negotiations were held.

Both parties have been afforded a full opportunity to be heard, to adduce evidence bearing on the issues involved, to examine and cross-examine witnesses, to make oral argument and to file briefs.

Upon the entire record, 1/ having observed the witnesses and assessed their credibility, I make the within findings, conclusions and recommendations.

1/ Respondent's motion to correct the transcript hereby is granted and the transcript is corrected in accordance therewith.

Findings

I

Complainant, since April 1974, has been the exclusive representative of Respondent's bargaining unit employees. The parties during all times material hereto were subject to a collective bargaining agreement entered into on October 15, 1975.

II

Inter alia it is Respondent's mission to reduce the flow into this country of illegal drugs and other contraband.

III

In furtherance of its mission Respondent began in 1969 to conduct periodic intensified interdiction operations--also referred to as special operations--concentrating its employees, on temporary duty assignment (TDY), at locations other than their normal duty stations.

IV

Respondent's witness, Marvin E. Milner, 2/ testified that special operations such as Star Trek II, the operation out of which the instant dispute arises, since 1969 have been "standard operating procedure" in which:

... we would garner the intelligence, focalize on a particular area, geographic area, based on the intelligence, smuggling trends, profiles, routes, patterns, et cetera, and then concentrate with manpower and resources in that particular area for designated periods of time. (TR. 238)

According to his testimony at least 12 special operations essentially similar to Star Trek II have been carried out

2/ Milner, who was regional coordinator for Star Trek II, has had long and intimate contact with intensified interdiction operations over the years. He was either Assistant Regional Patrol Director or Regional Patrol Director during the entire period of Complainant's representation; prior thereto, during the period from 1969 to 1974, he had been a supervising customs inspector and an operations officer with the division of inspections and control.

prior thereto within the time frame of Complainant's exclusive representation. His testimony is supported by documentary evidence of a few such operations and there is no evidence to the contrary.

Complainant's chief steward, Thomas L. Haugen, himself a participant in Star Trek II, in response to the question "What is the difference, if any, between Star Trek II as a TDY assignment, and any other TDY assignment in your work?" responded: "As far as specifics go, a number of things, but in general, they are the same." (TR. 85)

V

Complainant, through its National Field Representative Mike Gaide, was aware that Respondent had carried out intensified operations prior to Star Trek II (TR. 111 et. seq.). Even apart from his knowledge however, considering the number of such earlier operations it can hardly be believed that other union officials as well were not familiar with management's practice of periodically conducting them. Actual notice had been given as to at least one prior operation, Star Trek I.

VI

At hearing, both sides endeavored to reconstruct the times of occurrence of the events surrounding Star Trek II. The testimony in this regard unfortunately consists largely of approximations and estimates and is so imprecise and overlapping that it cannot be relied upon as the basis for other than a finding of general chronological sequence; and, in some respects even chronology is in doubt. The witnesses apparently testified from memory and understandably their accounts vary.

Overall, however, it appears that Respondent, having made the determination and been authorized by its Washington, D. C. headquarters to carry out Star Trek II, proceeded to implement it, by the following series of steps, commencing in early to mid-September 1976: (a) it issued a solicitation for volunteers giving advice of the general nature of the forthcoming operation, that TDY assignment away from regular duty station was involved and that those selected would not be permitted to take leave until completion of the operation; (b) selections were made from among the volunteers; (c) those volunteers selected to participate were notified and a briefing session was held, probably prior to September 24, 1976; (d) all participants

were given ample opportunity to draw the recommended sum of \$300.00 in advance travel funds and provisions were made for an additional \$150.00 to be available at the TDY station if needed, such total amount being sufficient for each tour; (e) the integrity of Star Trek II requiring internal secrecy as to the time of commencement of its operative or "strike" phase and the situs of the intensified searches, neither the date nor location of the "strike" was disclosed to the participants until 12 hours prior thereto; travel and lodging arrangements were made for them unless they requested otherwise; (f) the first "strike" took place on the morning of October 9, 1977, and the operation was concluded on November 17, 1976 (Exhibit M-8).

VII

Notice of Star Trek II was first given to the union qua union on September 24, 1976, at which time management's Regional Director of Personnel Management, George Candish, handed to NTEU National Field Representative, Mike Gaide, a copy of an undated internal memorandum (Joint Exhibit 5) from its Regional Commissioner to its District Director, giving advice of operation Star Trek II. To said memorandum was affixed a list of those employees who had already been selected to participate, the selection having been made from among those volunteering in response to the earlier solicitation.

It is thus evident that as to the parties inter se elements of the operation having impact on bargaining unit employees had already been implemented, without opportunity for negotiations, prior to September 24, 1976.

The testimony of Candish that he had given Gaide earlier advice of Star Trek II and that the memorandum was furnished pursuant to his agreement to provide further available information is unsupported by the Regional Commissioner's letter of April 14, 1977, which is reproduced hereinbelow. That letter fixes September 24, 1976, as the date of notice to the union of the operation.

Under the circumstances here I do not find such earlier awareness of the operation as Complainant's Chief Steward had as being tantamount to notice to the union. 3/

3/ Dependent upon the situation the cases have gone both ways: U. S. Army Electronics Command, Fort Mammouth,

His knowledge, in any event, came from the information contained in the solicitation and therefore did not pre-cede implementation of the operation overall.

VIII

The parties have an established practice and procedure with regard to mid-contract negotiations on matters of regional scope, which is applicable to this situation. Under that practice regional matters are negotiated at the regional level (TR. 102-103, 160-161). Those proposals upon which the union desires to negotiate are presented at a meeting arranged pursuant to request; specific proposals are not made in advance of such meeting. Accordingly, when, following the aforementioned briefing session Complainant's Chief Steward indicated to Respondent's District Patrol Director his desire to negotiate certain aspects of the operation he was appropriately advised to contact the Assistant Regional Commissioner, and, Complainant has not contended that any action taken by said Chief Steward constituted a valid request to negotiate. Having received said advice he turned the matter over to Mike Gaide, who assumed any further responsibility in the matter.

IX

Since Star Trek II was unilaterally implemented, questions such as the timeliness of Complainant's request to negotiate, whether or not it had sufficient information to formulate proposals for negotiation, whether or not Respondent employed dilatory or misleading tactics and other like and related matters are largely academic. In the interest of continuity and completeness, however, I note the following:

3/ (cont.) New Jersey and National Federation of Federal Employees, Local 476, Independent, Case No. 32-3673(CA); General Services Administration, Region 3, Public Buildings Service, Central Support Field Office, and American Federation of Government Employees, Local 2151, AFL-CIO, A/SLMR No. 583; Headquarters, 63rd Air Base Group (MAC), United States Air Force, Norton Air Force Base, California and American Federation of Government Employees, Local No. 1485, Case No. 72-5762(CA); United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois and Local 167, National Federation of Federal Employees, A/SLMR No. 289.

It is my impression from the testimony that even if, as Candish testified, he did not expressly state, as Gaide contends, that he would negotiate with regard to the operation, Gaide was justified in inferring from whatever Candish said or indicated that he stood ready to negotiate; and, Candish in fact testified that such was his position - at least as to non-secret matters. However, I do not find that Candish made a binding commitment to Gaide that the operation would not be proceeded with until further information was provided and an opportunity to negotiate afforded.

I find that as of September 24, 1976, when it was given a copy of the aforesaid memorandum, Complainant had in its possession sufficient information about Star Trek II to request a meeting and to negotiate in many of those areas which were of concern to it.

It did not then request a meeting, but chose instead to await the further information allegedly promised by Candish. No further information was forthcoming; the action or "strike" phase of the operation began, without further notice, on October 9, 1976; and, Complainant thereafter made its request to negotiate. Such request cannot be considered timely. The two week period between official notice of the operation, and the mounting of the first strike provided Complainant ample opportunity to request negotiations. That it decided to await such further information as might be forthcoming, when it already had in its hands sufficient information on which to commence negotiations, was of its own choosing.

I reiterate that the above is chiefly of academic interest, and for yet a further reason. Hereinbelow I conclude, based upon the position letter from Candish's superior, Respondent's Regional Commissioner, that "management" expressly rejected the concept that prior negotiations were required under the Executive Order; and, would not have entered into negotiations on Star Trek II until it was completed, notwithstanding what Candish may personally have contemplated and indicated. I therefore find that any request for negotiations would have been futile; it is thus of no value to Respondent as a defense, and of no real consequence herein, that Complainant made no formal request to meet and negotiate.

X

On January 14, 1977, Respondent's Regional Commissioner wrote to Complainant's National President, in part, as follows. (Joint Exhibit 4):

On December 14, 1976, my representatives met with members of the National Treasury Employees Union for the purpose of informally resolving a charge by National Treasury Employees Union that this agency violated Executive Order 11491, as amended, by its implementation of Operation Star Trek II.

As explained to your representatives during the meeting, the operation was of a sensitive nature, directly related to the mission of the agency. For security purposes, personnel were informed of its contents only on a "need to know" basis. On September 24, 1976, Mr. Michael Gaide was given all the existing information available by Mr. George Candish, Director, Personnel Management Division. Thereafter, the operation commenced and, for security purposes, no further discussion with the bargaining unit was permitted. When questioned concerning further negotiations by Mr. Gaide, my representative explained to him that post implementation negotiations would be possible upon completion of the operation.

Though we realize the value of such negotiations is reduced, under the circumstances, post termination negotiations are the only feasible manner in which such an operation can be conducted. To have done otherwise could have jeopardized Star Trek II and thereby the mission of the agency.

In the spirit of cooperation and good faith bargaining, this office is willing to sit down and negotiate the impact that Star Trek II had on the bargaining unit. Perhaps this discussion can lead to valuable suggestions for future operations along these lines.

XI

Further, Respondent's then position was definitively set forth by its Regional Commissioner in his April 14, 1977, letter to the Compliance Officer, U. S. Department of Labor, LMSA, in part, as follows (Joint Exhibit 3):

This is in response to allegations made by the National Treasury Employees Union that the United States Customs Service, Region VII, violated Section 19(a), subsection (1) and (6),

of Executive Order 11491, as amended. The union claims that management implemented a special operation, code named Star Trek II, without first presenting the exclusive representative the opportunity to negotiate its impact on the bargaining unit. The agency contends that the operation was carried out under security measures, and negotiations could only take place when it came to a conclusion. The following is a brief outline of the agency's position.

The U.S. Customs Service is a law enforcement agency, obligated to protect the revenue of the United States and interdict narcotics and other contraband. In order to carry out its mission, it is necessary from time to time to institute enforcement programs such as Star Trek to catch offenders of Customs' laws off guard. Such programs by their very nature are secretive and can only be detailed on a need to know basis, otherwise the outcome of the operation could be in jeopardy.

With security in mind, on September 24, 1976, representatives of the agency informed the union representative of the existence of Star Trek II and of its imminent implementation. The union was also told that additional information, "if available," would be supplied to it. After the operation commenced, NTEU tried to gain more information and set dates to negotiate its impact on bargaining unit employees.

Their representatives were advised by the Agency that such negotiations could only take place when security precautions became unnecessary, i.e., upon completion of the operation. During a meeting to informally resolve this matter on December 14, 1976, the Agency again stated its willingness to negotiate the impact of the operation after security precautions were resolved. However, the union remained adamant that negotiations must start prior to completion of Star Trek II.

Now that the operation has been completed, the Agency remains willing to negotiate its impact on the bargaining unit employees with the union.

Section 11(a) of the E.O. imparts an obligation to management to negotiate "personnel policies and practices and matters affecting working conditions." However, it does not demand that such negotiations commence prior to or even during a matter affecting the bargaining unit's working conditions. It merely confers an obligation to negotiate. This Agency contends that it is willing to live up to its obligation, but in a manner which will not compromise its ability to carry out its mission.

Conclusions

The dispute in this matter is over management's obligation to meet and negotiate with the exclusive representative of its employees regarding special operation Star Trek II and more specifically with regard to its implementing procedures and impact on adversely affected employees.

As there are no specific proposals to be considered, (TR. 128), I address only the general scope of management's obligation to meet and negotiate.

Positions of the Parties

While it is presently contended on Respondent's behalf that it had no obligation to negotiate the implementation and impact of Star Trek II because that operation merely continued an established past practice and brought about no such change as would require mid-contract negotiations, an entirely different reason was given at and after the time of its refusal to meet and negotiate. Thus management, in the April 14, 1977, letter from its Regional Commissioner takes the clear position that for security reasons no prior negotiations could be had.

It is nevertheless now asserted that management stood ready, up to the October 9, 1976, "strike" to negotiate on non-secret matters. I reject that assertion and the testimony of Mr. Candish, upon which it is based, as being inconsistent with the unambiguous and unequivocal language of said letter which, in my opinion, is not now susceptible of qualification by ameliorative oral testimony from the commissioner's subordinate.

I am obliged to note further that the suggestion in that letter that section 11(a) of the Executive Order does not require prior negotiations is contrary to the view of the Assistant Secretary and the Federal Labor Relations Council. 4/

As to the merits of the defense that all prior negotiations would have compromised the security of the mission, I conclude, that since only the precise "strike" time and location were required to be kept secret, meaningful prior negotiations could have been had on a number of matters of concern to Complainant without compromising the integrity of the operation (TR. 158-159).

I find that no emergency existed in connection with Star Trek II; Respondent's own witness so testified and there is no other evidence to support a contrary finding. I therefore conclude, as Complainant urges, that the emergency provisions of section 12(b)(6) are inapplicable to this proceeding.

Complainant contends that it has made no clear and unmistakable waiver of its right to negotiate. There is no evidence that would support a finding to the contrary, and I therefore conclude that no such waiver has been made. Contrary to the conclusion Complainant would urge, however, such determination is not dispositive of the issues in this matter for it must be determined in the first instance whether or not a right to negotiate existed.

Neither from the Regional Commissioners' aforequoted letters nor from any other evidence adduced can it be concluded that a section 3(b)(3) determination was made in this case, such as would render the Order inapplicable; nor do I understand Respondent at any time so to have contended.

The Assistant Secretary has jurisdiction under sections 6(a)(4) and 11(d) to make the negotiability determinations required herein.

4/ Report and Recommendations of the Federal Labor Relations Council on the amendment of Executive Order 11491, as amended, Labor-Management Relations in the Federal Service January 1975, V.3.; National Labor Relations Board and National Labor Relations Board Professional Association, A/SLMR No. 246.

The Collective Bargaining Agreement

The collective bargaining agreement makes no reference to special operations and there is no evidence that contract negotiations were had thereon. It seems that special operation Star Trek I, of which the union had express notice, was conducted at about the time of the negotiations on the contract, but the exact time relationship has not been established and there is no basis for a finding that the parties negotiated the agreement in contemplation of special operations.

There are provisions in the agreement which are incompatible with the exigencies of special operations. Article 29, for example, which requires in part that a schedule of employee placement be posted on official bulletin boards at least five days prior to the beginning of each pay period would foreclose the flexibility management must have in the rapid shifting about of personnel for the effective conduct of special operations.

However, there are numerous provisions contained in the agreement which are of such general nature as to have direct applicability to special operations, such, for example, as Article 27, which deals in part with the financial aspects of travel. Therefore, notwithstanding that special operations per se were not negotiated, I conclude that management was under no obligation to enter into mid-contract negotiations on those procedures already negotiated 5/ into the agreement which it utilized in implementing Star Trek II, which by virtue of their general applicability were applicable as well to special operations. Such proposals as the union may present are thus circumscribed.

The Position Descriptions

Position descriptions covering virtually all of those categories of employees who participated in Star

5/ In this connection the following testimony was given by Mr. Candish:

Q. In the past have there ever been any negotiations or discussions, well, bargaining with the union regarding details, shift assignments, travel, work assignments?

A. Yes, these are negotiated into the basic contract. (TR. 156)

Trek II are in evidence. Considering them in the light of the uncontroverted evidence accompanying their introduction I conclude that TDY assignments are an expected and expectable part of the duties of these employees.

Complainant has not denied that TDY assignments in special operations or otherwise properly are within the scope of employees duties. 6/ Furthermore, the testimony indicates that to many employees TDY is desirable and sought after. It is part of the union's concern that TDY assignments are not being made equitably and that those not selected suffer in adverse impact, and its challenge is addressed therefore to the procedures utilized in implementing such TDY assignments. As to such procedures the position descriptions are silent and do not have the effect of relieving management of the obligation to negotiate thereon.

Executive Order 11491 - Pertinent Provisions

Section 11(a) of the Order, places a mutual obligation upon an agency and the exclusive representative of its employees to negotiate in good faith with respect to personnel policies and practices and matters affecting working conditions.

However, section 11(b), excepts from the agency's obligation to negotiate "matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices.

Additionally, section 12(b) establishes the following as non-negotiable rights expressly reserved to management:

- (1) to direct employees of the agency:
- (2) to hire, promote, transfer, assign, and retain employees in positions within agency,

6/ International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., FLRC No. 71A-30. The Federal Labor Relations Council held in Local 174 International Federation of Professional and Technical Engineers, AFL-CIO, CLC and Long Beach Naval Shipyard, Long Beach, California, FLRC No. 73A-16, that temporary assignment of personnel is a right expressly reserved to management by section 12(b) (2) of the Executive Order.

- and to suspend, demote, discharge, or take other disciplinary action against employees;
- (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
- (4) to maintain the efficiency of the Government operations entrusted to them;
- (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
- (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency;

Even so, it is well established that an activity is obligated to bargain concerning the implementing procedures which it observes in the exercise of its excepted 7/ or reserved 8/ decision making and action authority and the impact on adversely affected employees even though the subject matter of the decision and action may be excepted under section 11(b) and/or non-negotiable under section 12(b) of the Order.

It is a limiting factor that the mid-contract obligation to negotiate the implementation and impact of personnel policies and practices and matters affecting working conditions is as to changes 9/ therein or additions 10/ thereto.

Respondent's Obligation to Negotiate With Respect to the Conduct of Operation Star Trek II

This portion of the discussion relates to the conduct of Star Trek II apart from the solicitation of volunteers

7/ United States Air Force Electronics Systems Division (AFSC), Hanscom Air Force Base and Local 975, National Federation of Federal Employees, A/SLMR No. 571, and the cases cited at footnote 2 therein.

8/ Department of Navy, Dallas Naval Air Station, Dallas, Texas and American Federation of Government Employees Local Union 2427, AFL-CIO, A/SLMR No. 510, and the cases cited at footnote 3 therein.

9/ Department of the Navy, Mare Island Naval Shipyard, Vallejo, California and Federal Employees Metal Trades Council, Metal Trades Department, AFL-CIO, A/SLMR No. 736.

10/ Section 11(d).

and the selection of participants; the latter aspects will be considered separately hereinbelow.

The decision to carry out Special Operation Star Trek II, how it was to be conducted (i.e., the "method") and what instrumentalities and resources were to be utilized (i.e., the "means" employed in conducting it) are section 12(b) non-negotiable management reserved rights. Additionally, being integrally related to Respondent's mission, the conduct of the operation falls within the purview of 11(b). Upon such matters management is not obligated to negotiate; 11/ and, Complainant has not seriously contended otherwise.

Absent other considerations, Respondent nevertheless was obligated to bargain concerning the implementing procedures which it observed when it carried out Star Trek II and the impact thereof on adversely affected employees.

The thrust of Respondent's present defense is that Star Trek II brought about no such changes in policy practice or working conditions as would require mid-contract negotiations. The testimony of Respondent's witness Milner prima facie establishes Respondent's regular and ongoing practice of periodically conducting intensified enforcement operations, utilizing personnel on TDY assignments at duty stations away from their regular duty station, which began in 1969 and continued during the several years of Complainant's exclusive representation prior to and through Star Trek II.

It must be observed that each special operation has its own unique characteristics (TR. 170); each succeeding operation thus in some manner is different from its predecessors. The record created in this case, however, does not demonstrate that such differences as may have existed between Star Trek II and its predecessor special operations constituted changes in the nature of the practice itself, or in working conditions, of such significance as would require management to enter into mid-contract negotiations. Neither Complainant's extensive cross-

11/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56; American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U. S. Department of Agriculture, FLRC No. 73A-36.

examination of Milner nor any other evidence revealed such.

I find and conclude therefore that Star Trek II continued management's longstanding practice of conducting special operations; that the participation therein of employees, on TDY assignment away from their regular duty

stations, was a well established condition of their employment; and, that the unilateral implementation of special operation Star Trek II, except as to the aspects distinguished and discussed hereinbelow, did not violate section 19(a)(1) or (6) of the Order.

Management's Obligation to Negotiate the Solicitation of Volunteers and Selection of Employee Participants in Operation Star Trek II

In implementation of its decision to conduct Special Operation Star Trek II management issued to its employees a solicitation for volunteers for the temporary duty assignments; and, from among the volunteers, the participants were selected.

If there was an obligation on the part of management to negotiate in this situation, of necessity prior notice and opportunity to request negotiation should have been given. This of course presupposes the furnishing of information to the union sufficient to formulate meaningful proposals.

Neither notice nor information was given to the union prior to the solicitation. Neither notice nor information was given to the union prior to the selections.

In consideration of whether or not negotiations were required of management as to the solicitation and selection process, it is necessary first to consider its asserted defense that there was no change in established past practice, which defense I have found meritorious as to the other aspects of the subject operation.

With regard to the procedures employed in the solicitation and selection process Milner, the coordinator of the operation testified in part, as follows:

Q. Now, you mentioned the selected employees. Were these employees selected by management to participate in Star Trek II?

A. They were selected from a list of voluntary employees.

Q. Were all the employees who participated in Star Trek II from volunteers?

A. The (sic) the best of my knowledge, they were.

Q. How were they selected? Were there more volunteers than were selected?

A. Yes, sir, there were.

Q. How were they selected to participate in Star Trek II?

A. I would imagine partially on availability, allowing for personal problems, family problems, or what have you.

(Emphasis supplied, TR. 225)

Q. How were volunteers for Star Trek II notified that they could sign up to be volunteers?

A. Announcements were put out that we would be holding an intensified operation, and people were asked, you know, if they wanted to volunteer. It would require TDY assignments, and there would be some travel involved; and the mechanics, and whether they put a list where they signed up, you know, individually, or they were requested individually by their immediate supervisor, I don't know. But the announcement (sic) was put out that we would be having the operation. (Emphasis supplied, TR. 230)

Q. In terms of how the volunteers were selected, can you tell me a little bit about that?

A. They were selected from the list of people who submitted their names.

Q. What were the criteria?

A. I would have to say, one, availability, known expertise. (Emphasis supplied, TR. 305)

Q. On the selection of volunteers, if more people volunteer than can go, how do you make the selection?

A. As I stated earlier, their known work habits, expertise, availability, physical condition at the time. Those are just some of the factors I would assume, you know--

Q. So you evaluate the employees?

A. I would -- I would say "yes."

Q. And do you have a sort of a standard of evaluation that you use, something like what you just mentioned earlier, those factors are what you would usually take into account?

A. I -- I would assume that the selecting officer, in this case in Star Trek II the assistant coordinator for each division, most definitely took these things into consideration from the listed employees.

Q. Do they have a written procedure for that?

A. I can't answer that question.

Q. Would you know about it if they did, if you are in charge of the whole thing?

A. You mean a selection criteria?

Q. Right.

A. Oh, I am sure I would.

Q. So they don't have one --

A. Not to my knowledge.

Q. -- if you haven't seen it?

A. I -- no, I have not seen it. That is right.

Q. And you would have seen it if there was one?

A. I would assume I would have seen it.
(Emphasis supplied, TR. 336-337)

Mr. Milner's testimony was characterized by candor and forthrightness throughout. I was generally impressed by the depth of his background and experience and he certainly was the most knowledgeable witness as to the logistics of special operations. I have added emphasis by underscoring in the above quoted testimony to highlight his uncertainty in the area of solicitation and selection. I am satisfied both from the character of the language used and the demeanor of the witness while delivering it that this portion of his testimony is reflective of nothing more than areas of consideration which he believes generally appropriate to the selection of participants. It can hardly be found from this testimony, or indeed from any other evidence presented, that there were in fact, existing criteria and specific procedures for the solicitation of volunteers and the selection of participants for special operations which were utilized unchanged in Operation Star Trek II. In the absence of evidence that there was an established practice with regard to the solicitation of volunteers and the selection of participants for special operations the defense that there was no change in prior practice or employment conditions, is unavailable to Respondent. Thus, it remained obligated to negotiate on the procedures of implementation and on impact, as to the solicitation and selection processes.

Such proposals as the union may make in this area however, may deal only with the procedures which management would observe leading to the exercise of the retained management right and must not interfere with the exercise of that right itself. 12/ Management is not obligated to negotiate a proposal which, based upon the special circumstances of a particular case, is integrally related to and consequently determinative of its decisions or action authority. That is to say, it need not negotiate on a proposal which infringes upon or has the effect of negating its excepted or reserved authority. 13/

12/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31; Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56.

13/ AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y.,

The union's position is expressed in part in the following colloquy:

JUDGE HALPERN: ... Have you taken the position here at all that there was a requirement that management negotiate who it was going to select?

MS. DAVIS: I think that the procedure for selection is what we are talking about, that what we would like to see negotiated is a procedure for selection which would, you know, set up some equitable methods for people to be selected so people would have a fair chance at an opportunity for a detail like this that frequently can help a person get promoted or whatever, in terms of their career with the customs service. (TR. 307)

The union's concern as thus enunciated lies within the negotiable area of "implementing procedures." It further is of obvious concern to the union that the solicitation for volunteers be made in such a manner as most effectively to reach all eligible employees and, the procedures to be employed by management in making the solicitation is also a proper subject for negotiations.

Star Trek II was implemented only after considerable prior investigation and planning. No overriding exigencies have been shown to have existed to support the proposition that prior negotiations on procedures to be utilized in solicitation of volunteers and selection of participants would unreasonably have delayed, impeded or constricted management in carrying out the operation. 14/

Respondent cites as one reason for its refusal to meet with Complainant, that those matters upon which Complainant indicated a desire to negotiate infringed upon

13/ (Continued) FLRC No. 71A-11; Lodge 2424, IAM-AW and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Md., FLRC No. 72A-18; Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina and National Federation of Federal Employees, Local 1613, Independent, A/SLMR No. 656.

14/ Bureau of the Mint, U. S. Department of the Treasury and American Federation of Government Employees, AFL-CIO et al., A/SLMR No. 750.

the confidentiality of the operation and would have compromised it. Even if such were the indications, management's approach--a refusal to meet--goes contrary to the council's expression of what the labor-management relationship should be in such a situation as enunciated in its September 10, 1973, Information Announcement, in which it said in part:

In some instances, management representatives have failed to offer feasible, negotiable alternatives to union proposals when they believe the union's proposals to be nonnegotiable. Instead, the management representatives have simply asserted that the union proposals are nonnegotiable giving the unions no alternative but to appeal or to drop the matter from negotiations. On the other hand, where management has offered alternatives, some union representatives have appealed the negotiability of their proposals without first considering and discussing the management proposals at the bargaining table. Both actions are a disservice to labor-management relations and demonstrate a failure on the part of the parties to attempt to work matters out bilaterally.

In summary I conclude that by unilaterally implementing special operation Star Trek II Respondent failed to afford Complainant notice and an opportunity to bargain concerning implementing procedures for the solicitation of volunteers and selection of participants and the impact of its actions upon adversely affected employees, in violation of section 19(a)(6) of the Order.

I further conclude, in accordance with numerous decisions of the Assistant Secretary, that this same conduct is violative of section 19(a)(1) of the Order in that it interferes with, restrains and coerces unit employees in the exercise of the right to be represented by the exclusive representative, as assured by the Order.

The Remedy

Having found that the Respondent has engaged in certain conduct prohibited by section 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Order.

RECOMMENDED ORDER

Pursuant to section 6(b) of Executive Order 11491, and section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby Orders that the U. S. Customs Service, Region VII, Los Angeles, California, shall:

1. Cease and desist from:

a. Issuing solicitations for volunteers in special operations such as operation Star Trek II, to employees exclusively represented by the National Treasury Employees Union, Chapter 103, or any other exclusive representative; and selecting participants to be assigned to such special operations, without affording such representative an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in issuing the solicitations and selecting the participants and on the impact on adversely affected employees;

b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

a. Notify the National Treasury Employees Union, Chapter 103, or any other exclusive representative of any intended solicitation for volunteers for special operations such as Star Trek II, and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in promulgating the solicitation, and on the impact of the solicitation on employees adversely affected;

b. Upon request, meet and confer in good faith with such representative, to the extent consonant with law and regulations, on the procedures which management will observe in selecting participants for such special operations, and on the impact of its selections on employees adversely affected by such action.

c. Furnish to such exclusive representative, on request, such information as may be requested to enable it to formulate meaningful proposals for negotiation, provided that the furnishing of such information is consistent with such security measures as are necessary for the conduct of the operation;

d. Upon request, meet and confer with regard to the impact upon employees adversely affected by the unilateral solicitations and selections involved in Operation Star Trek II.

e. Post at its various facilities throughout Region VII copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Commissioner and shall be posted and maintained by him for sixty (60) days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

f. Pursuant to section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within thirty (30) days from the date of this Order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges other violations of section 19(a)(1) and (6) be, and it hereby is, dismissed.


STEVEN E. HALPERN
Administrative Law Judge

Dated: February 28, 1978
San Francisco, California

SEH:vag

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, AS AMENDED LABOR-MANAGEMENT RELATIONS
IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith with the National Treasury Employees Union, Chapter 103, or any other exclusive representative of our employees, to the extent consonant with law and regulations concerning the procedures which management will observe in issuing solicitations for volunteers and making selections of participants in Special Operations such as Star Trek II, and as to the impact on adversely affected employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, meet and confer in good faith, to the extent consonant with law and regulations, with the National Treasury Employees Union, Chapter 103, or any other exclusive representative of our employees, concerning the procedures which management will observe in issuing solicitations for volunteers and making selections of participants in Special Operations such as Star Trek II, and as to the impact on adversely affected employees; and as to the impact upon employees adversely affected by the solicitation and selection procedures employed in Star Trek II.

Dated: _____ By: _____
(Agency or Activity) (Signature)

June 23, 1978

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 its provisions, they may communicate directly with the Regional Director for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is Room 9061, Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF SECOND SUPPLEMENTAL DECISION AND ORDER
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION,
REGIONAL OFFICE, REGION 4
A/SLMR No. 1067

On October 31, 1975, the Assistant Secretary issued his Decision and Direction of Election in 5 A/SLMR 669, A/SLMR No. 575 (1975), finding that the claimed unit consisting of all professional and nonprofessional employees of the Regional Office, General Services Administration, Region 4, was appropriate for the purpose of exclusive recognition under the Order. On February 14, 1977, the Federal Labor Relations Council (Council), before determining whether to accept or deny the Activity's petition for review, remanded the subject case to the Assistant Secretary for clarification in the light of the principles enumerated in its consolidated DCASR decision. Thereafter, on November 7, 1977, the Assistant Secretary issued his Supplemental Decision and Remand in A/SLMR No. 928, in which he remanded the subject case to the appropriate Regional Administrator for the purpose of reopening the record to secure additional evidence in order to provide an adequate basis upon which to make affirmative determinations regarding "effective dealings" and "efficiency of agency operations."

In light of this evidence secured at the reopened hearing, and based on the rationale of the Council as expressed in its consolidated DCASR decision, the Assistant Secretary found that the unit sought herein was not appropriate for the purpose of exclusive recognition under Section 10(b) of the Order. He noted that although the employees in the sought Regional Office unit enjoyed a clear and identifiable community of interest, the evidence established that the sought unit, which does not constitute a functional or craft grouping of employees and is less than region wide in scope, would not promote effective dealings or efficiency of agency operations. He also found that the establishment of the claimed unit would result in further fragmentation of the Activity.

Accordingly, since the claimed unit did not satisfy equally each of the three criteria set forth in Section 10(b) of the Order, the Assistant Secretary found that the unit sought herein by the AFGE was not appropriate for the purpose of exclusive recognition under the Order and ordered that the Certification of Representative previously issued to the Petitioner herein be revoked, and that the petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGIONAL OFFICE, REGION 4

Activity

and

Case No. 40-6038(RO)
A/SLMR No. 575
FLRC No. 76A-64
A/SLMR No. 928

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2067, AFL-CIO

Petitioner

SECOND SUPPLEMENTAL DECISION AND ORDER

On October 31, 1975, the Assistant Secretary issued his Decision and Direction of Election in the above-captioned case in 5 A/SLMR 669, A/SLMR No. 575 (1975), finding, in essence, that the claimed unit consisting of all professional and nonprofessional employees of the Regional Office, General Services Administration (GSA), Region 4, was appropriate for the purpose of exclusive recognition under the Order. 1/ Thereafter, on February 4, 1977, the Federal Labor Relations Council (Council), before determining whether to accept or deny the Activity's petition for review in the instant case, remanded the subject case to the Assistant Secretary for clarification in the light of the principles enunciated in its consolidated Defense Supply Agency, Defense Contract Administration Services Region (DCASR) decision.2/

1/ Pursuant to the Assistant Secretary's Decision and Direction of Election, an election was held in the unit found appropriate. The professional employees cast a majority of their ballots against representation, and a Certification of Results of Election was issued on April 2, 1976. The 351 nonprofessional employees voted to be represented by the Petitioner and a Certification of Representative was issued on April 2, 1976. On September 14, 1977, a multi-unit negotiated agreement was signed by the parties covering the employees in the above certified unit as well as employees in two other units.

2/ Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, FLRC No. 75A-14;

(Continued)

Thereafter, on November 7, 1977, the Assistant Secretary issued his Supplemental Decision and Remand in the above-captioned case in A/SLMR No. 928, in which he remanded the subject case to the appropriate Regional Administrator for the purpose of reopening the record to secure additional evidence in order to provide an adequate basis upon which to make affirmative determinations regarding "effective dealings" and "efficiency of agency operations." On February 22, 1978, a hearing was held before Hearing Officer Renee B. Rux. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject case, including the facts developed at both hearings, and the briefs filed by the Activity and American Federation of Government Employees, Local 2067, AFL-CIO, hereinafter called AFGE, the Assistant Secretary finds:

The Activity has consistently asserted that the unit sought herein by the AFGE is not appropriate for the purpose of exclusive recognition because it will not promote effective dealings or efficiency of agency operations, and will encourage the further fragmentation of units within the Activity. The Activity contends that the only appropriate unit would be a residual unit of all unrepresented Region 4 employees, including the claimed Regional Office employees.

The record reveals that the Activity currently employs approximately 2,128 employees, of whom approximately 1,642, are eligible to be represented exclusively. Of the latter number, approximately 1,181 are currently represented by labor organizations in 18 exclusively represented bargaining units covered by 12 existing negotiated agreements. Besides the employees in the unit sought herein, there are 461 unrepresented employees located at 77 locations scattered throughout the Region.

The Regional Personnel Office in Atlanta, Georgia, is responsible for all personnel functions for the entire Region. In this regard, the record reveals that all personnel records are kept in this office and that all personnel actions within the Region are required to be approved by the Regional Personnel Office. All employees of the Region, regardless of their location, are subject to common personnel policies and practices with respect to promotion, disciplinary action, leave schedules and wage increases. Also, there are uniform working conditions throughout the Region, such as standardized hours and wages, award programs, overtime and various employee benefits.

The overall labor relations policy for the GSA is established in GSA headquarters in Washington, D.C. and is transmitted to the Regional Offices for implementation. The Regional Office is the only organizational level of the Agency below the Central Office level where labor

2/ Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, FLRC No. 75A-128; Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, FLRC No. 76A-4.

June 26, 1978

relations specialists are assigned. The Regional Labor Relations Officer is responsible for all labor relations matters within the Region, and he has been delegated substantial discretion in handling labor relations matters. Thus, both he and his staff are responsible for the handling of all unfair labor practice and unit determination cases as well as grievances filed under either the GSA grievance procedure or one of the numerous negotiated grievance procedures. They also are responsible for the negotiation and administration of negotiated agreements and for training supervisors in the administration of negotiated agreements and the handling of grievances. Due to the variance in the numerous negotiated agreements within the Region, each agreement requires specialized handling.

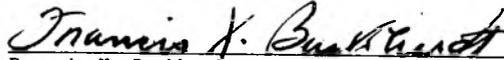
Under the particular circumstances of this case, and based on the rationale of the Council as expressed in its DCASR decision, cited above, I find the unit sought herein is not appropriate for the purpose of exclusive recognition under Section 10(b) of the Order. Thus, although, as previously found in A/SLMR No. 575, the employees in the sought Regional Office unit enjoy a clear and identifiable community of interest, the evidence as supplemented at the reopened hearing, further establishes that such a unit, which does not constitute a grouping of employees along functional or craft lines and which is less than region-wide in scope, will not promote effective dealings or efficiency of agency operations. In this regard, it was particularly noted that the Activity's Regional Personnel Office located in Atlanta, Georgia, is responsible for all personnel functions for the entire Region, and that labor relations policies which are determined at the Central Office in Washington, D. C. are implemented on a regional basis by the Regional Labor Relations Officer and his staff. Thus, as it appears that all personnel and labor relations authority rest at the Regional level or above, I find that the petitioned for unit containing only Regional Office employees, will not promote effective dealings or efficiency of agency operations. Moreover, as the Activity already contains 18 separate bargaining units and 12 separate negotiated agreements, in my view, the establishment of the claimed unit of Regional employees would promote further fragmentation of the Activity as there would still exist additional groupings of unrepresented employees within Region 4.

Accordingly, since the claimed unit does not satisfy equally each of the three criteria set forth in Section 10(b) of the Order, I find that the unit sought herein by the AFGE is not appropriate for the purpose of exclusive recognition under the Order. Therefore, I shall order that Certification of Representative previously issued to the Petitioner herein be revoked, and that the petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the Certification of Representative issued in Case No. 40-6038(RO) be, and it hereby is, revoked, and that the petition in Case No. 40-6038(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 23, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

- 3 -

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF TRANSPORTATION,
NATIONAL HIGHWAY TRAFFIC SAFETY
ADMINISTRATION
A/SLMR No. 1068

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, Local 3313, AFL-CIO (AFGE) seeking to clarify the status of some 13 Operations Research Analysts in the GS-1515 job classification series. The Activity took the position that the Operations Research Analysts should be excluded from the exclusively recognized unit of nonprofessional employees because they are professional employees by virtue of their scientific training and their performance of specialized studies.

The Assistant Secretary found, in agreement with the Activity, that the Operations Research Analysts are professional employees and, therefore, are not within the exclusively recognized unit of nonprofessional employees. In reaching this conclusion, the Assistant Secretary considered the educational requirements for the Operations Research Analyst position and the intellectual and varied nature of their work which requires use of mathematical and scientific disciplines.

Accordingly, the Assistant Secretary clarified the unit consistent with his decision.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
NATIONAL HIGHWAY TRAFFIC SAFETY
ADMINISTRATION

Activity

and

Case No. 22-08504(CU)

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 3313, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

This matter is before the Assistant Secretary pursuant to Regional Administrator Hilary M. Sheply's Order Transferring Case to the Assistant Secretary of Labor in accordance with Section 206.5 of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' statement of issues and stipulation of facts, accompanying exhibits and a brief submitted by the Activity, the Assistant Secretary finds:

The Petitioner, American Federation of Government Employees, Local 3313, AFL-CIO, hereinafter called AFGE, was certified on May 4, 1973, as the exclusive representative of a nationwide unit of all nonprofessional employees assigned to the National Highway Traffic Safety Administration, hereinafter called Activity, of the Department of Transportation. In this clarification of unit proceeding, the AFGE seeks to include within the existing unit the Operations Research Analysts in the GS-1515 job classification series. The Activity, on the other hand, contends that the aforementioned employees are professional employees and, therefore, are not within the exclusively recognized unit of nonprofessional employees.

The mission of the Activity is to support the national goals and statutory responsibilities of the Secretary of Transportation with respect to the development and administration of programs that implement legislation designed to reduce automotive fuel consumption and economic losses,

and to safeguard the motor vehicle consuming public through regulation, research, information, and education. 1/

The evidence establishes that there are some 13 Operations Research Analysts in the GS-1515 series, hereinafter called Analysts, employed by the Activity. 2/ The Analysts are located in various offices and divisions under four Associate Administrators of the Activity and in a Regional Office. 3/ Among the job functions performed by the Analysts are the making of economic impact studies related to the Activity's rulemaking authority; the design of surveys to obtain needed data with respect to elements of the highway safety programs; and assistance to the states in determining statistical data requirements and in devising adequate data collection procedures so that analysis and evaluation of highway safety programs may be conducted in an effective manner. The Analysts are responsible for investigating the nature of such assigned problems and independently determining the appropriate techniques for data collection, treatment and analysis. A primary method of fulfilling specific assignments is the development of scientific "models" to provide a simplified representation of the operation of a specific problem related to traffic safety. The record reflects that the creation of such "models" requires the utilization of rigorous mathematical, statistical and scientific theories.

The basic educational qualification for the Analyst position is at least a Bachelor's degree from an accredited college or university, with a course of study that included 24 semester hours of coursework in any combination of the following: operations research, mathematics, statistics, logic, and subject matter courses which require substantial competence in mathematics or statistics. The record also reveals that in addition to the foregoing education requirements, a graduate degree in the field of operations research is highly desirable and may be substituted for professional work experience as qualification for positions above the GS-9 level. 4/

1/ The Activity was established in the Department of Commerce in 1966 and, thereafter, was transferred to the Department of Transportation in 1967 as two separate departments, combining into the current single activity in 1970.

2/ The record reveals that the Activity employs 1 Analyst at the GS-9 grade level, 2 Analysts at the GS-11 grade level, 1 Analyst at the GS-12 grade level, 1 Analyst at the GS-11 grade level, 6 Analysts at the GS-14 grade level and 2 Analysts at the GS-15 grade level.

3/ The four Associate Administrators are: the Associate Administrator for Rulemaking, the Associate Administrator for Traffic Safety Programs, the Associate Administrator for Research and Development, and the Associate Administrator for Plans and Programs.

4/ The evidence establishes that all the Analysts have at least a baccalaureate degree and, in many instances, advanced degrees in fields related to their work.

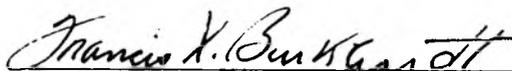
Under the circumstances herein, I find that the Operations Research Analysts, GS-1515, are professional employees within the meaning of the Order. Thus, the evidence establishes that the work of the Analyst is predominately intellectual and varied, involves the exercise of discretion and judgement, cannot be standardized, and requires knowledge of an advanced type normally acquired by a prolonged course of specialized intellectual instruction. In this regard, it is noted particularly that the Analysts spend a major portion of their time analyzing the outcome of the use of certain scientific "models", that they are constantly developing new "models" in order to solve the problems of traffic safety, and that the performance of their various tasks requires that the Analysts be trained in specialized fields involving mathematical and scientific disciplines.

Accordingly, as the Operations Research Analysts, GS-1515, are professional employees within the meaning of the Order, 5/ I find that they are not within the exclusively recognized unit of nonprofessional employees represented by the AFGE.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, Local 3313, AFL-CIO, was certified as the exclusive representative on May 4, 1973, be, and it hereby is, clarified by excluding from the unit Operations Research Analysts, GS-1515, assigned to the National Highway Traffic Safety Administration.

Dated, Washington, D.C.
June 26, 1978


Francis X. Burkhardt, Assistant Secretary
of Labor for Labor-Management Relations

5/ See Department of Interior, Bureau of Land Management, Riverside District and Land Office, 2 A/SLMR 328, A/SLMR No. 170 (1972),

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE AIR FORCE,
HEADQUARTERS, 321st COMBAT
SUPPORT GROUP (SAC),
GRAND FORKS AIR FORCE BASE,
GRAND FORKS, NORTH DAKOTA
A/SLMR No. 1069

This case arose when the American Federation of Government Employees AFL-CIO, Local 1347 (AFGE) filed a petition on September 20, 1977, seeking an election in a unit of all nonprofessional Air Force Civilian employees paid from appropriated funds employed on Grand Forks Air Force Base, North Dakota, including on-base tenant organizations. The petitioned for unit is coextensive with the unit for which the Intervenor, the National Federation of Federal Employees, Local 1347 (NFFE) was recognized as the exclusive representative.

The NFFE took the position that the open period of a renewed agreement of one year between the Activity and the NFFE should be consistent with the open period of the parties' initial agreement when such initial agreement runs for more than three years from the date it was signed and dated locally. The AFGE asserted, on the other hand, that its petition was timely filed because it was filed during the open period of the renewed agreement between the Activity and the NFFE which it argued ran from December 17, 1976 (the terminal date of the initial three year agreement) to December 17, 1977.

The Assistant Secretary found that the AFGE's petition was timely filed. He noted that although, under Section 202.3 (c)(2) of the Assistant Secretary's Regulations the open period for filing a petition under the initial agreement was from August 16, 1976, to September 15, 1976, because the agreement ran for more than three years from the time it was signed and dated locally, the open period under Section 202.3 (c)(1) of the Regulations for the one year renewed agreement was fixed by the terminal date of such agreement which could clearly be ascertained by reference to the agreement itself.

Accordingly, as the AFGE's petition was filed during the open period of the renewed agreement, he directed an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
HEADQUARTERS, 321st COMBAT
SUPPORT GROUP (SAC),
GRAND FORKS AIR FORCE BASE,
GRAND FORKS, NORTH DAKOTA

Activity

and

Case No. 60-5406(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1347

Petitioner

and

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 1347

Intervenor

DECISION AND DIRECTION OF ELECTION

This matter is before the Assistant Secretary pursuant to Regional Administrator for Labor-Management Services Cullen P. Keough's Order Transferring Case to the Assistant Secretary in accordance with Section 206.5 of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits, and a brief filed by the Intervenor, National Federation of Federal Employees, Local 1347, hereinafter called NFFE, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local 1347, hereinafter called AFGE, seeks an election in a unit of all eligible Air Force civilian employees paid from appropriated funds employed on Grand Forks Air Force Base, North Dakota, including on-base tenant organizations. The petitioned for unit is coextensive with the unit for which the NFFE was recognized as the exclusive representative in 1967. It is undisputed that the sole issue before the Assistant Secretary in this matter is whether the AFGE's petition in this matter was timely filed.

The record reflects that on November 14, 1973, the Activity and the NFFE signed and dated a negotiated agreement which was approved by the Director of Civilian Personnel, Headquarters, Strategic Air Command, United States Air Force on December 17, 1973. The agreement provides, in pertinent part, that its effective date and the effective date of any supplement thereafter, is the date of approval by the Headquarters, United States Air Force. It further provides that it is binding on the parties for three years from the effective date and from year to year thereafter, unless either party notifies the other in writing not more than 90 days nor less than 60 days prior to such date or any subsequent anniversary date of a desire to modify or terminate the agreement. The parties stipulated that no such notification was given prior to the agreement's expiration in 1976, and that, therefore, the agreement was automatically renewed in 1976. The AFGE's petition in this matter was filed on September 20, 1977.

Sections 202.3(c)(1) and (2) of the Assistant Secretary's Regulations provide that in order for a petition to be timely filed, it must be filed:

- (1) Not more than ninety (90) days and not less than sixty (60) days prior to the terminal date of an agreement having a term of three years or less from the date it was signed and dated by the activity and the incumbent exclusive representative; or
- (2) Not more than ninety (90) days and not less than sixty (60) days prior to the expiration of the initial three (3) years period of an agreement having a term of more than three (3) years from the date it was signed and dated by the activity and the incumbent exclusive representative;

The NFFE takes the position that the open period of the renewed agreement herein should be consistent with the open period of the parties' initial agreement of 1973, as such initial agreement ran more than three years from the date it was signed and dated locally. Thus, in effect, the NFFE contends that since the open period of the three-year agreement, which was signed and dated locally on November 14, 1973, ran from August 16, 1976, to September 15, 1976, the same open period should apply in any subsequent year in which the agreement was renewed automatically in accordance with its terms. In these circumstances, the NFFE asserts that the AFGE's petition of September 20, 1977, was untimely with respect to the renewed agreement. The AFGE asserts, on the other hand, that its petition of September 20, 1977, was timely because it was filed during the open period of the automatically renewed agreement which ran for one year from December 17, 1976 (the terminal date of the initial agreement) to December 17, 1977. 1/

1/ The AFGE contends the open period in the renewed agreement ran from September 18, 1977, to October 18, 1977.

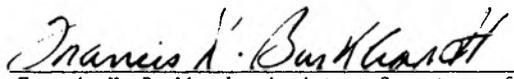
Under the circumstances of this case, I find the petition herein was timely filed. As contended by the NFFE, under Section 202.3(c)(2) of the Assistant Secretary's Regulations the open period of the initial agreement ran from August 16, 1976, to September 15, 1976, because the agreement had a term of more than three years from the time it was signed and dated locally (November 14, 1973). 2/ However, different conditions apply with respect to determining the open period of the renewed one year agreement, which I consider to be a new agreement for bar purposes. Thus, in view of its one-year duration, the open period of such agreement is governed by the provisions of Section 202.3 (c)(1) of the Assistant Secretary's Regulations, which concern agreements having a term of three years or less. Inasmuch as the terminal date of the renewed one-year agreement could be clearly ascertained by its terminal date, consistent with Section 202.3 (c)(1) of the Assistant Secretary's Regulations such terminal date established the open period of the renewed agreement. And as the AFGE's petition of September 20, 1977, was filed timely during the 60-90 day period prior to the termination of the renewed one-year agreement, I shall direct an election in the following unit which I find to be appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All eligible Air Force civilian employees paid from appropriated funds employed on Grand Forks Air Force Base, North Dakota, including on-base tenant organizations, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in Executive Order 11491, as amended.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees of the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are all those in the unit who were employed during the payroll immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit, or were discharged for cause, since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 1347; by the American Federation of Government Employees, AFL-CIO, Local 1347; or by neither.

Dated, Washington, D.C.
June 26, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

2/ Cf. Naval Air Station, Willow Grove, Pennsylvania, A/SLMR No. 772 (1976).

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO
AND FIREARMS, MIDWEST REGION,
CHICAGO, ILLINOIS
A/SLMR No.1070

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 94 alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to notify the exclusive representative and give it the opportunity to be present at meetings held by management with bargaining unit employees at which matters affecting working conditions were discussed. The NTEU asserted that the meetings were formal discussions within the meaning of Section 10(e) of the Order and, therefore, the Respondent's failure to give notice effectively bypassed the exclusive representative.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order. Thus, in his view, while the purpose of the meetings was to solicit suggestions from bargaining unit employees with respect to a management proposal over a matter excluded from the obligation to bargain by Section 11(b) and 12(b) of the Order, the Respondent should have anticipated that matters impacting on working conditions also would be discussed. The Administrative Law Judge noted that at one of the meetings there was discussion about the impact of the proposed changes. He found that the Respondent failed to give the exclusive representative notice of a formal discussion within the meaning of Section 10(e) and, therefore, deprived it of the opportunity to be represented.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge. Accordingly, he ordered that the Respondent cease and desist from engaging in the conduct found violative of the Order and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO
AND FIREARMS, MIDWEST REGION,
CHICAGO, ILLINOIS

Respondent

and

Case No. 50-15436(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 94

Complainant

DECISION AND ORDER

On March 9, 1978, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, both the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed an answering brief with respect to the Respondent's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting briefs filed by the parties and the answering brief to the Respondent's exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, shall:

1. Cease and desist from:

(a) Engaging in formal discussions with unit employees concerning the impact of a change in the methods and means by which its operations are performed on the general working conditions of employees in the unit when such employees are represented exclusively by the National Treasury Employees Union, or any other labor organization, without affording such labor organization the opportunity to be represented at such discussions.

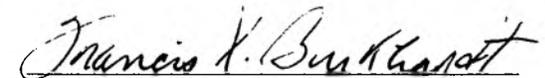
(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Post at all of its facilities in the Midwest Region 1/ copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Director of the Midwest Region, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
June 27, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1/ Under the circumstances herein, I have ordered that the remedial notices to employees be posted at all of the Respondent's facilities in the Midwest Region. The violation to be remedied in this matter involves an improper failure by the Respondent to notify the Chapter President of the Complainant, NTEU Chapter 94, of a formal discussion and afford the latter an opportunity to be represented at such discussion. In view of the nature of the violation and the Administrative Law Judge's undisputed finding that NTEU Chapter 94 acts for the NTEU in the Midwest Region of the Bureau of Alcohol, Tobacco and Firearms, I find that a posting coextensive with NTEU Chapter 94's jurisdiction in the Midwest Region is warranted.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT engage in formal discussions with unit employees concerning the impact of a change in the methods and means by which our operations are performed on the general working conditions of employees in the unit when such employees are represented exclusively by the National Treasury Employees Union, or any other labor organization, without affording such labor organization the opportunity to be represented at such discussions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 1060, Federal Building, 230 South Dearborn Street, Chicago, Illinois 60604.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of :

DEPARTMENT OF THE TREASURY, :
BUREAU OF ALCOHOL, TOBACCO and :
FIREARMS, MIDWEST REGION, :
CHICAGO, ILLINOIS :

Respondent :

Case No. 50-15436(CA)

and :

NATIONAL TREASURY EMPLOYEES :
UNION and NTEU CHAPTER 94 :
Complainants :

Appearances:

Richard P. Theis, Esq.
Assistant Counsel
National Treasury Employees Union
1730 K Street, N.W., Suite 1101
Washington, D.C. 20006
For the Complainants

John A. Chevrier, Esq.
Office of the Chief Counsel
Bureau of Alcohol, Tobacco and Firearms
U.S. Treasury Department
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20226
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated April 4, 1977 and filed April 6, 1977 alleging violations of Sections 19(a)(1) and (6) of the Executive Order. The violations were alleged to consist

of the Respondent holding two meetings with a group of employees at which contemplated changes in personnel policies and practices and other matters affecting working conditions were allegedly discussed thereby bypassing the union.

On July 6, 1977 the Acting Regional Regional Administrator issued a Notice of Hearing and the next day the Regional Administrator issued an Order Rescheduling Hearing for a hearing to be held September 19, 1977 in Chicago, Illinois. A hearing was held that day in that City. Both sides were represented by counsel. They presented witnesses who were examined and cross-examined and offered exhibits which were received in evidence with one exception. Both parties made closing arguments and filed timely briefs.

Facts

The National Treasury Employees Union, the national organization, is the certified exclusive representative of a nationwide unit of the employees of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (with the usual exclusions). It was so certified in March 1974. In the administration of the collective bargaining relationship NTEU generally acts through an appropriate chapter (local) of its organization. The chapter that acts for it in the Midwest Region of the Bureau is Chapter 94. There are about 1,000 employees in the nationwide unit of whom about 170 are employed in the Midwest Region. The headquarters of the Midwest Region are in the Klucynski Building, the Federal Office Building at 230 South Dearborn Street, Chicago, Illinois. About 50 employees of the Midwest Region in the unit are employed at that location and about 120 employees of the Midwest Region in the unit are employed in various area offices as Field Inspectors and in other capacities.

Prior to April 1977 the Firearms and Explosives Licensing Section of the Midwest Region of the Bureau had seven Examiners in the unit and seven clerks with a clerk assigned to each Examiner. They comprised the entire Section. Evelyn Fusco was their supervisor. The Examiners, with the assistance of their clerks, processed original applications for licenses and renewal applications.

Arthur Davidson is the Chief, Technical Service, of the Midwest Region. The 50 unit employees in the Midwest Region headquarters are under his supervision. Edward Lake is an Analyst, under a Chief Analyst, for the Regional Administrator. His function included the analysis of operations and the development of ideas for improvement.

Beginning some months prior to August 20, 1976 Lake began developing plans for revising the method of operation of the Firearms and Explosives Licensing Section of the Midwest Region of the Bureau of Alcohol, Tobacco and Firearms. In developing such plans he consulted some with Fusco and Davidson. He did not consult with the Complainants. The change in operating procedure he tentatively arrived at included a change in the function of the individual clerks and a change in the location of the file cabinets. Instead of a clerk being assigned to an individual Examiner to assist her 1/ in all aspects of her work, each clerk would be assigned to a specific task (typing, filing, etc. at one of four "stations") for all the Examiners. Also, instead of each Examiner having a large filing cabinet at her individual desk those filing cabinets would be placed at a central location and the individual Examiner would have a miniature cabinet at her desk. The revised prospective procedure was reduced to writing in chart or tabular form. 2/

On August 20, 1976 the seven Examiners were called to a meeting with Davidson (Chief), Lake (Analyst), and Fusco (supervisor). Copies of the plan were distributed and Davidson told the Examiners to read them and make notes on any comments they had for discussion at a subsequent meeting. This was a very brief meeting.

The next meeting was on September 1, 1976, with the Examiners and the same management representatives to discuss the plans. Davidson wanted the benefit of the expertise of those who did the work of the Section above the clerical level. Five of the Examiners expressed a preference for retaining the existing method of operation. Included in the reasons given was the impact the revised procedure would have on the clerks, such as that it would make their work more boring, would make them less qualified for promotion to Examiner should a vacancy occur, and others. Davidson commented that perhaps the clerks' stations could be rotated. This was an extended meeting.

1/ In this time and climate it is cumbersome to select the proper gender of the pronoun to refer to a random member of a group including both males and females. Judging from the given names of the seven Examiners, I conclude that six of them were females. In referring to one of them at random I will use the the feminine pronoun and trust that Jose Sanchez will not take affront.

2/ Exhs. C1-C4.

NTEU, the certified representative, had designated its chapter Presidents as its representative to receive communications from the Regions of the Bureau on all matters not pertaining to the processing of a pending grievance. Hyman Abrams ^{3/} was the President of Chapter 94. He was not given notice of or an opportunity to be represented at either the August 20 or September 1 meeting.

Davidson found those meetings unproductive and none of the Examiners' suggestions was adopted.

It was decided to put the plan into effect on April 4, 1977. On March 10, 1977 Davidson wrote to Abrams advising him of the decision to institute the change in operations and stating that if the Chapter desired to discuss the impact, if any, on bargaining unit members management would meet with Abrams or his designated representative on March 18. ^{4/} No reply was received by March 24 and on that day Davidson again wrote to Abrams stating that management was going to meet with the Examiners on March 30 at 1:00 P.M. and with the Clerks on March 31 at 9:00 A.M. to inform them of the changes and provide instructions; the letter stated that the notice was given "to provide the Union an opportunity to be present at these formal discussions". ^{5/} Abrams was out of town on vacation from March 5 through March 31 and did not receive either of those letters until his return. He had not designated an alternate to act for him in his absence.

The complaint is directed to the August 20 and September 1 meetings. The Complainant takes the position that at those meetings there were discussed changes in personnel policies and practices and other matters affecting working conditions and its not being given an opportunity to be present deprived it of its right under the last sentence of Section 10(e) of the Executive Order in violation of Section 19(a)(6) and derivatively in violation of Section 19(a)(1).

Discussion and Conclusions

Were this a case of first impression I would find that the failure to apprise the Complainants of the August 20 and September 1, 1976 meetings was not an unfair labor practice in violation of Sections 19(a)(1) and (6) of the Executive Order.

^{3/} The transcript uniformly refers to him as Hyrum Abrams. It appears from various exhibits that his given name is Hyman. Such errors are hereby corrected.

^{4/} Exh. R-1.

^{5/} Exh. R-2.

Their purpose was to solicit suggestions from the employees in the best position to make informed suggestions, concerning changes by the Respondent in "the technology of performing its work" and the methods and means by which such operations are to be conducted, subjects specifically excluded from the obligation to meet and confer by Sections 11(b) and 12(b) of the Executive Order. They were a sort of oral "suggestion box" for improvements in methods of operation. ^{6/}

But it should have been anticipated that at such a meeting the matter of the impact of the proposed changes on working conditions or personnel practices and policies would arise. And in fact they did arise at the September 1, 1976 meeting. Specifically, at that meeting some Examiners suggested that the proposed changes would have an adverse impact on the working conditions of the clerks and their opportunities for advancement, and Davidson replied with a suggested antidote or palliative. Thus I am constrained by Internal Revenue Service, Ogden Service Center, A/SLMR No. 944 (November 23, 1977) to hold that the meeting on September 1, 1977, without the Complainants being given an opportunity to be represented, violated their right under the last sentence of Section 10(e) of the Executive Order in violation of Section 19(a)(6) and derivatively of the employees' right under Section 19(a)(1).

RECOMMENDATION

I recommend that the Assistant Secretary issue the order attached hereto together with its Appendix.

The Complainants are requesting that the posting be "throughout the unit", i.e., nationwide. The Respondent named in the complaint and in the Notice of Hearing is the Bureau of Alcohol, Tobacco and Firearms, Midwest Region. The wrong that occurred was in the Firearms and Explosive Licensing Section of the Midwest Region of the Bureau. It is located entirely in regional headquarters in Chicago, and consists of about 15 of the 50 employees at that headquarters. The wrong was committed by one whose jurisdiction did not extend beyond the regional headquarters. A posting at the Midwest Regional Headquarters would be sufficient. I do not believe it necessary or appropriate "to effectuate the policies of the order" ^{7/} to have the notice posted in every town and hamlet that may have a distillery inspector of the Bureau

^{6/} See page 7 of the ALJ decision in Internal Revenue Service, Ogden Service Center, A/SLMR No. 944.
^{7/} Regulations, § 203.26(b).

a thousand or two thousand miles from Chicago because of a marginal violation in the Firearms and Explosives Licensing Section at the Midwest Regional Office. 8/ Accordingly, I recommend that the posting be ordered at the Midwest Regional Office of the Bureau in Chicago.



MILTON KRAMER
Administrative Law Judge

Dated: March 9, 1978
Washington, D.C.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations orders that the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, shall:

1. Cease and desist from:

(a) Engaging in formal discussions with employees concerning the impact of a change in the methods and means by which its operations are performed on the general working conditions of employees in the unit when such employees are represented exclusively by the National Treasury Employees Union or any other labor organization without affording such labor organization the opportunity to be represented at such discussions.

(b) In any like or related manner failing to confer or negotiate with a labor organization as required by Executive Order 11491, as amended.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Post at its facility at the Regional Office of the Midwest Region copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Administrator of the Midwest Region, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Administrator shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

June 29, 1978

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT engage in formal discussions with employees concerning the impact of a change in the methods and means by which our operations are performed on the general working conditions of employees in the unit when such employees are represented exclusively by the National Treasury Employees Union or any other labor organization without affording such labor organization the opportunity to be represented at such discussions.

WE WILL NOT in any like or related manner fail to confer or negotiate with a labor organization as required by Executive Order 11491, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ BY: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 1033-B, Federal Building, 230 South Dearborn Street, Chicago, Illinois 60604.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ENVIRONMENTAL PROTECTION AGENCY,
ENVIRONMENTAL RESEARCH LABORATORY,
NARRAGANSETT, RHODE ISLAND
A/SLMR No. 1071

This case arose as a result of a petition filed by an individual seeking the decertification of the Intervenor, National Association of Government Employees, Local R1-240 (NAGE), and a petition filed by the American Federation of Government Employees, AFL-CIO (AFGE) seeking an election in a unit consisting of all professional and nonprofessional employees of the Activity. The parties herein agreed to the appropriateness of the petitioned for unit, which is coextensive with the unit for which the NAGE is the incumbent exclusive representative. However, the AFGE and the NAGE took the position, with which the Activity and the individual Petitioner disagree, that certain student employees classified as either a "1040" or a "graduate student" should be excluded from the claimed unit.

Under the particular circumstances of this case, the Assistant Secretary found that the Activity's "1040" and "graduate student" employees should be included in the unit found appropriate. Thus, he noted that such employees share a community of interest with the Activity's other professional and nonprofessional employees, that such current employees have been employed by the Activity for substantial periods of time, and that, therefore, such employees have a reasonable expectancy of continued employment at the Activity.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Carol C. Blackburn. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject cases, the Assistant Secretary finds:

ENVIRONMENTAL PROTECTION AGENCY,
ENVIRONMENTAL RESEARCH LABORATORY,
NARRAGANSETT, RHODE ISLAND 1/

Activity

Case No. 31-11018(DR)

and
WALTER B. GALLOWAY

Petitioner

and
NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-240

Intervenor

ENVIRONMENTAL PROTECTION AGENCY,
ENVIRONMENTAL RESEARCH LABORATORY,
NARRAGANSETT, RHODE ISLAND

Activity

Case No. 31-11022(RO)

and
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Petitioner

and
NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-240

Intervenor

1. The labor organizations involved claim to represent certain employees of the Activity.

2. In Case No. 31-11018(DR), the Petitioner, Walter B. Galloway, an employee of the Activity, seeks the decertification of the Intervenor, National Association of Government Employees, Local R1-240, hereinafter called NAGE, as the exclusive representative of certain Activity employees. In Case No. 31-11022(RO), the Petitioner, American Federation of Government Employees, AFL-CIO, hereinafter called AFGE, seeks an election in a unit consisting of all professional and nonprofessional employees of the Environmental Research Laboratory, Narragansett, Rhode Island, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined by the Order. 2/

At the hearing, the parties agreed as to the appropriateness of the petitioned for unit, which is coextensive with the unit currently represented by the NAGE which was certified in 1972. 3/ The AFGE and the NAGE take the position, with which the Activity and Galloway disagree, that certain employees under either a "1040" appointment or a "graduate student" appointment should be excluded from the unit. 4/

2/ The parties stipulated that there is no bar to an election in this matter and that employees classified as professionals are professional employees within the meaning of the Order.

3/ The Certification of Representative excluded guards from the unit. The parties stipulated that guards have never been employed at the Activity.

4/ The term "1040" appointment refers to the maximum number of hours such employees may work annually. Chapter 213, Appendix C-2(q) of the Federal Personnel Manual (FPM) states, in pertinent part, that:

. . . appointees are to assist scientific, professional, or technical employees. Persons employed under this provision shall be: (1) Bona fide high school science or mathematics teachers or (2) bona fide students at high schools or accredited colleges or universities who are pursuing courses related to the field in which employed.

(Continued)

1/ The Activity's name appears as amended at the hearing.

The Activity is one of eight such laboratories within the Environmental Protection Agency and is headed by a Director who reports directly to the Director, Office of Research Development, in Washington, D.C. The Activity's programs involve developing water quality criteria to assure the protection and propagation of marine life. With regard to the two disputed employee classifications, the record reveals that the "1040" and "graduate student" employees share with the Activity's other professional and nonprofessional employees common supervision and duties, similar working conditions, job classification and performance evaluation procedures as well as some of the same fringe benefits, such as annual leave, sick leave, holiday pay and eligibility for awards. Further, they are paid according to the same wage schedule as other professional and nonprofessional employees of the Activity.

Since 1973 the Activity has hired employees in the "1040" and "graduate student" classifications. Of the current 36 "1040" employees, there are 22 professionals and 14 nonprofessionals. All three current "graduate student" employees are professional employees. Of the currently employed employees in these classifications, 47 percent of the "1040" employees have been employed from 1½ to 3 years. The "graduate student" employees have been employed from 1 to 3 years and were classified for 1 or 2 of those years as "1040" employees. The "1040" employees work part-time during the period October to May, and full-time from June to September. The appointments of the "1040" employees are renewed annually as long as they are pursuing high school or college courses related to the field in which they are employed. The evidence establishes that such employees could possibly be employed by the Activity for several years as they progress from "1040" to "graduate student" status.

Under the particular circumstances of this case, I find that the Activity's "1040" and "graduate student" employees should be included in the unit found appropriate. Thus, as noted above, the record reveals

4/ No person shall be employed under this provision in (i) positions of a routine clerical type or (ii) in excess of 1040 working hours a year; . . .

The term "graduate student" appointment refers to the qualifications required for such appointment. Item (p) of the above noted Appendix to the FPM states that employees can receive such appointments for:

positions of a scientific, professional, or analytical nature when /the positions are/ filled by bona fide graduate students at accredited colleges or universities provided that the work performed for the agency is to be used by the student as a basis for completing certain academic requirements toward a graduate degree. Employments under this provision may be continued only so long as the foregoing conditions are met, and the total period of such employment shall not exceed one year in any individual case: Provided, That such employment may, with the approval of the Commission, be extended for not to exceed an additional year.

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that such employees share common supervision, similar working conditions and duties, and common personnel policies and practices with the Activity's other professional and nonprofessional employees. In addition, the evidence establishes that a substantial number of the "1040" and "graduate student" employees have been employed by the Activity for substantial periods of time and that, therefore, they have a reasonable expectancy of continued employment at the Activity. 5/ Accordingly, I shall include the "1040" and "graduate student" employees in the unit found appropriate.

As noted above, the unit involved herein was certified under Executive Order 11491, as amended. Accordingly, and noting the lack of any disagreement between the parties as to the appropriateness of the unit, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended:

All professional and nonprofessional employees, including temporary full-time employees who are employed for a period not to exceed one year and employees classified as either a 1040 or a graduate student employee, of the Environmental Research Laboratory, Narragansett, Rhode Island, excluding confidential employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order. 6/

It is noted that the unit found appropriate includes professional employees and that the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in the unit with employees who are not professionals unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in the unit with nonprofessional employees must be ascertained. I shall, therefore, direct separate elections in the following groups:

5/ See General Services Administration, Region 10, Interagency Motor Pool No. 2, Portland, Oregon, 2 A/SLMR 195, A/SLMR No. 146 (1972), and U.S. Department of Agriculture, Forest Service, Schenck Civilian Conservation Center, North Carolina and Forest Service, National Forests of North Carolina, 1 A/SLMR 551, A/SLMR No. 116 (1971).

6/ The parties stipulated that temporary full-time employees should be included in the unit. They also stipulated that the following employees should be excluded from the unit: the Secretary to the Director of the Activity, because she is a confidential employee within the meaning of the Order; and employees classified as either a Stay-In-School or a summer employee because employees in these classifications do not share a community of interest with the Activity's professional and nonprofessional employees or have a reasonable expectancy of continued employment at the Activity. There was no evidence that these stipulations were improper.

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Voting Group (a): All professional employees, including temporary full-time employees who are employed for a period not to exceed one year and employees classified as either a 1040 or a graduate student employee, of the Environmental Research Laboratory, Narragansett, Rhode Island, excluding all nonprofessional employees, confidential employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

Voting Group (b): All nonprofessional employees, including temporary full-time employees who are employed for a period not to exceed one year and employees classified as either a 1040 or a graduate student employee, of the Environmental Research Laboratory, Narragansett, Rhode Island, excluding all professional employees, confidential employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

The employees in the nonprofessional Voting Group (b) will be polled whether they desire to be represented by American Federation of Government Employees, AFL-CIO; National Association of Government Employees, Local R1-240; or neither.

The employees in the professional Voting Group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether they wish to be represented for the purpose of exclusive recognition by American Federation of Government Employees, AFL-CIO; National Association of Government Employees, Local R1-240; or neither. In the event that the majority of the valid votes in Voting Group (a) are cast in favor of inclusion in the same unit as the nonprofessional employees, the ballots of Voting Group (a) shall be combined with those of Voting Group (b).

Unless a majority of the valid votes of Voting Group (a) are cast for inclusion in the same unit as the nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit and an appropriate certification will be issued indicating whether American Federation of Government Employees, AFL-CIO; National Association of Government Employees, Local R1-240; or neither was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees, including temporary full-time employees who are employed for a period not to exceed one year and employees classified as either a 1040 or a graduate student employee, of the Environmental Research Laboratory, Narragansett, Rhode Island, excluding confidential employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following groups of employees constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

- a. All professional employees, including temporary full-time employees who are employed for a period not to exceed one year and employees classified as either a 1040 or a graduate student employee, of the Environmental Research Laboratory, Narragansett, Rhode Island, excluding all nonprofessional employees, confidential employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.
- b. All nonprofessional employees, including temporary full-time employees who are employed for a period not to exceed one year and employees classified as either a 1040 or a graduate student employee, of the Environmental Research Laboratory, Narragansett, Rhode Island, excluding all professional employees, confidential employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period, and who have not been rehired or reinstated before the election date.

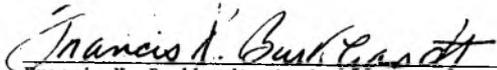
- 6 -

Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by American Federation of Government Employees, AFL-CIO; National Association of Government Employees, Local R1-240; or neither.

June 29, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Dated, Washington, D.C.
June 29, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
FEDERAL AVIATION ADMINISTRATION ACADEMY,
AERONAUTICAL CENTER,
OKLAHOMA CITY, OKLAHOMA
A/SLMR No. 1072

This case involved a petition filed by the Aeronautical Center Employees Organization, PATCO/MEBA, AFL-CIO, (PATCO) seeking an election in a unit of all unrepresented, nonprofessional, non-instructor employees of the Federal Aviation Administration Academy (Academy), located at the Federal Aviation Administration Aeronautical Center (Center) in Oklahoma City, Oklahoma. The Activity contended that the unit sought was inappropriate under Section 10(b) of the Order as the employees involved do not share a community of interest separate and distinct from other Center nonprofessional employees and that such unit would lead to fragmentation and would not promote effective dealings and efficiency of agency operations. It also asserted that the employees in the petitioned for unit should be included in a Center-wide unit of all unrepresented nonprofessional employees.

The Assistant Secretary found that the claimed unit was appropriate for the purpose of exclusive recognition. In this regard, he noted that the petitioned for unit was, in effect, a residual unit of all unrepresented, nonprofessional employees of the Academy and that such unit was consistent with the division-level bargaining history at the Center. As he found that the petitioned for employees shared a clear and identifiable community of interest and that the petitioned for unit would reduce unit fragmentation at the Academy and would promote effective dealings and efficiency of agency operations, he ordered an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
FEDERAL AVIATION ADMINISTRATION ACADEMY,
AERONAUTICAL CENTER,
OKLAHOMA CITY, OKLAHOMA

Activity

and

Case No. 63-7895(RO)

AERONAUTICAL CENTER EMPLOYEES ORGANIZATION,
PATCO/MEBA, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Paul H. Hall. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief submitted by the Petitioner, Aeronautical Center Employees Organization, PATCO/MEBA, AFL-CIO, hereinafter called PATCO, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.
2. In its amended petition, the PATCO seeks an election in a unit of all unrepresented, nonprofessional, non-instructor employees of the Federal Aviation Administration (FAA) Academy, a component of the Aeronautical Center, hereinafter called Center, located in Oklahoma City, Oklahoma. The Activity contends that the unit sought is inappropriate under Section 10(b) of the Order as the employees involved do not share a community of interest separate and distinct from other Center employees and that such unit would lead to fragmentation and would not promote effective dealings and efficiency of agency operations. Further, it asserts that the employees in the petitioned for unit should be included in a Center-wide unit of all unrepresented nonprofessional employees.

The Center is an intermediate field organization of the FAA with operating, research and support functions which are national in scope

and cannot be performed at the regional level. It is comprised of 16 organizational components including, among others, the FAA Depot, the Civil Aeromedical Institute, the Airmen and Aircraft Registry (for civilian aircraft registrations and airmen's records), an Aircraft Services Base (to maintain and modify FAA aircraft), and the FAA Academy, hereinafter called Academy. Also located at the Center are various staff functions necessary to support its operations. Each divisional component has its own organizational structure and supervision, with the division heads exercising the authority to hire, discharge, award and promote the employees assigned to their respective divisions.

The mission of the FAA Academy is to provide training and retraining for FAA employees and other governmental and non-governmental personnel. In fulfilling its mission, the Academy, pursuant to the direction and supervision of the Superintendent of the Academy, employs approximately 550 instructors assigned from various FAA regions, currently represented exclusively by the PATCO, and approximately 86 nonprofessional "non-instructors" in administrative support positions who are the subject of the PATCO's instant petition.

The history of bargaining at the Center reveals a pattern of division-level bargaining units. In this regard, the record reflects that of the 16 above-noted organizational components, eight other than the Academy have exclusively recognized units. All such units have been organized at the division level and have been established pursuant to the agreement of the parties or under the procedures of Executive Order 10988. ^{1/} The record further reveals that within the Academy itself, the PATCO has been the exclusive representative for a unit of all instructors since 1973.

The petitioned for unit consists principally of clerical employees and the Center asserts that there are other similarly situated employees in other divisions. However, the evidence establishes that the claimed employees of the Academy share a common training mission different from other components of the Center, common overall supervision and generally similar job duties. Also, as in the case of other division heads, the Superintendent of the Academy has the authority to hire, discharge, award and promote employees of the Academy. Moreover, the Superintendent of the Academy is authorized to act as the deciding official in the case of minor adverse actions and can render final decisions on formal agency grievances. Although all Academy employees are serviced by the Center's

^{1/} Some of the units of exclusive recognition contain employees in similar job classifications as those in the petitioned for unit. The record reflects that the American Federation of Government Employees, AFL-CIO, herein called AFGE, is the exclusive representative of seven of the above-noted division-level units and that the National Association of Government Employees represents the remaining unit. Subsequent to the hearing in this matter, the Assistant Secretary, pursuant to a petition for consolidation of units filed by the AFGE, directed an election to consolidate the seven units represented exclusively by the AFGE. See Department of Transportation, Federal Aviation Administration Aeronautical Center, Oklahoma City, Oklahoma, A/SLMR No. 1021 (1978).

Personnel Office, which also handles labor relations and assists in contract negotiations for each division, each division head at the Center, including the Superintendent of the Academy, approves the final negotiated agreement and is responsible for its administration.

Based on the particular circumstances herein, I find that the claimed unit of all nonprofessional, non-instructor employees of the Academy is appropriate for the purpose of exclusive recognition. Thus, the evidence establishes that the petitioned for unit is, in effect, a residual unit of all unrepresented, nonprofessional employees of the Academy and that such a division-level residual unit coincides with the existing bargaining pattern at the Center, a pattern which has been established, for the most part, based on the Center's desire in the past for division-level bargaining. In my view, since the petitioned for employees of the Academy share a common mission and overall supervision, generally similar job duties, and enjoy uniform personnel policies and practices and labor relations policies, they have a clear and identifiable community of interest. I find also that such a residual unit of employees of the Academy, which is consistent with the division-level bargaining history at the Center and with the labor relations responsibility of the Academy Superintendent, will promote effective dealings and efficiency of agency operations and reduce unit fragmentation at the Academy. 2/

Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Section 10(b) of Executive Order 11491, as amended:

All non-instructor employees of the FAA Academy, Aeronautical Center, Oklahoma City, Oklahoma, excluding management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees and supervisors as defined in Executive Order 11491, as amended.

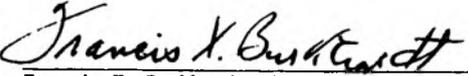
DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as soon as possible but not later than 60 days from the date below. The appropriate Area Administrator shall

2/ The fact that the AFGE's above-noted consolidated unit may result in employees similarly classified to those in the instant petition being included in a single unit established across division lines, does, in my view, not render the unit found appropriate herein, established on divisional lines, inappropriate. In this regard, it is noted that consolidation procedures apply only to situations where there is no question concerning representation and the unit involved meets the criteria specified in Section 10(b) of the Order.

supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or who were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the Aeronautical Center Employees Organization, PATCO/MEBA, AFL-CIO.

Dated, Washington, D.C.
June 29, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

July 5, 1978

A/SLMR No. 1073

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

Respondent

and

Case No. 22-07949(CA)

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION
A/SLMR No. 1073

NATIONAL ASSOCIATION OF AIR
TRAFFIC SPECIALISTS

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the National Association of Air Traffic Specialists (NAATS) alleging that the Respondent, the Federal Aviation Administration, violated Section 19(a)(1) and (6) of the Order by failing to consult, confer or negotiate with certain of its facility representatives. The NAATS, which holds national exclusive recognition, argued that under the terms of the parties' agreement, it had the right to designate facility representatives of its choice. The Respondent contended that as the facility representatives were not employed at the particular facility to which they had been assigned, there was no obligation under the Order or the parties' negotiated agreement which required the Respondent to recognize and deal with such facility representatives.

The Administrative Law Judge recommended dismissal of the complaint on the basis that the dispute involved a question of contract interpretation. He noted that neither the Order nor the parties' agreement required the Respondent to deal with non-resident facility representatives, and that, therefore, the Respondent's conduct was not violative of the Order.

The Assistant Secretary concurred with the Administrative Law Judge's determination that the complaint be dismissed but for different reasons. He noted that a labor organization holding exclusive recognition has the right under the Order to select its own representatives when dealing with agency management, absent a clear and unmistakable waiver. In the circumstances of this case, no such waiver was found to exist.

Rather, the Assistant Secretary found that Section 19(d) of the Order precluded further processing of the complaint. In this regard, the record revealed that several days prior to the filing of the pre-complaint charge, the Complainant had filed and actively pursued a contractual grievance which raised the same issue. Under these circumstances, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

On April 25, 1978, Administrative Law Judge Edwin S. Bernstein issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The Complainant, which holds national exclusive recognition for a unit of Air Traffic Control Specialists employed in over 300 Flight Service Stations, alleged that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to consult, confer or negotiate with certain of its designated facility representatives. The Complainant argued that under the terms of the parties' negotiated agreement, it had the right to designate a facility representative at each of the Respondent's Flight Service Stations. The Respondent, on the other hand, argued, in part, that it had no contractual obligation to consult with facility representatives who were not employed at the particular facility to which they had been so designated.

The Administrative Law Judge, in dismissing the instant complaint, found that as there was no specific requirement in either the Order or the parties' negotiated agreement that the Respondent recognize and deal with non-resident facility representatives, the Respondent's conduct was not violative of the Order. In this regard, he concluded that the question pertaining to the designation of facility representatives was a matter of contract interpretation.

While I agree with the Administrative Law Judge's conclusion that the complaint should be dismissed, I reach such conclusion for different reasons. It has previously been held that a labor organization holding exclusive recognition has the right under the Order to select its own representatives when dealing with agency management. 1/ It has further been held that in order to establish a waiver of a right granted under the Order, such waiver must be clear and unmistakable. 2/ In this regard, noting, as did the Administrative Law Judge, that the parties' had reasonably differing interpretations of the various pertinent articles of their negotiated agreement, I find insufficient evidence to establish that the Complainant clearly and unmistakably waived its right to select its own representatives at each of the Respondent's facilities where unit employees were located.

However, in the particular circumstances of this case, I find that Section 19(d) of the Order precludes further processing of the instant complaint. 3/ The record reveals that several days prior to the filing of the pre-complaint charge in this matter the Complainant's Central Region Director filed a contractual grievance with the Respondent's Central Region Director regarding the latter's refusal to consult with a unit employee who had been designated as the facility representative at Flight Service Stations at which he was not employed. The grievance was denied on both procedural grounds and on its merits. Thereafter, the Complainant requested arbitration. The Respondent replied that as the grievance and the pre-complaint charge raised the same issue, the Complainant should indicate which procedure it wished to pursue. The Complainant took the position that as the grievance presented a "regional

1/ See U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, 3 A/SLMR 60, A/SLMR No. 242 (1973).

2/ Cf. Utah Army National Guard, Salt Lake City, Utah, A/SLMR No. 966 (1978), and Bureau of the Mint, U.S. Department of the Treasury and Bureau of the Mint, U.S. Assay Office, San Francisco, California, 6 A/SLMR 639, A/SLMR No. 750 (1976).

3/ Section 19(d) of the Order provides, in pertinent part:

. . . Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. . . .

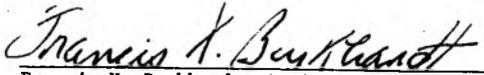
issue" while the unfair labor practice charge raised a "national issue", it was not estopped from pursuing both actions. However, it decided to defer its arbitration request pending disposition of the unfair labor practice charge.

In my view, as the issue raised in the grievance was the same as that raised in the unfair labor practice charge, i.e., the alleged failure to consult, confer or negotiate with certain of the Complainant's facility representatives, and as the Complainant's actions indicated that it actively pursued the grievance, even to the point of requesting arbitration, I find that Section 19(d) of the Order precludes further processing of the complaint and shall order that it be dismissed on this basis. 4/ With respect to the Complainant's contention that the grievance raised a "regional issue" while the charge dealt with a "national issue", it was noted that the issues raised in both forums are identical, and, as the parties are operating under a nationwide agreement, any resolution of the grievance would be applicable to the nationwide unit. 5/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-07949(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
July 5, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

4/ Cf. United States Department of Air Force, Warner Robins Air Materiel Area (WRAMA), Commissary Store 2853RD Air Base Division, Robins Air Force Base, Georgia, 4 A/SLMR 61, A/SLMR No. 340 (1974).

5/ See Internal Revenue Service, Ogden Service Center, and Internal Revenue Service, et al., A/SLMR No. 806, FLRC No. 77A-40 (1977).

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



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 In the Matter of :
 :
 DEPARTMENT OF TRANSPORTATION :
 FEDERAL AVIATION ADMINISTRATION :
 Respondent :
 :
 and : Case No. 22-07949 (CA)
 :
 NATIONAL ASSOCIATION OF AIR TRAFFIC :
 SPECIALISTS :
 Complainant :
 :

Raymond B. Thoman, Esquire
 Office of Labor Relations
 Department of Transportation
 Federal Aviation Administration
 800 Independence Avenue, S.W.
 Washington, D.C. 20591

For the Respondent

Lawrence C. Cushing
 President and Executive Director
 National Association of Air Traffic
 Specialists
 Suite 415, Wheaton Plaza North
 Wheaton, Maryland 20902

For the Complainant

Before: EDWIN S. BERNSTEIN
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding was initiated upon the filing of a complaint by National Association of Air Traffic Specialists ("the Union") against Department of Transportation, Federal Aviation Administration ("the Agency") on May 5, 1977.

The complaint alleged that the Agency violated Sections 19(a)(1) and (6) of Executive Order 11491, as amended ("the Executive Order") by refusing to recognize, consult, confer and negotiate with union - appointed Facility Representatives ("FACREPS"). The Regional Administrator for the Philadelphia Region issued a Notice of Hearing on July 20, 1977 with respect to alleged violations of Sections 19(a)(1) and (6) of the Executive Order.

A hearing was held before me in Washington, D.C. on September 28, 1977. Both parties were present and were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to adduce relevant evidence. Briefs were filed by both parties.

Upon the entire record in this case and my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendation.

Findings of Fact

The Union holds national exclusive recognition rights for all air traffic control specialists employed at over 300 Agency flight service stations in the 50 United States, Guam, Puerto Rico and the Canal Zone. These stations are located from 50 to 100 miles apart.

The parties' current labor agreement, made effective November 1, 1976 included the following provisions:

ARTICLE 4--UNION REPRESENTATIVES AND RIGHTS

Section 1. The Union may designate Facility Representatives at each facility. The Union may designate one representative and one designee for each team, crew, or group, as appropriate, in each facility. Normally, on each tour of duty, the Union may designate one representative to deal with first and second level supervisors. At the tour representative's option, he may designate an alternate to act on his behalf in dealing with first and second level supervisors. In addition, the Union shall designate in writing one principal representative and one designee. Only the principal representative and/or his designee may deal with the Facility Chief.

ARTICLE 11--NAMES OF EMPLOYEES
AND COMMUNICATION

Section 3. At facilities where the Union has no designated representative or members, the Employer agrees to contact each employee by mail or other appropriate means and inform them of the Union's exclusive representative status. The Employer will explain that the Union has the right and the responsibility under Executive Order 11491 to represent all employees in the unit. The message to employees will enclose an address card that the employee may return to the Union signifying his or her desire to be placed on the Union mailing list, and will advise the employee of the name and address of the Union's Regional Representative for that FAA Region.

Under the parties' agreement, a Facilities Representative's role is to represent the employees at the flight service station.

The allegations center around similar actions regarding four flight service stations located at Dyersberg, Tennessee; Emporia, Kansas; Chadron, Nebraska; and Sidney, Nebraska. Because there were no union members at these stations, the Union designated an employee from another station as a non-resident Facilities Representative. The Union notified the chiefs of the stations by letters dated December 28, 1976 for Dyersberg; February 17, 1977 for Chadron and Sidney; and September 3, 1977 for Emporia. In similar letters, the Agency refused to recognize the designees. Typical of the Agency's responses was a letter dated March 23, 1977 referring to the Dyersberg designee which stated in part:

Roy, I appreciate what you are trying to do, but I cannot agree to recognize an employee from another facility as facility representative. My view is based primarily on two factors -- there is no contractual provision or requirement for a "nonresident" facility representative. Secondly, and most important, to have such an arrangement is totally impractical. There is simply no way a facility chief could meet many of the contractual obligations required of him if the facility representative was an occasional visitor.

Conclusions of Law

The Union contended that the Agency's refusal to recognize and confer with non-resident FACREPS violated Sections 19(a) (1) and (6) of the Executive Order because it resulted in non-compliance by the Agency with the following language of Section 10(e) of the Executive Order:

"The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

The Agency acknowledged that it is obligated to meet and confer with the Union and its representatives, however, it contended that where there are no Union members at a facility, the Agency is obligated to deal with national union representatives and not with non-resident FACREPS.

The Union argued that the language of Article 4 of the parties' agreement supports its position. The Agency disagreed.

The Assistant Secretary has consistently held that a sincere dispute concerning differing and arguable interpretations of a labor-management agreement, as distinguished from clear, unilateral breaches of the agreement, is not an unfair labor practice in violation of the Executive Order. General Services Administration, Region 5, Public Buildings Service, Chicago Field Offices, A/SLMR No. 528; Federal Aviation Administration, Muskegon Air Traffic Control Tower, A/SLMR No. 534; Department of Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624; Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark, Ohio, A/SLMR No. 677.

The Executive Order does not specifically require the Agency to recognize and deal with non-resident FACREPS. Nor can it be concluded with any degree of certainty that the parties' agreement requires this. Therefore, the Agency's position here does not constitute a clear, unilateral breach of its obligations under the agreement and Executive Order. Rather it constitutes a sincere, good faith interpretation with regard to language in Articles 4(1) and 11(3) of the parties'

agreement which probably supports the Agency's position and at best is ambiguous.

The Union's designation of Mr. Rasmussen as a non-resident FACREP for 12 days at the Minneapolis Flight Service Station did not result in a waiver of the Agency's position. There was no evidence that the Agency knew of Mr. Rasmussen's designation.

Accordingly, the Agency did not violate the Executive Order.

Recommendation

Having found that Respondent did not violate the Executive Order, I recommend that the complaint be dismissed in its entirety.


EDWIN S. BERNSTEIN
Administrative Law Judge

Dated: April 25, 1978
Washington, D.C.

ESB:le

1/ I can not attach any significance to the fact that the last three words of the first sentence of Article 4(1) read, "in each facility" in the 1973 agreement and "at each facility" in the 1976 agreement. Both Webster's New World Dictionary & Roget's International Thesaurus list "in" and "at" as synonyms. Furthermore, the testimony of both Mr. Worthley & Mr. Heinbach supports the conclusion that the change resulted because the Article was copied from another labor agreement rather than from any intent to change the meaning of the phrase.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE, KANSAS CITY,
OGDEN, CHAMBLEE, PHILADELPHIA, AUSTIN,
COVINGTON, FRESNO AND BROOKHAVEN SERVICE
CENTERS, DETROIT DATA CENTER AND MARTINSBURG
NATIONAL COMPUTER CENTER
A/SIMR No. 1074

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapters 66, 67, 70, 71, 72, 73, 78, 82, 97 and 98 (Complainant), alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to negotiate the impact and implementation of its decision to institute new Standard Position Descriptions and Classification Guidelines for the GS-592 series Tax Examiners and Tax Assistants as it affected employees at the GS-6 level and below. The Respondent concluded that it was not obligated to bargain with the Complainant concerning the impact and implementation of its action with respect to employees classified as Tax Examiners and Tax Assistants, GS-6 or below, as none of these employees would be downgraded, but would be reassigned and/or reclassified and that, since Article 6, Section 2(B)(5) of the parties' Multi-Center Agreement applies to this type of situation, the Complainant had waived its right to bargain on the impact and implementation of the decision as it applied to this group of employees.

The Assistant Secretary found that the evidence was insufficient to establish that the Complainant had waived the right to negotiate with respect to impact and implementation of the change of position and/or classification as it affected employees at the GS-6 level and below. In this regard, the Assistant Secretary noted that while Article 6, Section 2(B)(5) of the parties' Multi-Center Agreement applied to the filling of a position by a lateral reassignment, the evidence did not establish that such Article was meant to encompass personnel actions such as involved herein without the Respondent having the obligation to bargain on impact and implementation. Under these circumstances, the Assistant Secretary found that the Respondent's refusal to negotiate as to the procedures used in implementing the New Position Descriptions and Classification Guidelines as they affected employees classified as GS-592 series Tax Examiners and Tax Assistants, GS-6 and below, and on the impact of such Guidelines on adversely affected employees constituted a violation of 19(a)(1) and (6) of the Order.

Accordingly, the Assistant Secretary ordered the Respondent to cease and desist from the conduct found violative and to take certain affirmative action.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE, KANSAS CITY,
 OGDEN, CHAMBLEE, PHILADELPHIA, AUSTIN,
 COVINGTON, FRESNO AND BROOKHAVEN SERVICE
 CENTERS, DETROIT DATA CENTER AND MARTINSBURG
 NATIONAL COMPUTER CENTER

Respondent

and

Case No. 22-07905 (CA)

NATIONAL TREASURY EMPLOYEES UNION AND
 NTEU CHAPTERS 66, 67, 70, 71, 72, 73,
 78, 82, 97 and 98

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator Hilary M. Shepley's Order Transferring Case to the Assistant Secretary of Labor in accordance with Section 203.5(b), 203.7(a)(4) and 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts and accompanying exhibits, the Assistant Secretary finds:

The complaint herein alleges that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by refusing to negotiate the impact and implementation of its decision to institute new Standard Position Descriptions and Classification Guidelines for the GS-592 series Tax Examiners and Tax Assistants as it affected employees GS-6 and below. The Respondent contends that it was not obligated to bargain with the Complainant concerning the impact and implementation of its actions with respect to employees classified as Tax Examiners or Tax Assistants, grade GS-6 or below. In this regard, it asserts that none of the Tax Examiners or Tax Assistants at the GS-6 level and below would be down-graded, but, rather, they would be reassigned and/or reclassified. Moreover, since Article 6, Section 2(B)(5) of the parties' Multi-Center Agreement applies to this type of situation, the Respondent takes the position that the Complainant had waived its right to bargain on the impact and implementation of the decision to issue new Standard Position Descriptions and Classification Guidelines as they applied to the disputed group of employees.

The undisputed facts, as stipulated by the parties, are as follows:

The National Treasury Employees Union (NTEU) is the exclusive representative of certain Internal Revenue Service (IRS) employees at the Kansas City, Ogden, Chamblee, Philadelphia, Austin, Covington, Fresno and Brookhaven Service Centers, the Detroit Data Center and the Martinsburg National Computer Center. The exclusively recognized unit encompasses approximately 30,000 employees. On March 21, 1975, Billy Brown, Director of the Personnel Division of the IRS, notified Vincent L. Connery, President of the NTEU, that the final draft of the new Standard Position Descriptions and Classification Guidelines for the GS-592 series Tax Examiners and Tax Assistants would result in approximately 50 down-grades per Service Center. ^{1/} On March 26, 1975, Connery notified Brown of the NTEU's desire to negotiate on the impact and implementation of the decision to implement the new position descriptions. Brown notified Connery on March 31, 1975, that the Regions would have until July 1, 1976, to effect the reclassifications and that the local Center management would be dealing with their respective local unions before any redeployment plan was finalized.

On July 18, 1975, the Respondent and the NTEU executed a Multi-Center negotiated agreement. Thereafter, on February 5, 1976, Brown notified Robert Tobias, General Counsel of the NTEU, that redeployment guidelines covering the contemplated down-grades would be issued on February 16, 1976. The parties met on February 20, 1976, and the NTEU was informed that approximately 500 down-grades would result from the new Standard. On February 26, 1976, Tobias transmitted a proposed Memorandum of Understanding to the Respondent which contained the NTEU's position on the manner of implementing the contemplated down-grading. On March 1, 1976, the parties met and agreed to negotiate the impact and implementation on a multi-unit basis.

On September 9, 1976, the Respondent informed Tobias that the GS-592 classification guidelines were being implemented. The next day, Tobias notified the Respondent that the NTEU demanded that implementation cease pending the outcome of negotiations. On September 17, 1976, the parties met and discussed all of the NTEU's proposals. As indicated above, the Respondent took the position that the NTEU had waived its right to negotiate procedures for lateral reassignments by virtue of Article 6, Section 2(B)(5) of the parties' Multi-Center Agreement. ^{2/}

^{1/} The new position description and classification guidelines were developed to address questions raised by the Civil Service Commission (CSC) with regard to the application of the classification standards applicable to Tax Examiners and Tax Assistants.

^{2/} Article 6 of the Multi-Center Agreement reads, in pertinent part:

Promotions

Section 1

The purpose of this Article is to ensure that all competitive promotions to Bargaining Unit positions and certain other placement actions as set forth in Section 2 of this

(Continued)

As a result, it refused to negotiate Section 3 3/ of the NTEU's proposals as it affected employees at the GS-6 level and below. The Respondent's position also was based on the fact that all employees who were deemed

2/ Article are made on a merit basis by means of systematic and equitable procedures so that the employees are given an opportunity to develop and advance to their full potential. To that end, the actions referred to above will be processed in accordance with this Article and the Employer's published promotion plans.

Section 2

B.

Exceptions to the coverage of this Article will be as follows: . . .

5. Filling a position by a lateral reassignment prior to a determination and an announcement by the Employer that the vacancy will be filled by a competitive action under the terms of this Article. (If a position has been posted as a vacancy to be filled by competitive action, the Employer may fill the vacancy without competition only if unforeseen circumstances of an extraordinary nature become known to the Employer, subsequent to the time a vacancy is announced and prior to the selection.)

3/ Section 3 of the NTEU's proposed Memorandum of Understanding states:

A. Employees adversely affected by a reclassification action will be referred for consideration for any available vacancy before the vacancy is filled by other means.

B. Employees adversely affected by a reclassification action will be considered as follows:

1. The employer will post the vacancy announcement and indicate that only those adversely affected by a reclassification action will be considered.

2. If there are more basically qualified applicants than available positions, the employees with the greatest length of Service Center employment will be reassigned first.

(Continued)

misclassified GS-6 or below could be laterally reassigned to another position and/or classification without loss of grade. Its latter position was contingent upon receiving a two year moratorium from the CSC for implementation of the latter's decision. 4/

The NTEU was of the view that the loss of position and/or classification created a sufficient adverse impact to require negotiations on the impact and procedures for implementation of the CSC decision. It further asserted that it had not waived its right to negotiate because the issue of GS-592 reassignments was not discussed during the negotiation of the Multi-Center negotiated agreement.

On October 19, 1976, the parties met in a negotiating session and the NTEU indicated that the parties were at an impasse. The Respondent removed all of the conditions that it had placed upon reassigning employees who were at the GS-6 level and below at the September 17, 1976, meeting and indicated that no GS-6 and below would be down-graded and that the project would be accomplished with reassignments to different positions and/or classifications. The Respondent again asserted its position that since no GS-6 employee or below would be down-graded, Section 3 of NTEU's proposals was non-negotiable with respect to GS-6 and below and that, therefore, there was, and could be, no impasse concerning that Section as it affected such employees. The Respondent also stated that its proposals would be implemented on November 1, 1976. At no time during the meetings between the parties did the Respondent refuse to negotiate the impact of the new guidelines on employees at the GS-7 level and above, inasmuch as it could make no guarantee that such employees would not be down-graded.

On October 26, 1976, the NTEU filed its pre-complaint charge in this matter alleging that the Respondent had violated Section 19(a)(1) and (6) of the Order by its refusal to bargain upon request. Thereafter,

3/ 3. If there are an insufficient number of basically qualified /applicants/ all who applied . . . will be reassigned and the affected employees with the least length of Service Center employment will fill the remainder of the positions.

C. Employees will retain their option of whether to accept reassignment.

1. Affected employees who choose not to be reassigned will be given salary retention rights.

2. Affected employees who choose not to be reassigned will be given special consideration pursuant to FPM Chapter 335, Subchapter 4-3 for positions for which they apply.

4/ The IRS requested a two-year period from the CSC to effect the necessary reclassifications in order to provide enough time to redeploy, without demotions, the incumbents of the affected positions.

on November 1, 1976, the NTEU requested the Federal Mediation and Conciliation Service to assign a mediator to the negotiations and the parties subsequently met in three mediation sessions. Although the Respondent did discuss other sections of the NTEU's proposals, it maintained throughout these sessions that Section 3 of the NTEU's proposals was non-negotiable as it applied to employees at the GS-6 level and below.

FINDINGS AND CONCLUSIONS

The Respondent herein has consistently acknowledged its obligation to bargain on the impact and implementation of the down-grading of some 500 employees caused by the new Standard Position Descriptions and Classification Guidelines for the GS-592 series Tax Examiners and Tax Assistants. In this regard, the record is clear that the Respondent, in fact, negotiated with the NTEU with respect to the impact and implementation of the down-grading of employees at the GS-7 level and above. However, the Respondent also has consistently refused to bargain in this regard concerning the employees classified GS-6 and below. As noted above, it has taken the position that by virtue of Article 6, Section 2(B)(5) of the parties' Multi-Center negotiated agreement the NTEU waived its right to negotiate where, as here, the employees involved in a personnel action were transferred laterally without loss of grade.

It has previously been held that in order to establish a waiver by a party of a right granted under the Executive Order, such waiver must be clear and unmistakable. Further, a waiver will not be found merely from the fact that a negotiated agreement omits specific reference to a right granted by the Executive Order or that a labor organization has failed in negotiations to obtain protection with respect to certain of the rights granted by the Order. ^{5/} In the instant case, I find that the evidence is insufficient to establish that the NTEU waived the right to negotiate with respect to impact and implementation of the change of position and/or classification as it affected employees at the GS-6 level and below. Thus, while Article 6, Section 2(B)(5) of the parties' Multi-Center negotiated agreement concerns the filling of a position by a lateral reassignment, the evidence does not establish that such Article was meant to afford the Respondent the right to make reassignments necessitated by a change in personnel policies without having to bargain with the Complainant on the impact and implementation of such decision. Under these circumstances, I find that the Respondent was under an obligation to negotiate over the impact and implementation of its actions with respect to employees at the GS-6 level and below as the Complainant had not clearly and unmistakably waived its right to negotiate with regard to such matters. Accordingly, I find that the Respondent's refusal, upon the request of the Complainant, to negotiate on the procedures used

^{5/} Cf. Bureau of the Mint, U.S. Department of the Treasury and Bureau of the Mint, U.S. Assay Office, San Francisco, California, 6 A/SLMR 640, A/SLMR No. 750 (1976), and NASA, Kennedy Space Center, Kennedy Space Center, Florida, 2 A/SLMR 567, A/SLMR No. 223 (1972).

in implementing the New Position Descriptions and Classification Guidelines as they affected employees classified as GS-592 series Tax Examiners and Tax Assistants GS-6 and below and on the impact of such Guidelines on adversely affected employees constituted a violation of 19(a)(1) and (6) of the Order. ^{6/}

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor Management Relations hereby orders that the Internal Revenue Service, Kansas City, Ogden, Chamblee, Philadelphia, Austin, Covington, Fresno and Brookhaven Service Centers, Detroit Data Center and Martinsburg National Computer Center shall:

1. Cease and desist from:

(a) Unilaterally instituting new Standard Position Descriptions and Classification Guidelines affecting the GS-592 series Tax Examiners and Tax Assistants, with respect to employees classified GS-6 and below represented exclusively by the National Treasury Employees Union, without affording such representative an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will utilize in effectuating such Guidelines and the impact of such Guidelines on adversely affected employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request by the National Treasury Employees Union, meet and confer, to the extent consonant with law and regulations, concerning the procedures used in implementing new Standard Position Descriptions and Classification Guidelines for the GS-592 series Tax Examiners and Tax Assistants, as it affects employees classified GS-6 and below, and on the impact of the Guidelines on adversely affected employees.

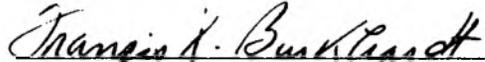
(b) Post at the Internal Revenue Service, Kansas City, Ogden, Chamblee, Philadelphia, Austin, Covington, Fresno and Brookhaven Service Centers, Detroit Data Center and Martinsburg National Computer Center, copies of the attached notice marked "Appendix" on forms to be furnished

^{6/} Cf. Department of Treasury, IRS, Manhattan District, A/SLMR No. 841 (1977).

by the Assistant Secretary of Labor for Labor Management Relations. Upon receipt of such forms they shall be signed by the respective Center Directors and shall be posted and maintained by them for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The respective Director of each of the above noted activities shall take reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
July 5, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally institute new Standard Position Descriptions and Classification Guidelines for GS-592 series Tax Examiners and Tax Assistants, with respect to employees classified GS-6 and below represented exclusively by the National Treasury Employees Union, without affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will utilize in implementing such Guidelines and on the impact of such Guidelines on adversely affected employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Executive Order.

July 10, 1978

WE WILL, upon request by the National Treasury Employees Union, meet and confer, to the extent consonant with law and regulations, concerning the procedures used in implementing the new Standard Position Descriptions and Classification Guidelines for the GS-592 series Tax Examiners and Tax Assistants, as it affects employees GS-6 and below, and on the impact of the Guidelines on the adversely affected employees.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

(Agency or Activity)

GENERAL SERVICES ADMINISTRATION,
NATIONAL ARCHIVES AND RECORDS SERVICE
A/SLMR No. 1075

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 4120 Gateway Building, 3535 Market St., Philadelphia, Pennsylvania 19104.

This case involved a petition for clarification of unit (CU) filed by the General Services Administration, National Archives and Records Service (Activity). The Activity sought to exclude employees of the National Archives Trust Fund Board (Board) from an exclusively recognized unit of all professional and nonprofessional employees of the National Archives and Records Service (NARS), Washington, D.C., Metropolitan Area, represented by the American Federation of Government Employees, Local 2758, AFL-CIO (AFGE). The Activity took the position that the Assistant Secretary does not have jurisdiction over the Board because it is not an "agency" within the meaning of Section 2(a) of the Order, and that employees of the Board are not covered by the definition of "employee" found in Section 2(b) of the Order. The AFGE contended that the Board and its employees are covered by the Order and that they are within the recognized unit. The Activity and the AFGE stipulated that if the Assistant Secretary asserted jurisdiction over the Board and its employees, the appropriate unit in the instant case should include the employees of the Board, as such employees have a community of interest with employees of the NARS, and such unit would promote effective dealings and efficiency of agency operations.

The Assistant Secretary concluded that the Board is an independent establishment within the meaning of Section 104 of title 5 of the United States Code. Accordingly, he found the Board to be an "agency" within the meaning of Section 2(a) of the Order whose mission and business activities are functionally related to the NARS. He found also that Board employees are "employees" within the meaning of Section 2(b) of the Order, and that the unit herein should be clarified to reflect that employees of the Board have been and remain within the exclusively recognized unit. In this regard, he noted that employees of the Board and of the NARS share a clear and identifiable community of interest and that, as stipulated by the parties, inclusion of the Board's employees in the subject unit would promote effective dealings and efficiency of agency operations.

Accordingly, the Assistant Secretary ordered that the unit herein be clarified to reflect his findings.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
NATIONAL ARCHIVES AND RECORDS SERVICE

Activity-Petitioner

and

Case No. 22-07754(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2758, AFL-CIO

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

This matter is before the Assistant Secretary pursuant to Regional Administrator Hilary M. Sheply's Order Transferring Case to the Assistant Secretary of Labor in accordance with Section 206.5 of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' joint stipulation of facts and statement of issues, accompanying exhibits and briefs, 1/ the Assistant Secretary finds:

On July 28, 1977, the Activity filed its amended petition for clarification of unit (CU) seeking to exclude employees of the National Archives Trust Fund Board from an exclusively recognized unit of all professional and nonprofessional employees of the National Archives and

1/ The Activity-Petitioner, hereinafter called Activity, subsequent to the Order Transferring Case to the Assistant Secretary filed a Motion To Insert Material Deleted Typographically from a Joint Stipulation of Facts. In the absence of any opposition, the Activity's Motion is hereby granted. The Activity's further request to file a post-stipulation brief was granted and, thereafter, the American Federation of Government Employees, Local 2758, AFL-CIO, hereinafter called AFGE, was permitted to file a brief in response to the Activity's post-stipulation brief.

Records Service (NARS), Washington, D.C., Metropolitan Area, represented exclusively by the AFGE. In this connection, the Activity asserts that the Assistant Secretary does not have jurisdiction over the National Archives Trust Fund Board, hereinafter called the Board, because it is not an "agency" within the meaning of Section 2(a) of the Order, 2/ and the employees of the Board are not covered by the definition of "employee" set forth in Section 2(b) of the Order. 3/ On the other hand, the AFGE contends that the Board and its employees are covered by the Order and are included within the exclusively recognized unit.

On December 28, 1970, the AFGE was certified as the exclusive representative of all professional and nonprofessional employees of the NARS Central Office in the Washington, D.C., Metropolitan Area. The Board was not specifically mentioned in the description of the bargaining unit as certified, but employees of the Board were included in the voter eligibility list and voted in the representation election held on December 17, 1970. Further, a number of Board employees are presently on dues deductions pursuant to Article 20 of the parties' negotiated agreement.

The Activity and the AFGE stipulated that if the Assistant Secretary asserts jurisdiction over the Board and its employees, the appropriate unit in the instant case should include the employees of the Board, as such employees share a community of interest with employees of the NARS, and such unit would promote effective dealings and efficiency of agency operations.

2/ Section 2(a) of the Order defines an "agency" as: "...an executive department, a Government corporation, and an independent establishment as defined in Section 104 of title 5, United States Code, except the General Accounting Office."

Section 104 of title 5 of the United States Code, in relevant part, defines an independent establishment as: "...(1) an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or any part of an independent establishment...."

3/ Section 2(b) of the Order defines an "employee" as: "...an employee of an agency and an employee of a nonappropriated fund instrumentality of the United States but does not include, for the purpose of exclusive recognition or national consultation rights, a supervisor, except as provided in section 24 of this Order."

The NARS, located within the General Services Administration, hereinafter called GSA, performs a variety of functions relating to the preservation, use, and disposition of the records of the United States Government. In the National Archives Building and regional branches, the NARS preserves and makes available for research, as well as places on exhibit, the Nation's records of enduring value. Among its other activities are the administration of a network of Federal records centers to store and service non-current records of Federal agencies, operation of a Presidential Library system and a government-wide records management program to improve the management and quality of Federal records and facilitate prompt disposition of inactive records, and publication of legislative, regulatory and other widely used documents. The director of the NARS is the Archivist of the United States.

The Board was created by an Act of Congress on July 9, 1941, and was designed to support the activities of the National Archives establishment. The Board's mission is to accept, receive, hold, and administer gifts or bequests of money, securities, or other personal property for the benefit of the NARS, and to finance and administer the reproduction or publication of records and other historical materials. The scope of the activities administered by the Board was augmented in 1948 by an amendment to the National Archives Act which provided that funds collected by the National Archives for copying records were to be paid into and administered as part of the National Archives Trust Fund, and in 1955 by the Presidential Libraries Act which provided that funds received in connection with Presidential Libraries were to be administered as part of the National Archives Trust Fund. The statutory members of the Board are the Archivist of the United States, who serves as Chairman, ^{4/} and the Chairmen of the Senate Committee on Post Office and Civil Service and the House Committee on Government Operations. Further, as indicated in the publication, National Archives Trust Fund Board, A GSA Handbook, which is a compilation of the by-laws and regulations of the Board, the Executive Director of the NARS is designated as Secretary to the Board. The by-laws of the Board provide that "the Secretary shall be the chief executive officer of the Board." ^{5/}

^{4/} The Archivist of the United States is appointed by the Administrator of the GSA.

^{5/} The by-laws of the Board, "Section 3. Secretary. " provide that:

The Secretary shall be appointed by the Chairman, with approval of the Board, and may be removed at any time. The Secretary shall be the chief executive officer of the Board and, subject to the control of the Board and the Chairman, shall exercise general supervision over all the

(Continued)

Board employees are appointed by the Board without regard to Civil Service laws and their duties and compensation are fixed by the Board. Compensation of persons employed by the Board is paid out of income from trust funds available to the Board for that purpose. However, Board employees may be considered employees of the GSA for purposes of personnel and payroll administration, are included in the annual GSA Affirmative Action Plan designed for the upward mobility of GSA employees, and may be bonded on the same basis as if they were employees of the GSA, upon approval by the Chairman (Archivist). The Chairman may also authorize the Secretary, Directors of Presidential Libraries administered by the GSA, and Regional Directors of the NARS, to appoint and fix the duties of Board employees. ^{6/}

The record shows that Board and NARS employees are serviced by the same personnel office and receive administrative support from the NARS, work together in the National Archives Building, accrue annual and sick leave in the same fashion, have the option of choosing the same Health Benefits Plan and joining the Civil Service Retirement System, share common immediate and overall supervision, perform similar duties and have like job titles. The GSA grievance procedure is utilized by Board employees, except that the Archivist of the United States, who acts as deciding official in such grievances, retains authority to make the final decision and no GSA official may impose a different final decision, which is possible in the case of a grievance filed by a NARS employee. The record reveals that there have been a number of transfers of employees between the Board and the NARS, and that the by-laws of the Board mandate that no employee of the GSA shall be adversely affected by a reassignment to a similar position when working for the Board. However, in order for a Board employee to apply for a NARS position, such employee must have

^{5/} business and affairs of the Board. He shall be responsible for the receipt and disbursement of trust funds in accordance with the law and the actions of the Board and the Chairman; shall maintain detailed accounts of receipts and expenditures and detailed records of the receipt and disposition of each gift or bequest made to the Board in a manner approved by the Board, shall represent the Board in determining investments to be made or retained by the Secretary of the Treasury. He shall record the proceedings of all meetings of the Board; shall have custody of its records; shall prepare such rules and information relating to the Board's organization and procedures as may be appropriate for publication in the Federal Register; and shall perform such other duties as may be prescribed by the Board or the Chairman.

^{6/} Although Board employees are not subject to Civil Service Commission regulations, the record reveals that in actual practice such regulations generally are followed in matters of pay and leave administration.

obtained competitive status from prior service or have been referred from an appropriate Civil Service Commission register. Prior to accepting a Board position, a NARS employee must resign from the competitive service.

Under all of the foregoing circumstances, I conclude that the National Archives Trust Fund Board is an independent establishment within the meaning of Section 104 of title 5 of the United States Code. Accordingly, I find it to be an "agency" within the meaning of Section 2(a) of the Order whose mission and business activities are functionally related to the NARS. In this regard, it is noted particularly that the statutory Chairman of the Board is the Archivist of the United States, an official appointed by the Administrator of the GSA, and, further, that the Secretary of the Board, who is its chief administrative officer, is the Executive Director of the NARS. Moreover, in my judgment, a finding that the Board is an "agency" within the meaning of Section 2(a) of the Order for the purpose of collective bargaining in no way conflicts with the Congressional concern that the Board accept and administer gifts, or bequests of money, securities or other personal property for the benefit of the NARS, or interferes with the Board's ability to collect and administer funds from the National Archives establishment or various Presidential libraries as part of the National Archives Trust Fund.

I find also that Board employees are "employees" within the meaning of Section 2(b) of the Order as they are employees of an "agency" as defined in the Order. In this regard, it is noted that the determination of whether employees, such as those involved herein, are subject to the jurisdiction of the Order, is dependent on whether they are employees of an "agency", rather than on their method of appointment, pay, or coverage under Civil Service laws and regulations. 7/

I find further that the unit herein should be clarified to reflect that the employees of the Board have been and remain within the exclusively recognized unit. In this regard, it is noted that employees of the Board were included in the voter eligibility list and voted in the representation election held in December 1970, are presently on dues checkoff and no evidence was presented that the AFGE has not represented such employees. Additionally, as noted previously, employees of the Board and the NARS share a clear and identifiable community of interest as they have common supervision, are serviced by the identical personnel office, receive administrative support from the NARS, work together in the National Archives Building and have similar job titles and duties. Moreover, as stipulated to by the parties, I find that inclusion of the

7/ See Action, 2 A/SLMR 495, A/SLMR No. 207 (1972), and National Science Foundation, 3 A/SLMR 564, A/SLMR No. 316 (1973).

Board's employees in the AFGE's unit would promote effective dealings and efficiency of agency operations.

Accordingly, and because employees of the Board have been and continue to be included in the AFGE's unit, I shall order that the existing exclusively recognized unit be clarified to reflect the inclusion of the professional and nonprofessional employees of the Board who are located in the Washington, D.C., Metropolitan Area.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which American Federation of Government Employees, Local 2578, AFL-CIO, was certified on December 28, 1970, be, and it hereby is, clarified by including in the description of said unit the professional and non-professional employees of the National Archives Trust Fund Board in the Washington, D.C., Metropolitan Area.

Dated, Washington, D.C.
July 10, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

July 11, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL ELECTION COMMISSION
A/SLMR No. 1076

This case involved a representation petition filed by the National Treasury Employees Union seeking an election in a unit consisting of all professional and nonprofessional employees of the Federal Election Commission. The Activity contended that certain categories of employees, including Attorneys, Research Assistants, Investigators, Auditors and Disclosure Analysts, were not eligible for inclusion in the proposed unit as their inclusion might result in a conflict of interest. The Activity further argued that the Attorneys should also be excluded on the basis that they acted as management officials. If, however, the Attorneys were found to be eligible for inclusion in a bargaining unit, the Activity argued that they should comprise a separate unit. Finally, the Activity took the position that temporary employees should be excluded from the unit.

The Assistant Secretary found that the claimed unit was appropriate for the purpose of exclusive recognition. In this regard, he noted that the employees in the proposed unit share a clear and identifiable community of interest in that they are engaged in a common mission with common overall supervision, are engaged in a highly integrated operation requiring a high degree of cooperative effort, enjoy uniform personnel policies and practices, and are employed in a single location. The Assistant Secretary further found that such unit would promote effective dealings and efficiency of agency operations. In this regard, the record revealed that the proposed unit embraces all eligible employees of the Activity, and that the level of recognition would occur at the same level where personnel and labor relations policies and practices are established and implemented. Further, the establishment of the claimed Activity-wide unit would, in the Assistant Secretary's view, prevent the fragmentation of the Activity's employees.

With respect to the eligibility questions, the Assistant Secretary found no basis under the Order to exclude certain categories of employees on the basis of a potential conflict of interest; that the Attorneys who were alleged to be management officials were not involved in internal policy formulation within the Activity; that a separate unit limited solely to Attorneys was unwarranted in the circumstances herein; and that temporary employees had a reasonable expectancy of continued employment and therefore their inclusion in the unit found appropriate was warranted.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

A/SLMR No. 1076

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL ELECTION COMMISSION

Activity

and

Case No. 22-8591(RO)

NATIONAL TREASURY EMPLOYEES UNION

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Daryl F. Stephens. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the case, including the briefs filed by the parties, the Assistant Secretary finds:

1. The labor organization involved claims to represent certain employees of the Activity.

2. The Petitioner, National Treasury Employees Union, hereinafter called NTEU, seeks an election in a unit of all professional and non-professional General Schedule employees, including temporary employees, of the Federal Election Commission, excluding guards, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order. The Activity takes the position that the unit as petitioned for is not appropriate for the purpose of exclusive recognition under the Order. In this regard, it contends that certain categories of employees, including Attorneys, Research Assistants, Investigators, Auditors and Disclosure Analysts, are not eligible for inclusion in the petitioned for unit as their inclusion in such a unit might result in a conflict of interest. It further argues that Attorneys also should be excluded from any unit found appropriate on the basis that they are involved in the formulation of policy and are, therefore, management officials. In the alternative, the Activity contends that if Attorneys are found to be eligible for inclusion in a bargaining unit, they should comprise a separate unit on the basis that Attorneys share

a clear and identifiable community of interest separate and distinct from all other Activity employees, and that they constitute a functional grouping of employees within the meaning of Section 10(b) of the Order. ^{1/} Finally, the Activity contends that temporary employees should be excluded from any unit found appropriate as they do not have a reasonable expectation of continued employment.

Located in Washington, D.C., the Activity was created by the Federal Election Campaign Act of 1971, as amended, (FECA) and has the responsibility for implementing, administering and enforcing the FECA, the Presidential Election Campaign Fund Act, and the Presidential Primary Matching Payment Account Act. Among its duties, the Activity receives and processes reports and statements filed by candidates, committees and other persons required to file under the Federal election laws; conducts audits of candidates and committees; issues advisory opinions and promulgates regulations interpreting the FECA; determines the eligibility of and makes payments to political candidates receiving public funds; and conducts investigations into possible violations of the FECA with the authority to initiate civil enforcement actions or attempt to remedy violations by conciliation.

The Activity is headed by six Presidential appointees and two non-voting *ex officio* members, the Secretary of the Senate and the Clerk of the House of Representatives. These Commissioners are responsible for administering, seeking compliance with, and formulating policy under the FECA, and for the overall direction of the Activity. All major policy decisions must be approved by a vote of four of the six voting Commissioners.

Below the level of the Commissioners, the Activity is essentially divided into two areas - the Office of the Staff Director and the Office of the General Counsel. The Staff Director, who is appointed by the Commissioners, is the chief executive officer of the Activity and, as such, is responsible for the overall management, operation and administration of the Activity. Reporting directly to the Staff Director is the Director of the Planning and Management Group, which reviews and evaluates Commission goals and programs. Also reporting organizationally to the Office of the Staff Director are the Assistant Staff Directors of the following divisions: Audit, Administrative, Reports Analysis, Public Disclosure, Data Systems, and Information.

The Audit Division, among other things, conducts audits of candidates, committees and other persons subject to the Federal election laws, makes initial recommendations as to the eligibility of candidates

^{1/} Section 10(b) of the Order states, in pertinent part, that:

A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations. . . .

to receive public funds, assists the General Counsel on enforcement matters, and compiles reports on publicly funded candidates which are submitted to Congress.

The Administrative Division supplies a variety of support services to the Activity, including budget and accounting, personnel, office supplies and services and editorial services. The Personnel Branch of this Division administers personnel policies for all Activity employees. With respect to hiring, the record reveals that the FECA empowered the Staff Director with the authority to appoint personnel, including temporary and intermittent employees, subject to approval by the Commissioners. Vacancy announcements are prepared and posted internally by the Personnel Branch, which also conducts recruitment outside the Activity. For vacancies within the Office of the Staff Director, applicants are interviewed by the division head or Assistant Staff Director who makes a recommendation to the Staff Director or the Assistant Staff Director of the Administrative Division. The recommendation is then forwarded to the Office of the General Counsel for review before being forwarded to the Commissioners. The Office of the General Counsel maintains its own recruitment program in which Attorney positions are advertised in major law journals, newspapers, and are posted at selected law schools. Applicants are first interviewed by team leaders and are then referred to the Associate General Counsel who makes a recommendation to the General Counsel which recommendation is then forwarded to the Commissioners.

The Personnel Branch performs a variety of duties in addition to processing new appointments and promotions. It notifies both the Offices of the General Counsel and the Staff Director of upcoming employee performance evaluations and forwards the necessary forms, and also maintains all employees' official personnel files. Apart from services rendered by its Personnel Branch, the Administrative Division provides additional services in the way of travel disbursements for all Commission employees and the preparation, for Commission review, of monthly budget analyses and a general budget, which utilizes input from the General Counsel.

As a result of a 1976 reorganization within the Activity, the former Disclosure Division became two separate divisions, the Reports Analysis Division and the Public Disclosure Division. These Divisions are responsible for all reports and statements filed with the Commission from their receipt, through the entry of the data into a computerized reporting system, to an analysis of their compliance with requirements of the FECA. The Data Systems Division is responsible for the development of computer based information systems. The operations of these three Divisions is highly integrated and requires a great deal of cooperative effort.

Finally, the Information Division provides and disseminates information to persons subject to or interested in Federal election laws. All publications issued by this Division must first be reviewed by the Office of the General Counsel for legal sufficiency prior to issuance. This Division is also responsible for responding to all Freedom of Information Act requests subject to legal advice provided by the Office of the General Counsel.

Enforcement and policy matters are handled by the Office of the General Counsel, which reports directly to the Commissioners. The General Counsel, who, like the Staff Director, is appointed by the Commissioners, provides the Commission with legal guidance and advice on all policy matters and represents the Commission in all litigation and enforcement proceedings. Within the Office of the General Counsel are four enforcement teams each headed by an Assistant General Counsel and staffed with Attorneys, Investigators and Research Assistants. There are Assistant General Counsels in the areas of legislation, policy and advisory opinions and regulations, and an Associate General Counsel for Enforcement who oversees the enforcement teams. Additionally, the Office of the General Counsel employs summer interns.

The Offices of the Staff Director and the General Counsel work closely on a variety of matters. Documents which are prepared by various divisions within the Office of the Staff Director are referred to the General Counsel through the Staff Director for a review of legal sufficiency. For example, reports completed by the Audit Division are referred to the Office of the General Counsel for review before being submitted to the Commission for approval. Irregularities or possible violations of the Federal election laws which are discovered by Auditors or the staff of the Reports Analysis Division in the regular course of their duties are referred to the Office of the General Counsel which may then decide to take further action. Where further investigation is warranted, Auditors may assist staff Attorneys in field examinations.

Personnel policies, applicable to Commission employees, were initially formulated by a task force, which included Attorneys and employees of the Office of the Staff Director, and were then submitted to the Commissioners for approval. These policies, which apply uniformly to all employees, include regulations involving equal employment opportunity, leave usage, incentive awards and quality increases, appointments and promotions and a grievances/complaints procedure.

Currently, there is no trained labor relations staff at the Commission. The record reveals that the Office of the General Counsel would handle labor relations for the Commission, including the negotiation of collective bargaining agreements which would be subject to approval by the Commissioner.

Based on all of the foregoing, I find that the proposed unit, consisting of all professional and nonprofessional employees of the Activity, is appropriate for the purpose of exclusive recognition under the Order.

Thus, as noted above, the evidence establishes that the employees in the proposed unit are engaged in a common mission with common overall supervision, are engaged in a highly integrated operation requiring a high degree of cooperative effort, enjoy uniform personnel policies and practices, and are employed in a single location. Consequently, I find that the employees in the claimed unit share a clear and identifiable community of interest. Moreover, I find that such unit will promote effective dealings and efficiency of agency operations. In this regard, the record reveals that the proposed unit embraces all eligible employees of the Activity, and that the level of recognition would occur at the same level where personnel and labor relations policies and practices are established and implemented. Further, the establishment of the claimed Activity-wide unit would prevent fragmentation of the Activity's employees.

Eligibility Issues

Attorneys, Research Assistants, Investigators, Auditors and Disclosure Analysts

As indicated above, the Activity contends that certain categories of employees, including Attorneys, Research Assistants, Investigators, Auditors, and Disclosure Analysts, should be excluded from the unit on the basis of a potential conflict of interest. In this regard, the Activity asserts that a conflict of interest, either real or apparent, would exist if employees of the Commission, whose official duties are to ensure compliance with, and enforcement of, the FECA, were to be represented by a labor organization which might engage in certain types of political activity falling within the jurisdiction of the Commission.

In my view, there is no basis under the Order for the exclusion of such employees. Thus, while Section 3 of the Order excludes certain employees and agencies from its coverage, 2/ the employees in the

2/ Section 3 of the Order states, in pertinent part:

(b) This Order (except section 22) does not apply to --

- (1) The Federal Bureau of Investigation;
- (2) The Central Intelligence Agency;
- (3) any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations;

(Continued)

disputed categories herein do not fall within such exclusions. In this regard, there has been no agency head determination that the inclusion of such employees would be inconsistent with national security requirements or the internal security of the agency. Nor is there any contention that the employees should be excluded on the basis that they administer a labor-management relations law or the Order. ^{3/} Moreover, as there was no evidence presented that the disputed employees have in the past been called upon to scrutinize reports filed by the NTEU or have had to review political activity engaged in by such labor organizations, I find that it has not been established that the inclusion of employees classified as Attorneys, Research Assistants, Investigators, Auditors and Disclosure Analysts in the unit found appropriate will

^{2/} (4) any office, bureau or entity within an agency which has as a primary function investigation or audit of the conduct or work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge of their official duties, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with the internal security of the agency; or

(5) The Foreign Service of the United States: Department of State, United States Information Agency and Agency for International Development and its successor agency or agencies.

(c) The head of an agency may, in his sole judgment, suspend any provision of this Order (except section 22) with respect to any agency installation or activity located outside the United States, when he determines that this is necessary in the national interest, subject to the conditions he prescribes.

(d) Employees engaged in administering a labor-management relations law or this Order shall not be represented by a labor organization which also represents other groups of employees under the law or this Order, or which is affiliated directly or indirectly with an organization which represents such a group of employees.

^{3/} Compare Occupational Safety and Health Review Commission, A/SLMR No. 1018 (1978).

result in a conflict of interest, either real or apparent. ^{4/} Accordingly, I find that such employees should be included in the unit found appropriate. ^{5/}

As noted above, the Activity also argues that Attorneys are management officials and, as such, should be excluded from any unit found appropriate. In this regard, it points to the fact that the Attorneys are primarily responsible for making policy recommendations to the Commissioners so that, in effect, it is the Attorneys who assume the policy making role rather than the Commissioners.

The record reveals that Attorneys are, from time-to-time, assigned policy matters, which include the issuance of advisory opinions whereby individuals or parties seek prospective advice on what courses of action are permissible under Federal election laws. For the most part, such policy formulation as engaged in by the Attorneys involves the interpretation of Federal election laws which is directed to parties over whom the Activity exercises jurisdiction, rather than involving internal policy formulation applicable to the Activity's employees. ^{6/} Under these circumstances, I find that they are not management officials within the meaning of the Order. ^{7/}

^{4/} During the course of the hearing in this matter, the Hearing Officer sustained the NTEU's objection to the Activity's line of questioning concerning the potential conflict of interest and suggested instead that the Activity present its arguments in a post-hearing brief. In my view, there is sufficient basis in the record herein to make a determination concerning the issues presented.

^{5/} As noted above, the record reveals that the Office of the General Counsel would handle labor relations for the Commission. Those Attorneys clearly acting in behalf of the agency on a regular basis with respect to the implementation of the agency's labor-management relations program should not be included in any unit found appropriate. Cf. United States Department of Justice, Immigration and Naturalization Service, San Francisco District, San Francisco, California, 6 A/SLMR 553, A/SLMR No. 730 (1976).

^{6/} Cf. Portland Area Office, Department of Housing and Urban Development, 1 A/SLMR 522, A/SLMR No. 111 (1971), wherein the Assistant Secretary found that an employee was not a management official on the basis that he did not participate in the formulation or determination of activity policies.

^{7/} With regard to those Attorneys who may have served on the task force which formulated a set of personnel policies, the record reveals that the duties of this task force were confined to one period of time. As there was no evidence that such duties are of a recurring nature, I find no basis to presently exclude those Attorneys as being management officials.

The Activity further argues that, in the event the Attorneys are found eligible for inclusion in a unit, a separate unit of Attorneys be found appropriate on the basis that they constitute a functional grouping of employees. In this regard, the Activity claims that the Office of the General Counsel and the Office of the Staff Director have separate missions, different personnel policies and practices, and that the Attorneys share educational requirements and working conditions which are different from other employees. The NTEU, on the other hand, argues that a separate unit for Attorneys would be inconsistent with the policies of the Order.

In its 1975 Report and Recommendations, the Federal Labor Relations Council addressed the issue of the status of Attorneys under the Order, finding no reason to accord them special status, and noting further that the processes of the Order were sufficient for resolving any questions concerning the status of Attorneys. Under these circumstances, and noting the Activity's highly integrated operation and the fact that under Section 10(b)(4) of the Order all professional employees, including Attorneys, will have an opportunity to vote whether they desire to be represented and, if so, whether they wish to be included in a unit limited solely to professional employees, or whether they wish to be included in a more comprehensive unit as petitioned for herein, I find that a separate unit limited solely to Attorneys is not justified. 8/

Temporary Employees

The Activity takes the position that temporary employees should be excluded from any unit found appropriate as they do not have a reasonable expectancy of continued employment.

The record establishes that since 1975, there have been 181 temporary appointments, of which 58 have been converted to permanent status. At the time of the hearing in this matter, the Activity employed 17 temporary employees of whom six were being considered for conversion to permanent status. Generally, the temporary appointments last for a period of several months and, in many instances, are extended for additional periods. The record also reveals that temporary employees perform the same duties as permanent employees, share the same job classifications and grade structure, compete for vacancies, enjoy common supervision and working conditions and receive many, though not all, of the benefits to which permanent employees are entitled. Under these circumstances, I find that temporary employees share in the community of interest enjoyed by the permanent employees, that they have a reasonable expectancy of continued employment, and that, therefore, their inclusion in the unit found appropriate is warranted.

8/ Cf. United States Department of the Treasury, Office of Regional Counsel, Western Region, 1 FLRC 258, FLRC No. 72A-32 (1973).

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended:

All professional and nonprofessional employees of the Federal Election Commission, including temporary employees, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order. 9/

As noted above, the unit found appropriate includes professional employees. However, the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in any unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees must be ascertained. I shall, therefore, direct separate elections in the following groups.

Voting Group (a): All professional employees of the Federal Election Commission, including temporary employees, excluding all nonprofessional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

Voting Group (b): All nonprofessional employees of the Federal Election Commission, including temporary employees, excluding all professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the National Treasury Employees Union.

The employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether or not they wish to be represented for the purpose of exclusive recognition by the National Treasury Employees Union. In the event that the majority of the

9/ The petitioned for unit herein specifically excluded guards. In its 1975 Report and Recommendations the Federal Labor Relations Council recommended that guards be treated for representational purposes the same as other employees, and the Order was subsequently amended to reflect this recommendation. In the absence of evidence in the record pertaining to guards, I make no finding as to their unit eligibility.

valid votes in voting group (a) are cast in favor of inclusion in the same unit as the nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) is cast for inclusion in the same unit as the nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether or not the National Treasury Employees Union was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon the result of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees of the Federal Election Commission, including temporary employees, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following groups of employees constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

a. All professional employees of the Federal Election Commission, including temporary employees, excluding all nonprofessional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

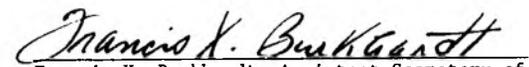
b. All nonprofessional employees of the Federal Election Commission, including temporary employees, excluding all professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the units found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall

supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the National Treasury Employees Union.

Dated, Washington, D.C.
July 11, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

July 12, 1978

A/SLMR No. 1077

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,
CANANDAIGUA, NEW YORK
A/SLMR No. 1077

VETERANS ADMINISTRATION HOSPITAL,
CANANDAIGUA, NEW YORK

Activity

and

Case No. 35-4753(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL UNION 3306

Petitioner

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 492

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer John P. Nuchereno. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. The Petitioner, American Federation of Government Employees, AFL-CIO, Local Union 3306, hereinafter called AFGE, seeks an election in a unit consisting of all professional employees of the Veterans Administration Hospital, Canandaigua, New York, excluding staff nurses and nurse instructors, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in the Order. The unit is coextensive with the unit for which the Intervenor, National Federation of Federal Employees, Local 492, hereinafter called NFFE, is currently the incumbent exclusive representative. 1/

1/ The NFFE was granted exclusive recognition in the aforementioned unit in 1966. The petitioned for unit is essentially as set forth in the February 8, 1974, negotiated agreement between the Activity and the NFFE.

This case involved a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local Union 3306 (AFGE) seeking an election in a unit of certain professional employees of the Veterans Administration Hospital, Canandaigua, New York. The petitioned for unit is coextensive with the unit for which the National Federation of Federal Employees, Local 492 (NFFE) is the incumbent exclusive representative. The Activity and the NFFE took the position that their negotiated agreement which was signed locally on December 17, 1973, and became effective on February 8, 1974, and which provided for automatic renewal triannually until modified or terminated, constituted a bar to the subject petition, and that, therefore, the AFGE's petition, which was filed on October 21, 1977, was not timely filed.

On December 10, 1976, the NFFE wrote the Activity that it "would like to negotiate their contract prior to February 8, 1977." In its communication the NFFE set forth certain articles of the negotiated agreement that it wished to revise. However, in the subsequent negotiations the parties negotiated on a number of matters, including a new duration period, in addition to the matters specified in the December 10 letter.

The Assistant Secretary found that the NFFE's agreement became one of indefinite duration after February 8, 1977, and thus could not serve as a bar to the AFGE's petition of October 21, 1977. In the Assistant Secretary's view, when the parties commenced negotiations immediately prior to and following the anniversary date of the agreement, it became unclear as to whether the parties intended to merely modify the existing agreement, terminate the existing agreement and negotiate a new agreement with a different term, or continue the old agreement indefinitely pending completion of negotiations. In this ambiguous setting, third parties wishing to challenge the representative status of the NFFE had no way of ascertaining the appropriate time for the filing of a petition. In the Assistant Secretary's view, such a situation might also give the NFFE an unfair advantage in being able to negotiate a completely new agreement and yet retain protection from challenges by third parties while the negotiations continued.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

The Veterans Administration Hospital, Canandaigua, New York, hereinafter called the Activity, and the NFFE take the position that their negotiated agreement constitutes a bar to the instant petition. The agreement, which was signed locally on December 17, 1973, became effective on February 8, 1974, when approved by the Chief Medical Director and provides for a duration period of three years from its effective date and for automatic renewal triannually until modified or terminated. 2/ The Activity and the NFFE contend that the negotiated agreement renewed itself on February 8, 1977, for a period of three years and constituted a bar to the AFGE's petition, which was filed on October 21, 1977. On the other hand, the AFGE contends that the 1973 negotiated agreement does not serve as a bar to its petition since, even if the agreement renewed itself in 1977, it is an agreement of indefinite duration.

The evidence establishes that on December 10, 1976, the NFFE wrote the Activity stating that it "would like to negotiate their contract prior to February 8, 1977." This communication set forth certain specific articles of the negotiated agreement that the NFFE wished to revise. Negotiating sessions commenced on January 26, 1977, and continued until September 15, 1977. The record reflects that the bargaining sessions involved a number of items and articles in the agreement in addition to those specified in the NFFE's December 10 letter, including a proposal to change the duration of the agreement. However, the parties failed to sign any new agreement or modification of the existing agreement. On October 21, 1977, the AFGE filed the instant petition.

Under the foregoing circumstances, I find that there was no agreement bar to the filing of the subject petition. As indicated above, the NFFE gave notice of its desire to revise the parties' existing agreement in December 1976, which resulted in several negotiating sessions being held during the subsequent six-month period. It was unclear from the NFFE's bargaining request and from the nature of the actual negotiations as to whether the parties intended to merely modify their existing agreement, terminate the existing agreement and negotiate a new agreement with a different term, or continue the old agreement indefinitely pending completion of negotiations. In this ambiguous setting, third-parties wishing to challenge the representative status of the NFFE had no way of ascertaining the appropriate time for the filing of a petition. In addition, this potentially created an unfair advantage for the incumbent labor organization in that it was possible for it to negotiate indefinitely for a completely new agreement and yet retain protection from challenges by third-parties while the negotiations continued.

2/ The agreement provides, in pertinent part:
Article 39 - DURATION OF AGREEMENT AND MODIFICATION

1. This agreement shall... remain in effect for a period of three (3) years from its effective date and be automatically renewable every three (3) years on the third anniversary date thereafter until modified or terminated as provided herein. Each new 3 year period will be a new duration period with a new effective date. (Continued)

-2-

Under these circumstances, I find that the extended agreement was one of indefinite duration after February 8, 1977, and that, therefore, such agreement could not serve as a bar to the AFGE's petition of October 21, 1977. Thus, in my view, the ambiguous arrangement which existed herein did not constitute a final, fixed term agreement and lacked the stability sought to be achieved by the agreement bar principle. 3/

Accordingly, I shall direct an election in the following unit which I find appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended: 4/

All professional employees of the Veterans Administration Hospital, Canandaigua, New York, excluding staff nurses and nurse instructors, nonprofessional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations.

- 2/ 2. Once each calendar year, either party may request modification of this agreement by notifying each other, not less than sixty (60) days prior to the anniversary date of this agreement, that a conference is desired to consider the need for revising this agreement. If either party indicates its intention to modify or make changes during the aforesaid periods, the agreement shall remain in full force and effect until such changes are negotiated....

Article 40 - TERMINATION OF AGREEMENT

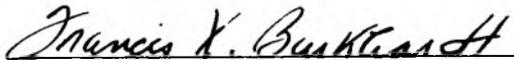
2. Either party may terminate this agreement and all amendments thereto on the terminal date of the agreement as determined in Article 39, or on any subsequent terminal date, by giving the other party written notice at least sixty (60) days in advance. It is provided in Section 1 of this article, the VA Hospital may not terminate this agreement without prior approval of the Chief, Medical Director, Department of Medicine and Surgery, VA Central Office, Washington, D.C.
- 3/ See Veterans Administration Health Care Facility, Montrose, New York, A/SLMR No. 980 (1978), and the cases cited therein.
- 4/ There was no dispute as to the appropriateness of the petitioned for unit.

-3-

July 12, 1978

Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit, or were discharged for cause, since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local Union 3306; by the National Federation of Federal Employees, Local 492; or by neither.

Dated, Washington, D.C.
July 12, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

TEXAS AIR NATIONAL GUARD,
149th TFGP TexANG,
KELLY AIR FORCE BASE, TEXAS
A/SLMR No. 1078

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local Union 3027 (Complainant) alleging, in essence, that the Respondent violated Section 19(a)(1), (2) and (4) of the Order by terminating Vincent Valadez, a probationary/trial employee, in reprisal for the filing of a grievance. The Complainant further alleged that the Respondent, by the conduct and statements of two of its supervisors, one of whose supervisory status was in dispute, interfered with, restrained, or coerced employees in the exercise of their rights guaranteed by the Order, and discouraged membership in a labor organization.

The Administrative Law Judge, noting that the 19(a)(1) allegation was derivative in nature and finding that one of the claimed supervisors was, in fact, not a supervisor at the time of Valadez' termination, concluded that the evidence did not establish that the Respondent interfered with, restrained, or coerced employees in the exercise of their rights. Similarly, he found no evidence that the Respondent discouraged union membership or discriminated against employees, including Valadez, because of their union activity. Finally, the Administrative Law Judge concluded that Valadez' termination was not due to the exercise of his rights guaranteed by the Order.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

TEXAS AIR NATIONAL GUARD,
149th TFGP TexANG,
KELLY AIR FORCE BASE, TEXAS

Respondent

and

Case No. 63-7440(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL UNION 3027

Complainant

DECISION AND ORDER

On April 30, 1978, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-7440(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 12, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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In the Matter of :
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Defense/Texas Air National Guard :
149th TFGP TexANG, Kelly Air Force :
Base, Texas :
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Respondent :
:
and :
:
American Federation of Government :
Employees, AFL-CIO, Local Union :
3027 :
:
Complainant :
.....

Case No. 63-7440(CA)

James Pons, Esquire
201 N. St. Marys, Ste 102
San Antonio, TX 78205

Alfonso Garcia
American Federation of Government Employees
443 Elmhurst
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For the Complainant

Douglas B. Owen, Esquire
Assistant Attorney General of Texas
and
Lonny Zwiener
Assistant Attorney General of Texas
Supreme Court Building
P. O. Box 12458
Austin, TX 78711

For the Respondent

Before: RHEA M. BURROW
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding arises pursuant to a complaint filed on June 9, 1977, under Executive Order 11491, as amended, hereinafter referred to as the Order, by the American Federation of Government Employees, Local Chapter 3027, against the Defense/Texas Air National Guard, 149th TFGP, TexANG Kelly Air Force Base, Texas. The proceeding was initiated by a charge filed on or about September 22, 1976 alleging violations of Section 19(a)(2) and (4) of the Order and a complaint filed on June 9, 1977 alleging violations of Sections 19(a)(1)(2) and (4) of the Order. The complaint states:

"On or about 21 September Management for the AFGE's Section conducted surveys on Mr. Vincent Valadez and Mr. Gary Beseth, both of whom have formal grievances pending. The survey consists of tape recording conversations of other people answering questions concerning Mr. Beseth and Mr. Valadez. Management has also initiated termination action on Mr. Valadez which is without a doubt reprisal for having filed a grievance on 19 August 1976. Mr. Valadez was terminated on 30 September 1976."

A Notice of Hearing on Complaint dated December 7, 1977 referenced alleged 19(a)(1)(2) and (4) violations of the Order. 1/ The 19(a) alleged violation was stated by Complainant at the hearing held on February 15 and 16, 1978, in San Antonio, Texas, to be derivative of the 19(a)(2) and (4) alleged violations. At the hearing all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to file post-hearing briefs.

1/ Respondent's motion to dismiss dated June 22, 1977 referred to in the Acting Regional Administrator's letter of December 7, 1977 was referred to the Administrative Law Judge for consideration.

Upon the entire record, including my observation of the witnesses and their demeanor, and the timely briefs filed by the parties, I make the following findings of fact, conclusions and recommendation.

Findings of Fact

1. At all pertinent and material times herein, the Complainant was the exclusive representative of all technicians in the Texas Air National Guard, 149th TFGP Kelly Air Force Base, Texas.

2. The Texas National Guard has State and Federal missions. For the State, it provides properly trained, organized and appropriately equipped units to perform State functions directed by the Governor of Texas and the Attorney General such as military support of civil defense, disaster relief and supplementing law enforcement agencies of the State. Its Federal mission is to provide units, in accordance with Department of Defense Mobilization Program, of sufficient strength, state of training and equipment to be deployed to meet schedules in current war plans. The 149th Tactical Fighter Groups located at Kelly Air Force Base is one of the Air National Guard units in Texas. Its mission is to provide combat-ready air crews to Tactical Air Command (TAC) for the purpose of executing tactical fighter missions. The F-100 Tactical fighter aircraft is the basic weapons system of the unit.

3. The 149th Tactical Fighter Group is composed of approximately 99 officers and 764 enlisted personnel. The unit is supported by a full time work force of 200 National Guard Technicians. National Guard technicians are federal employees and their responsibilities encompass administrative training, logistics and operational activities, as well as the utilization, maintenance and repair of equipment issued to the National Guard of Texas by the Federal Government. Except as prescribed by the Secretary of the Army or Air Force, technicians, as a condition of employment, must be members of the National Guard holding the military grade of an officer, warrant officer, or enlisted man as required by the position in which they are employed.

4. Vincent Valadez, Jr. was a probationary employee with the Air Technician Detachment at Kelly Air Force Base, San Antonio, Texas during the period from October 12, 1975 to September 30, 1976. He worked as a Powered Ground Equipment

Mechanic WG-10, step 4 civil service wise and was a Staff Sergeant when on reserve duty. Prior to October 1975, he had graduated from high school in 1969, attended college for a brief period and served in the active reserves. For several summers before October 1975, he had temporary appointments to work 60 days or more with the Texas Air National Guard as a weapons mechanic. The record does not establish that he had service that was creditable toward his probationary period.

5. Gary Wayne Beseth has been employed at Respondent's activity at Kelly Air Force Base for about five years. He initially completed a one year probationary period of employment. During 1976 he served Civil-Service wise as a WG-10, step 4, employee and militarily in the Air National Guard as a Staff Sergeant.

6. Both Beseth and Valadez were members of AFGE Local, Union No. 3027 while employed during 1976.

7. James D. Johnston was the Power Support Equipment mechanic Foreman at the Texas Air National Guard Base at all pertinent times material to this proceeding. As foreman he was supervisor of two departments, the Inspection Shop and the Pick Up and Delivery Shop.

8. Arthur Fernandez and L.W. Workman were the respective supervisors working under Mr. Johnston when Vincent Valadez began his probationary employment in October 1975.

9. Arthur Fernandez was Valadez' immediate or first line supervisor when Valadez began his probationary employment. He evaluated him in January and early May 1976 but the latter evaluation was withdrawn because Fernandez was no longer a supervisor. James D. Johnston had assumed the first line supervisory duties of Fernandez in early May 1976. Evaluations thereafter were by Johnston who advised Valadez the reasons for withdrawal of the Fernandez May 1976 evaluation of him. 2/

2/ The two departments headed by Johnston were comprised of three supervisors including himself, Fernandez and Workman and three WG-10 employees Gary W. Beseth, Rudy Castillo and Vincent Valadez. Six persons were not considered sufficient to justify three supervisors and the supervisory jobs of Fernandez and Workman were abolished because of a higher level agency determination.

Valadez' evaluations by Johnston were on May 22 and August 31, 1976. Each of Valadez's evaluations were discussed with him and none were more than borderline as to satisfactory adjustment and progress. The latter was unsatisfactory and separation was recommended. I do not find that any incidents relating to Valadez' application in March 1976 to attend a course that was later cancelled had any significant impact or relationship to the Unfair Labor Practice alledged in August 1976.

10. On the basis of the entire record, I find a clear pattern of unsatisfactory job performance throughout Vincent Valadez's probationary period of employment.

11. Four other probationary employees have been under the supervision of Johnston since 1971 and Valadez is the only one that has been terminated at the end of the probationary period.

12. Johnston had also been a member of AFGE Local 3027 until he was promoted to a position in management.

13. Arthur Fernandez is and was a member of AFGE Local 3027 during 1976 when Valadez' probationary employment was terminated.

14. Fernandez and Johnston became aware of Valadez's membership in the Union when he applied to attend a steward training class in March 1977. He was not a steward at the time but was designated as an alternate by the Union. The class did not materialize and was cancelled.

15. When Valadez discussed his employment status and job dissatisfactions with Colonel Donald Kerr in April 1976, he made no mention of his membership in or activities with a labor union.

16. The record does not warrant an inference of union animus or discriminatory motive on the part of the Respondent that is recognizable under the Order.

17. The record does not support Complainant's assertion that the termination of Valadez's probationary employment in September 1976 caused decline in union membership. The overwhelming evidence from members who had resigned including Wilfred R. Wildman the immediate past Local Union President, was that they had left the union because they were dissatisfied

with its operation and management or for personal reasons unrelated to this proceeding. None had left because of fear or reprisal from the Respondent. 3/

18. There is conflicting testimony between James D. Johnston and Gary Wayne Beseth as to the type of evaluation Beseth observed to have been prepared with regard to Valadez in August 1976. Under all the circumstances, having considered the testimony of the witnesses and observed their demeanor, I find that the evaluation of record is the only one made by Mr. Johnston and there was no satisfactory rating of Valadez in August 1976.

19. Valadez and Beseth had each filed a complaint against management relating to statements alleged to have been made by Arthur Fernandez, however, the complaint by Beseth was withdrawn prior to the hearing.

Position of the Parties

The Complainant alleges in substance that Arthur Fernandez and J. D. Johnston by their conduct and statements to bargaining unit members interfered with, restrained and coerced employees in the exercise of rights assured them under the Order and discouraged union membership; that union employees Gary Beseth and Vincent Valadez, Jr., were disciplined and discriminated against as far as tenure, promotion and retention are concerned by reason of having filed complaints under the Order. By reason of the above actions, the Respondent violated sections 19(a)(1)(2) and (4) of the Order.

The Respondent denies Complainant's allegations and asserts the complaint should be dismissed because of lack of specificity and not being timely filed within 60 days after a final answer. Respondent further asserts that Arthur Fernandez was not a management official or supervisor at the time of the incidents mentioned in the complaint and had not been since early May 1976 and this was well known to Vincent Valadez, Jr. In fact Respondent states Fernandez was a member of AFGE Local Union 3027. Further, the Activity

3/ At the hearing 10 witnesses offered testimony as to reasons for leaving the Union and Respondent offered to bring in 20 additional ones. I cut off the additional witnesses because of the pattern of testimony established which was not rebutted after a rather unimpressive attempt. The premise that Valadez was being separated because of evaluation by someone who was not a supervisor was unfounded. Valadez was advised in May 1966 that Johnston was his supervisor and he, Johnston, made the evaluations eventuating in his separation.

argues that Vincent Valadez' separation at the expiration of his probationary period of employment resulted solely from unsatisfactory job performance. The Activity relies in part upon its argument that Valadez demonstrated a pattern of unsatisfactory performance before any Respondent Management official or supervisor was aware that he was a member of a union.

Section 19(a) of the Order

Section 19 of the Order relates to Unfair Labor Practices and provides in part that:

- "(a) Agency management shall not -
 - (1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;
 - (2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment;
 - (4) discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under this Order."

Conclusions of Law

1. On the basis of the above findings of fact, I conclude that Arthur Fernandez, Jr. was not a supervisor within the meaning of Section 2(c) of the Order after the first week in May 1976 and was not a supervisor at the time the allegations attributed to him in the Complaint occurred.

2. Since Arthur Fernandez, Jr., was not a management official or supervisor but a rank and file dues paying member of AFGE Local 3027 for several months before the allegations attributed to him in the Complaint was filed, he did not by his conduct and statements interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured under the Order.

3. The record does not establish that James D. Johnston, either by his conduct or statements to bargaining union members interfered with, restrained, or coerced Valadez or Beseth or any bargaining unit employees in the exercise of their rights assured by the Order.

4. The record does not establish that Arthur Fernandez or James Johnston by their statements or conduct discouraged membership in a labor organization.

5. The record does establish that Gary Beseth and Vincent Valadez, Jr. each filed a grievance but the grievance of Beseth was subsequently withdrawn. Neither Beseth or Valadez or any other employee was disciplined or discriminated against because of any complaint or testimony given under the Order.

6. Neither Valadez, Beseth or any other employee is shown to have been discriminated against by the Respondent in regard to hiring, tenure, promotion, retention or other employment conditions because of their union activity.

7. The record does not establish that Texas Air National Guard employees have been encouraged or discouraged from membership or activity in a labor organization by reason of actions of Arthur Fernandez or James D. Johnston.

8. Vincent Valadez's separation from his job by Respondent during his trial or probationary period neither interfered with his or Complainant's exercise of any rights under the Order nor was his discharge motivated by union activities in violation of the Order. The record as a whole evidences a clear pattern of borderline and unsatisfactory performance on the part of Valadez before any management official or supervisor was aware he was an active union member. There was no significant improvement thereafter demonstrated before his probationary status was terminated.

Despite the contentions, the record is replete with evidence that he (Valadez) was not subject to disparate treatment. His final performance was evaluated because regulations so required and not because of his union activities. The regulations also required that a trial employee's separation be based upon the subjective evaluation of his supervisor or supervisors as was done in this case. The evidence establishes it is the practice of the Activity not to deny career tenure to employees who have performed satisfactorily during their trial periods. Satisfactory performance by Valadez was not demonstrated.

It is not my function to determine whether Valadez's separation was justified or that his probationary status was incorrect, but whether there was discriminatory motivation as to his discharge because of his union activities. I conclude that the Complainant has failed to meet the required burden of proof. Therefore, the termination of Vincent P. Valadez probationary employment was not related to his exercise of the rights assured him by the Order.

Conclusion

In conclusion, I find that the Respondent did not violate either Sections 19(a)(1)(2) or (4) of the Order by separating Vincent Valadez, Jr., from his position on September 30, 1976 or by reason of any statements or acts of conduct on the part of Arthur Fernandez and James D. Johnston. In regard to the latter conclusion the evidence is clear that Fernandez was not a supervisor or held out to be one after the first week in May 1976 and the evidence does not establish any discriminatory statements or acts on the part of James Johnston. In fact, there are no allegations against Johnston in the complaint nor does the record show that management had any part in any alleged tape recordings mentioned in the complaint or had possession of any such alleged recordings.

As to the motion to dismiss, the charge letter dated September 22, 1976 alleging a violation on September 21, was sent to the Texas Adjutant General and there was a response on October 1, 1976 stating that AFGE Local Union 3027 had no standing as a labor organization to file an unfair labor practice charge with this Department since its formal recognition was withdrawn on June 1, 1971. There was no statement in the letter that the determination was a final one. The complaint dated April 24, 1977 is shown to have been filed with the Area Director on June 9, 1977 and the Respondent was notified on or about the same date. Thus, there was a complaint by a labor organization within 9 months of the occurrence of the alleged unfair practice.

In view of my recommended disposition of the matter on the merits, I find it unnecessary to rule on the motion to dismiss.

Recommendation

In view of the foregoing findings and conclusions, I recommend that the complaint herein be dismissed in its entirety.

Rhea M. Burrow
RHEA M. BURROW
Administrative Law Judge

Dated: 4/30/78
Washington, DC

RMB:dmb

July 13, 1978

A/SLMR No. 1079

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE,
NATIONAL OFFICE,
OFFICE OF INTERNATIONAL OPERATIONS
A/SLMR No. 1079

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and the National Treasury Employees Union, Chapter 83 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to permit a union attorney to attend a Step 2 grievance meeting held under the parties' negotiated agreement to discuss an employee's grievance. The Respondent took the position that the Assistant Secretary should decline jurisdiction in this matter because the basic dispute involves interpretation of the parties' negotiated agreement. It further asserted that if the Assistant Secretary retains jurisdiction in this matter, the Complainant waived its Section 10(e) right to designate whomever it chose to represent it at the grievance meeting.

The Administrative Law Judge recommended that the complaint be dismissed. In reaching this result, he noted that the instant dispute centers on whether the Complainant waived rights otherwise granted it under Section 10(e) of the Order. He found that, in view of the language of the parties' negotiated agreement and the history of bargaining between the parties, the Complainant knowingly and intentionally waived its right to designate, as its Section 10(e) representative, individuals other than those specifically enumerated in the negotiated grievance procedure. Accordingly, the Administrative Law Judge concluded that the Respondent's conduct herein did not violate Section 19(a)(1) and (6) of the Order and recommended that the complaint be dismissed in its entirety.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
NATIONAL OFFICE,
OFFICE OF INTERNATIONAL OPERATIONS

Respondent

and

Case No. 22-08509(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 83

Complainant

DECISION AND ORDER

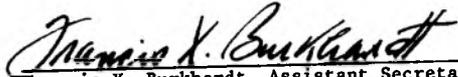
On March 27, 1978, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-08509(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 13, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



.....
In the Matter of :
:
INTERNAL REVENUE SERVICE :
NATIONAL OFFICE :
OFFICE OF INTERNATIONAL OPERATIONS :
:
Respondent : Case No. 22-08509 (CA)
:
and :
:
NATIONAL TREASURY EMPLOYEES UNION :
NATIONAL TREASURY EMPLOYEES UNION :
CHAPTER 83 :
:
Complainant :
.....

KEITH AQUI, Esquire
ROGER P. KAPLAN, Esquire
Office of Chief Counsel
Internal Revenue Service
Room 4586, 1111 Constitution Avenue, N.W.
Washington, D.C. 20224
For the Respondent

LINDA LIPSETT, Attorney at Law
JOHN F. BUFE, Esquire
National Treasury Employees Union
1730 K Street, N.W.
Washington, D.C. 20006
For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on September 2, 1977, under Executive Order 11491, as amended, by the National Treasury Employees Union and NTEU Chapter 83 (hereafter

called the Union), against the Internal Revenue Service, National Office, Office of International Operations (hereafter called the Activity), a Notice of Hearing on Complaint was issued by the Assistant Regional Administrator for the Philadelphia Region on January 5, 1978.

The complaint alleges that the Activity violated Sections 19(a)(1) and (6) of the Order by refusing to permit Linda Lipsett, a union attorney, to attend a Step 2 Grievance Meeting held to discuss an employee's grievance.

A hearing was held in this matter on February 21, 1978, in Washington, D.C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Post-hearing briefs have been received from both parties and given careful consideration.

Upon the entire record in this case, including the arguments and stipulations of counsel, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union is the exclusive bargaining representative for approximately 2500 professional and nonprofessional employees of the National Office of the Internal Revenue Service in Washington, D.C. and a party to the National Office Agreement negotiated in 1975 covering such employees. Article 35 of this agreement sets out a 5-step procedure for processing employee grievances arising under the Agreement.

The essential facts of this controversy are not in dispute. On June 10, 1977, pursuant to Article 35, Section 7 of the National Office Agreement, a Step 2 Grievance Meeting was held to discuss the grievance of Ms. Penelope Wagener, a unit employee. Representing the Activity at this meeting were Ms. Beverly Weber, an IRS Labor Relations Specialist; Mr. James Phillips, an IRS Bureau Chief; and Mr. John Carey, Assistant Chief of Audit. Accompanying the grievant were Ms. Shirley Koonce, a steward for NTEU Chapter 85; and Ms. Linda Lipsett, an attorney for the Union.

Prior to the start of the meeting, Ms. Weber objected to Ms. Lipsett's attendance and informed her that the grievance would not be discussed if Ms. Lipsett insisted on being present. Ms. Lipsett subsequently left under protest, and the meeting commenced with Ms. Koonce present and participating.

On June 29, 1977, Ms. Lipsett's protest was made the subject of an unfair labor practice charge filed with the Activity. Efforts to settle the dispute proved unavailing, and the filing of a complaint with the Assistant Secretary's office led to the instant proceedings.

Discussion and Conclusions

The Activity argues that the Assistant Secretary should decline jurisdiction in this matter since the basic dispute involves interpretation of provisions of the parties' negotiated agreement. Article 35, Section 7 of the contract sets out who can be present at a Step 2 Grievance Meeting and therefore, the Activity argues, the Union's remedy lies in a grievance filed under the parties' negotiated procedure and not in an unfair labor practice proceeding. The Activity cites Department of Transportation, Federal Aviation Administration, Western Region, A/SLMR No. 930 (Nov. 7, 1977) as precedent for its position.

However the Activity misconstrues the Assistant Secretary's previous holdings in this area and the Union's basic contention in this case. In the case cited *supra*, the Assistant Secretary held that a legitimate dispute over interpretation of the negotiated agreement, without more, is insufficient to support an unfair labor practice charge, since such a dispute does not amount to a violation of the Executive Order. 1/

Here, the Union alleges more than a mere breach of contract. The Union asserts that its rights under Section 10(e) of the Order have been violated, and that these rights have not been waived or usurped by its acceptance of the National Office Agreement. The Assistant Secretary has repeatedly held that he will not relinquish jurisdiction where at issue is the question whether a party to an agreement has given up rights guaranteed by the Order. See, e.g., Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, Washington, D.C., A/SLMR No. 680 (July 26, 1976); NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No 223 (Dec. 4, 1972). Therefore, since the instance dispute centers on whether the Union has waived rights otherwise granted it under Section 10(e) of the Order, I conclude that the Assistant Secretary should retain jurisdiction in this matter.

1/ See Department of Transportation, supra, at 4.

Turning to the merits of this controversy, it first must be noted that neither party disputes the Union's right, under Section 10(e) of the Executive Order, to have a representative of its own choosing present at grievance meetings of the type involved herein. 2/ Indeed, in Fort Jackson, A/SLMR No. 242 (Jan. 17, 1973), the Assistant Secretary emphasized that the choice of a Section 10(e) representative "must be left to the exclusive representative and not to the whim of management." 3/ Accordingly, I conclude that the Union had a right, under Section 10(e) of the Order to designate whomever it chose to represent the Union at the grievance meeting in question here. Therefore, if the Activity is to prevail in this action, it must show that the Union waived or otherwise relinquished this right afforded it under the Order.

The proponent of such a waiver bears a heavy burden of persuasion; the Assistant Secretary has repeatedly held that he will only find a waiver of rights granted under the Executive Order where there is clear and unmistakable evidence of such. 4/ Thus, the Assistant Secretary has refused to find a waiver merely from the fact that an agreement omits specific reference to a right 5/, or is otherwise ambiguous. 6/ Nevertheless, an examination of the contract language, bargaining history, and entire record herein forces me to conclude that, in designating the specific representatives which may be present at meetings at each level of the negotiated grievance process, the Union waived its right, under Section 10(e)

2/ See, e.g., Internal Revenue Service, Cincinnati District, Cincinnati, Ohio, A/SLMR No. 705 (Sept. 15, 1976); U.S. Department of the Treasury, Internal Revenue Service, Pittsburgh District, Pittsburgh, Pennsylvania, A/SLMR No. 498 (March 31, 1975).

3/ Fort Jackson, supra at 4; accord, Internal Revenue Service, Omaha District Office, A/SLMR No. 417 (July 31, 1974).

4/ See, U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, Indianapolis, Indiana, A/SLMR No. 651 (May 19, 1976); United States Department of the Navy Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400 (June 21, 1974).

5/ See, NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223 (Dec. 4, 1972).

6/ See Internal Revenue Service, Omaha District Office A/SLMR No. 417 (July 31, 1974).

of the Order, to designate different or additional representatives to attend these meetings.

A waiver has been defined as the intentional relinquishment of a known right. 7/ Nowhere in the parties' negotiated agreement is there language expressly waiving the Union's right to designate representatives of their own choosing in Article 35, Section 7 grievance meetings. Indeed, the specific contract provision in controversy here is at best ambiguous on this point. Article 35, Section 7 of the parties' agreement states in pertinent part:

Step 2

An employee dissatisfied with the answer provided in Step 1 may appeal his grievance to the appropriate Branch Chief. If such appeal is made either party may request a hearing be held to discuss the matter... The foregoing meeting will be between the office of the Branch Chief and the aggrieved and/or his or her Union steward.

Clearly this language designates who may be present at Step 2 Grievance Meetings; just as clearly, it does not indicate who may not be present at these meetings. The Activity argues that all other representatives are barred by exclusion. To support this contention, the Activity relies on other language in the contract, a perceived scheme of informality at the early stages of the grievance procedure, and the history of bargaining between the parties.

The Activity argues that the clearly delineated scheme of the grievance machinery is to have initial grievance meetings low-key and informal, introducing more formal procedures and higher levels of authority later in the process. Having a union attorney present at a Step 2 Grievance Meeting allegedly would destroy the informality of this meeting, defeating its intended function in the overall grievance process.

The Activity's contentions are supported by the testimony of Mr. Irving A. Des Roches, chief negotiator for the Internal Revenue Service in matters involving union represented employees. Mr. Des Roches testified that this grievance procedure was designed to perpetuate the tested

7/ See Internal Revenue Service, A/SLMR No. 1001 (March 7, 1978).

policy of escalating the levels of responsibility attendant at different levels of the procedure.

The contract itself also clearly evinces this design. Thus, Article 35, Section 7 provides that a Step 2 Grievance Meeting shall be between the office of the Branch Chief, the aggrieved, and/or his or her Union steward; a Step 3 Grievance Meeting envisions attendance by the office of the Division Director, the aggrieved, and/or his or her Union steward; Step 4 envisions attendance by the Office of the Assistant Commissioner, the aggrieved, his or her Union steward, and/or the Chief steward. Finally, at Step 5, the meeting is between the Office of the Deputy Commissioner, the aggrieved, his or her Union steward, the Chief steward, the NTEU Joint Council President and/or a representative of the NTEU National Office of the Union. To allow a representative of the Union's National Office to attend a Step 2 Grievance Meeting, even as a non-participating observer, clearly would disrupt the scheme of escalating levels of responsibility that the contract clearly envisions.

However, Mr. Des Roches also testified that this procedure was initially formulated in 1971-72 during negotiations with NTEU's predecessor union. Furthermore, he testified that the procedure presently embodied in Article 35, Section 7 of the National Office Agreement was adopted more or less intact from previous agreements, and there was no discussion in the negotiations leading up to this agreement of who could or could not attend a Step 2 Grievance Meeting. Normally, a union will not be bound by the designs and intentions of its predecessor. Here, however, the Union submitted a proposal to introduce representatives from the Union's National Office at a Step 4 Grievance Meeting. ^{8/} This proposal was submitted during negotiations leading to the adoption of the National Office Agreement, and was subsequently withdrawn. I find that by submitting and subsequently withdrawing such a proposal, the Union evinced an awareness that it was bound to limit its representatives to those individuals specifically designated by the agreement. Why submit such a proposal if the Union had not waived its right to designate as a representative whomever it wished? That the Union was aware it had relinquished this right by acceding to this agreement is also evident from the language of Section 7 itself. With regard to the Union's representatives at a Step 5 Grievance Meeting, the contract states:

^{8/} See Respondent's Exhibit #1.

"If the offices of the NTEU Joint Council President and Chief Steward positions are held by one individual, this does not authorize an additional Union steward at the meeting."

This language clearly suggests that the representatives designated to attend grievance meetings in Section 7 are the only individuals authorized to be present.

No one of the elements discussed herein is sufficient to surmount the heavy burden which a "clear and unmistakable" test imposes. However, viewing the circumstances of this case in its entirety with special attention to the language of the agreement and the history of bargaining between the parties, I am convinced that the Union knowingly and intentionally waived its right to designate, as its Section 10(e) representative, individuals other than those specifically enumerated in Article 35, Section 7 of the negotiated agreement. Therefore I conclude that the Activity did not violate Section 19(a)(1) or (6) of the Order by denying the Union this right in the circumstances set forth herein.

Recommendation

Having found that the Activity has not engaged in conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend the complaint herein be dismissed in its entirety.


BURTON S. STERNBURG
Administrative Law Judge

Dated: March 27, 1978
Washington, D.C.

BSS:yw

July 13, 1978

A/SLMR No. 1080

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY ADMINISTRATION,
BUREAU OF DATA PROCESSING,
ALBUQUERQUE DATA OPERATIONS CENTER,
ALBUQUERQUE, NEW MEXICO
A/SLMR No. 1080

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3512, (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally instituting a new telephone policy of referring incoming calls for union officials through the Activity's Labor Relations Officer without affording the AFGE an opportunity to meet and confer concerning the implementation of the policy or its impact on unit employees. The Respondent contended that the policy was simply a re-affirmation of an already existing policy, was concerned solely with Federal Telecommunications Service (FTS) calls, and, moreover, the AFGE had never requested to meet and confer concerning the implementation and impact of the telephone policy.

The Administrative Law Judge found that the Respondent had changed its telephone policy with respect to incoming calls for union officials and that the policy was implemented before the AFGE had an opportunity to request to meet and confer concerning that policy. In this regard, he noted that although the telephone policy ostensibly concerned only FTS calls, it was virtually impossible to differentiate between incoming FTS calls and regular incoming telephone calls. Thus, the Administrative Law Judge concluded, among other things, that by unilaterally implementing the procedure concerning incoming calls to union officials, the Respondent failed to provide the AFGE with timely notice and an opportunity to bargain concerning new procedures for screening incoming calls to union officials and the impact of such procedures upon adversely affected employees, in violation of Section 19(a)(6) and (1) of the Order.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge, and issued an appropriate remedial order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY ADMINISTRATION,
BUREAU OF DATA PROCESSING,
ALBUQUERQUE DATA OPERATIONS CENTER,
ALBUQUERQUE, NEW MEXICO

Respondent

and

Case No. 63-7603(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3512,

Complainant

DECISION AND ORDER

On April 21, 1978, Administrative Law Judge Joseph A. Matera issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation, to the extent consistent herewith. 1/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor

1/ While I have concluded, in agreement with the Administrative Law Judge, that the Respondent violated Section 19(a)(6) and (1) of the Order by its failure to meet and confer concerning the implementation and impact of the change in its telephone policy enunciated on May 11, 1977, I find it unnecessary to pass upon his apparent finding that the Respondent's conduct also constituted an independent Section 19(a)(1) violation since the complaint herein contains no allegation of an independent Section 19(a)(1) violation.

for Labor-Management Relations hereby orders that the Department of Health, Education and Welfare, Social Security Administration, Bureau of Data Processing, Albuquerque Data Operations Center, Albuquerque, New Mexico, shall:

1. Cease and desist from:

(a) Instituting any change in the method of receiving incoming telephone calls with respect to officers and officials of the American Federation of Government Employees, AFL-CIO, Local 3512, the employees' exclusive representative, without first notifying the American Federation of Government Employees, AFL-CIO, Local 3512, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the impact and implementation of such change.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purpose and policies of Executive Order 11491, as amended:

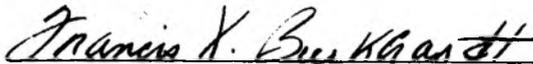
(a) Rescind the policy of screening incoming telephone calls for officers and officials of the American Federation of Government Employees, AFL-CIO, Local 3512.

(b) Notify the American Federation of Government Employees, AFL-CIO, Local 3512, of any intended change in the method of receiving incoming telephone calls for officers and officials of the American Federation of Government Employees, AFL-CIO, Local 3512, and, upon request, meet and confer, to the extent consonant with law and regulations, on the impact and implementation of such change.

3. Post at its facility at the Albuquerque Data Operations Center, Albuquerque, New Mexico, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Albuquerque Data Operations Center and shall be posted and maintained by him for 60 days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

4. Pursuant to section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
July 13, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

WE WILL NOT institute any change in the method of receiving incoming telephone calls with respect to officers and officials of the American Federation of Government Employees, AFL-CIO, Local 3512, the employees' exclusive representative, without first notifying the American Federation of Government Employees, AFL-CIO, Local 3512, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the impact and implementation of such change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind the policy of screening incoming telephone calls for officers and officials of the American Federation of Government Employees, AFL-CIO, Local 3512.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Local 3512, of any intended change in the method of receiving incoming telephone calls for officers and officials of the American Federation of Government Employees, AFL-CIO, Local 3512, and upon request, meet and confer, to the extent consonant with law and regulations, on the impact and implementation of such change.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 600
San Francisco, California 94105



(415) 556-0555

Agency or Activity

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

In the Matter of

U. S. DEPARTMENT OF HEALTH, EDUCATION AND
WELFARE, SOCIAL SECURITY ADMINISTRATION;
SOCIAL SECURITY ADMINISTRATION; BUREAU OF
DATA PROCESSING; ALBUQUERQUE DATA OPERATIONS
CENTER, ALBUQUERQUE, NEW MEXICO

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3512

Complainant

CASE NO.
63-7603 (CA)

Francis X. Dippel
Management Representative for Bureau
of Data Processing
Social Security Administration,
Room 1220, West High Rise
6401 Security Boulevard
Baltimore, Maryland 21235
For the Respondent

Joseph B. Bracy
Deputy Assistant Bureau Director
Local Labor Relations Officer
Administration Bureau of Data Processing
Social Security Administration
Room 3218, Operations Lind
6401 Security Boulevard
Baltimore, Maryland 21235
For the Respondent

William E. Wade
National Representative
American Federation of Government Employees,
AFL-CIO
96 North Lakeview Drive
Clearfield, Utah 84015
For the Complainant

Before: JOSEPH A MATERA
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on a Complaint, issued on December 19, 1977, by the Regional Administrator, Labor-Management Services Administration of the U. S. Department of Labor, Kansas City Region, a hearing in this case was conducted on January 31, 1978, at Albuquerque, New Mexico. This proceeding was initiated under Executive Order 11491, as amended (hereinafter called the Order) by the filing of a complaint on August 5, 1977, by William E. Wade, National Representative, American Federation of Government Employees, Local 3512, AFL-CIO (hereinafter the "Union"), against Albuquerque Data Operations Center (hereinafter called Respondent). This Center is part of the Bureau of Data Processing, U. S. Department of Health, Education and Welfare (hereinafter called Agency).

The said complaint charged a violation of section 19(a)(1) and (6) of the Order as a result of the alleged unilateral change of policy by Respondent concerning the use of agency telephones for incoming calls to union officials.

The parties were represented at the hearing and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Thereafter, both the Union and Respondent made genuine efforts to resolve their dispute prior to decision, requiring a delay in the filing of briefs. The briefs of both parties were received and have been duly considered.

Upon the entire record in this case, and from my observations of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing I make the following findings of fact, conclusions of law and recommendations.

Findings of Fact

The Union herein was at all times material hereto the exclusive collective bargaining representative of certain employees of the Respondent. At all such times and particularly during May, 1977, the parties were negotiating a general labor agreement and were operating only under an Interim Memorandum of Understanding (R-1). The general agreement did not become effective until October 31, 1977.

The Albuquerque Data Operations Center is a field Installation Branch of the Bureau of Data Processing,

Social Security Administration, Baltimore, Maryland. It employs approximately 450 persons and incorporates a stand-alone administrative, personnel and labor-relations function to service its staff, including a full time Labor Relations Officer, Mr. John Tony Armijo. This staff person deals with on-site labor-management concerns and is liaison to the agency's Labor-Relations Officer in Baltimore.

On August 5, 1977, a complaint was filed by the Union against Respondent with the Department of Labor (Case No. 63-7603(CA)) alleging a violation of section 19(a)(1) and (6) of the Order, as the result of an alleged change of policy by the Respondent regarding incoming calls to union officials.

The facts show that on May 11, 1977, Mr. Armijo, the personnel and labor-relations officer of Respondent, called a meeting with the union president and vice-president, the union national representative also being present as an observer. At this meeting the official minutes indicate that he informed the Union that:

... it is now ADOC policy on incoming calls to any union official of 3412 that Mr. Armijo be informed of the call. Mr. Armijo will then return the call, gather the information from the caller, and transmit the information to the Union.

On outgoing calls the Union is to request Mr. Armijo's prior approval before making FTS calls and presenting the reasons why the call is necessary. If Mr. Armijo is so convinced that the call is necessary he will give his approval. (Jt. Exh. No. 2).

This procedure for incoming calls was included in a subsequent memorandum to all supervisors two days after the May 11, 1977, meeting (R-8) as follows:

... Union officials were informed that they had never been given the right to use the FTS facility. Therefore all requests to make an FTS phone call by union officials are to be made to the ADOC Labor Relations Officer and the decision for permission to use the FTS would be made on a case-by-case basis, to assure management control over Operations, Code 0906 time used by union officials. Supervisors, or their employees, who answer incoming FTS calls for union officials are to take the

name, FTS number, and message of the caller and the supervisor is to give the information only to the Labor Relations Officer who will then contact the union official to transmit the message. (R. Exh. No. 8, emphasis supplied).

At the May 11, 1978, meeting, at which this policy was announced, the minutes of the meeting indicate that the union president, Dolores Esquivel, stated she felt she could comply with the FTS policy and that the Union had not deviated from that FTS policy in the past (R-8).

Prior to implementation of this policy concerning Federal Communication Calls (hereinafter called FTS calls), testimony indicated that all incoming calls to the union president or other officials were handled in the same way as for all other employees. If the call was an emergency call, it would be given directly to the union president. If it was not, a telephone number would be taken and given to the union president to return the call. No apparent distinction was made regarding FTS and commercial calls. With the advent of the FTS policy concerning outgoing or incoming FTS calls to union officials, any incoming call to union officials required the procedure set forth in the memorandum of May 13, 1977. While this procedure related to FTS calls only, the testimony indicates, and I find, that it was not possible to tell whether an incoming call was on an FTS line or on a commercial line. In effect, therefore, all calls to union officials required the described screening process after May 13, 1977.

Shortly after this telephone policy was implemented, the Union was provided with its own office space at Respondent's facility. On or about May 25, 1977, a commercial telephone was installed in that office for the Union's use.

It is the position of Respondent that its notification to the Union on May 11, 1977, was a reaffirmation of its policy on FTS telephone usage and was not a new position, hence did not require bargaining with the Union. It points to several occasions in past bargaining sessions with the Union when it refused requests by the Union for general FTS telephone capability, on the basis that such utilization is prohibited by agency regulation. In continuing its focus on the issue as one involving FTS usage, it points to the fact that it did allow proper use of FTS by the Union through clearance with its Labor Relations Officer of proposed outgoing FTS calls on a case-by-case basis. This policy which is the subject of the complaint, was undertaken according to Respondent, as a result of direction from the Assistant Bureau Director at the

parent office of DHEW to control use and abuse of the FTS capability. A suspected abuse of the FTS capability by the union president, in indicating time spent on calls that may not have been made, was also set forth as a further justifying basis for this new policy. Finally the Respondent argues that when this policy was presented at the May 11, 1977, meeting the Union offered no objections, but rather indicated through its president that it could comply with the policy, and did not indicate any desire to bargain.

The Union disputes the fact that the issue between the parties herein simply is one of FTS usage. It maintains that its charge relates rather to the improper screening of incoming calls to union officials, a new policy about which it was not given the opportunity to negotiate or confer prior to its announcement at the May 11, 1977, meeting and its formal implementation by memo two days after that meeting. As to the union president's indication at that May 11 meeting that she could comply with the announced policy, she testified that this related to outgoing FTS calls, since there never was a policy on incoming calls prior to the meeting.

The Respondent, at the hearing and in its brief, has treated the charge filed by the Union as one dealing primarily with the appropriateness of use of the FTS facility by the Union. However, the charge filed by the Union makes it clear that the essence of its complaint was the procedure for handling of incoming calls to Union officials after May 11, 1977, when the Respondent announced its policy in this respect, and whether this policy constituted a change requiring Respondent to meet and confer or negotiate with the Union prior to its implementation. The matter of FTS usage is discussed herein. However, I conceive the principal issue to be whether the Respondent agency stands in violation of the Executive Order, and specifically section 19(a)(1) and (6), by its failure to meet and confer/negotiate with the Union prior to its implementation of the telephone policy affecting incoming calls to union officials enunciated at the Union-Management meeting of May 11, 1977, which was confirmed by the management memo of May 13, 1977.*

*To avoid misunderstanding in this respect, the parties were instructed at the conclusion of the hearing as to my position in regard to the basis of the complaint and the issues to be addressed, and no questions were raised by either party. (See transcript at p. 219, lines 12-21).

Conclusions of Law

Those portions of section 19(a) of the Order which are pertinent to the issues raised herein provide that Agency management shall not (1) interfere with, restrain, or coerce an employee in the exercise of the rights as assured by the Order, or (6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

Section 11(a) of the Order creates a mutual duty upon an agency and a union to negotiate in good faith in respect to personnel policies, practices and matters affecting working conditions so far as may be appropriate under applicable laws and regulations.

Section 11(b) provides that in prescribing regulations relating to personnel policies, practices and working conditions an agency shall have due regard for the obligation imposed by paragraph (a) of this section. In addition, section 12(a) establishes that any agreement between an agency and a labor organization is subject to existing or future laws and regulations, by published agency policies and regulations in existence at the time the agreement was approved. Under section 12(b) management officials retain the right in accordance with applicable law and regulation "... (4) to maintain the efficiency of government operations entrusted to them"

However, it is well established that even as to accepted or reserved areas of management, there is an obligation to bargain regarding the implementing procedures which it employs in respect to these areas. United Air Force Electronics Systems Division (AFSC)-and-Local 975, National Federation of Federal Employees, A/SLMR No. 571; Department of Navy, Dallas Naval Air Station-and-American Federation of Government Employees Local Union 2427, AFL-CIO, A/SLMR No. 510. However, the requirement of negotiation as to the implementation and impact of personnel policies and practices and matters affecting working conditions relates only to changes therein. (Department of the Navy, Mare Island Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO, A/SLMR No. 736) or additions thereto. (Section 11(d) of the Order).

Respondent's defense is that its announcement regarding FTS usage on May 11, 1977, brought about no such changes or additions in policy, practice or working conditions as would require negotiation before implementation. Even if negotiation was required, Respondent argues that the Union requested no such bargaining and even indicated

through its president it could comply, thus leaving management free to act.

It must first be observed that under 10(e) of the Order, a labor organization which is authorized to act as exclusive bargaining representative carries a responsibility of representing all interests of all employees in the unit and to this end must be assured of an effective means of communication. Cf. Internal Revenue Service, Office of District Director and National Treasury Employees Union and United States Civil Service Commission, FLRC No. 72 A-50. While the purpose alleged by Respondent for its May 11, 1977, policy statement was laudable, that of controlling the unauthorized use and abuse of FTS calls, its implementation did involve a change in past agency practice concerning incoming calls to union officials.

This is clear from the straight-forward testimony of the Respondent's Labor Relations Officer beginning on page 128 of the transcript:

JUDGE MATERA: So, your testimony then is that prior to May of 1977, insofar as any incoming calls were concerned, whether it be on F.T.S. lines of whether it be on commercial lines, there was no policy that you knew of concerning the control of such incoming calls to union officials?

THE WITNESS: No, Sir.

JUDGE MATERA: No. policy.

THE WITNESS: Number two, I don't think there is a way you can distinguish between a commercial long-distance call and an F.T.S. call.

JUDGE MATERA: Following the May, 1977 meeting then, was the first time you instituted a control on incoming calls to union officials, is that correct?

THE WITNESS: Yes. sir.

JUDGE MATERA: And following May of 1977, then, any incoming calls for union officials, as I understand it now, if it was on an F.T.S. line, had to be reported?

THE WITNESS: To me.

JUDGE MATERA: To you, by the person taking that call, before they could relay it on to a union official, is that correct?

THE WITNESS: Yes, sir.

JUDGE MATERA: You just testified that there isn't any way to tell whether a call coming in on an F.T.S. line or on a commercial line.

THE WITNESS: Let's put it this way. I can't distinguish, maybe someone else can, I don't know.

This impact of the policy of Respondent was the essence of the complaint filed by the Union. As the testimony from witnesses for the Union as well as Respondent made clear at the hearing, the overall effect of the announced policy was to provide for the screening not only of FTS calls to union officials, but of all potential calls to union officials since it was not possible to tell whether an incoming call was on a FTS or commercial line. Thus, on all calls to union officials, it became the policy of the Respondent to require that its Labor Relations Officer be informed of the call, return the call, gather the information from the caller, and transmit this information to the Union.

I conclude from the record that this procedure clearly differed from that utilized by Respondent prior to the May 11, 1977, meeting, when messages taken on non-emergency calls for union officials were then directly relayed to that official to return, in the same manner as calls for all other personnel. I also find that the unilaterally implemented procedure produced a significant interference with the Union's exercise of its rights under the Order. It was the testimony of one witness, (beginning on page 78 of the transcript) Louis Montenegro, a national representative of the Union, that he experienced repeated difficulties and delays in trying to contact the local president of the Union at Respondent's facility after the implementation of this procedure. In addition, I find that the adopted procedure constituted a potential breach of confidentiality in the required screening of callers by the Respondent's Labor Relations Officer so as to constitute a violation of the obligation of Respondent to provide an effective means of communication to the

Union, as required under 10(e) of the Order. The requirement that all persons desiring to speak with a union official give to the Respondent's Labor Relations Officer the nature of their business would to my mind produce a chilling effect on the free communication necessary to a free, vigorous and healthy agency-union relationship. While the Labor Relations Officer testified that this aspect of the stated policy at the May 11, 1977, meeting was in the nature of a facetious remark exchanged with the union officials (T. 132), this requirement to gather information from Union callers nevertheless appeared on the written memorandum to supervisors on May 13, 1977, formally implementing this policy (R-8). Such a policy would have the further coercive effect of tending to dissuade employees or others with whom the Union must communicate, from consulting with the Union or seeking its assistance because of apprehension regarding confidentiality. Cf. Veterans Administration, Veterans Administration Data Processing Center and National Federation of Federal Employees, Ind., Local 1745, A/SLMR No. 663. This unilateral action by Respondent would further restrain the Union in the exercise of its responsibilities under the Order by evidencing to employees the fact that the activity could act to change conditions of employment that are properly subject to negotiation without regard to its obligation to consult with the employees' exclusive representative. Cf. United States Air Force, Kingsley Field, Klamath Falls, Oregon and National Federation of Federal Employees, Local 704, Independent (NFFE) A/SLMR No. 443.

The Respondent argues that even if there was a duty to bargain concerning the matter in issue, since the Union requested no bargaining and at the May 11, 1977, meeting indicated it could comply with the FTS policy, the Respondent was free to act and any requirement to bargain was in essence waived.

A waiver of the critical right to negotiate must be shown in a clear and unmistakable fashion. Cf. NASA Kennedy Space Center, Florida and American Federation of Government Employees (AFL-CIO), A/SLMR No. 223; Utah Army National Guard, Salt Lake City and American Federation of Federal Employees, Local 2724, A/SLMR, No. 966.

Having found that the implementation and impact of the change in phone procedure required negotiation by management prior to its inception, it follows that sufficient prior notice and the meaningful opportunity by the Union to request negotiation should have been afforded. This further presupposes the furnishing to the

Union of sufficient information to allow the Union to prepare meaningful proposals in respect to the proposed change.

Neither meaningful notice nor information of any kind was given to the Union concerning the meeting of May 11, 1977. There was no apparent opportunity for the union officials to analyze the impact of the proposed change prior to its announcement at the May 11 meeting. As the minutes of that meeting indicate, the labor relations officer served only to announce "... that it is now the ADOC policy..." (R-8). (Emphasis supplied). The procedure for incoming calls was not open to discussion and was made official throughout the agency two days later with the May 13, 1977, memorandum to the supervisors. Under those circumstances, the statement by the Union president that she felt that she could comply with FTS policy and that the Union had not deviated from that policy hardly constituted a meaningful waiver of the Union's right to negotiate. As she explained in her testimony at the hearing, she was referring to the policy as to outgoing FTS calls. With the lack of notice or information to the Union prior to this meeting, I find this explanation at trial perfectly reasonable and reject any notion that there was a waiver of the duty to bargain.

To summarize, I find that by unilaterally implementing the procedure concerning incoming calls to union officials, Respondent failed to provide Complainant with appropriate, timely and meaningful notice, and an opportunity to bargain concerning new procedures for screening incoming calls to union officials, and the impact of such procedures upon adversely affected employees, in violation of section 19(a) (6) of the Order.

I further conclude that by unilaterally implementing a new procedure regarding incoming telephone calls to union officials, Respondent violated section 19(a)(1) and 10(e) of the Order in that its conduct interfered with Complainant's effective means of communication, restraining and coercing employees in the exercise of the rights assured by the Order.

As noted above, several weeks after the incoming call procedure was established, Respondent provided the Union with a separate office and a commercial telephone. In light of the testimony by the union's president that she spends about 90 percent of her time performing duties on behalf of the Union, the basis for insuring of free and effective communication already exists. However, testimony at the hearing also established that the policy in question is

still in effect "even today" for any incoming calls received outside of the Union phone. Thus, even though the Respondent here has established the means to avoid future violations of the Act by this commendable provision to the Union of a separate office and phone, to effectuate the purposes of the Order, other unit employees should be clearly informed that the Respondent will not continue the screening of any incoming calls to union officials, and this acknowledgement by Respondent will act to assure the discontinuance of any future similar occurrences. Since incoming calls not directed to the Union office should be few in number with increased knowledge of the Union office number, the direct transmittal of these calls to the union office, or informing the caller of the union office number should create little, if any, burden or disruption of Respondent's operation. I therefore recommend adoption of the Order set forth below.

RECOMMENDED ORDER

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Social Security Administration, Bureau of Date Processing, Albuquerque, New Mexico shall:

1. Cease and desist from:

(a) changing existing policies and practices or other matters affecting the working conditions of unit employees without first giving appropriate notice to, meeting and conferring with the American Federation of Government Employees, AFL-CIO, Local 3512.

(b) interfering with, restraining or coercing employees and failing to provide an effective means of communication by the screening of incoming telephone calls to union officials.

(c) in any like or related manner interfering with, restraining or coercing employees in the exercise of rights protected by the Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) notify the American Federation of Government Employees, AFL-CIO, Local 3512 or any other exclusive representative, a reasonable time prior to its institution of any changes in the procedure for answering incoming calls to union officials and, upon request, meet, confer and

negotiate to the extent consonant with applicable law and regulations, including those dealing with restrictions on use of FTS facilities, before implementation of such procedures for answering incoming calls to union officials including the impact of these proposed changes on unit employees and their effect on the exercise by the Union of its responsibilities under the Order.

3. Post at all Social Security Administration, Albuquerque Data Operations, Albuquerque, New Mexico, facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Director of the Albuquerque Data Operations Center and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

4. Pursuant to section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.



JOSEPH A. MATERA
Administrative Law Judge

Dated: April 21, 1978
San Francisco, California

JAM:scm

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet, confer and negotiate in good faith by instituting changes in the procedures for answering incoming calls to union officials without first notifying the American Federation of Government Employees, AFL-CIO, Local 3512 or other exclusive representative, a reasonable time prior to the institution of any such changes and affording said exclusive representative the opportunity to meet, confer and negotiate to the extent consonant with law and regulations, including those dealing with restrictions on use of FTS facilities, concerning the implementation by management of any such procedures and the impact of such proposed procedures on unit employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights assured by the Executive Order by failing to provide an effective means of communication to the American Federation of Government Employees, AFL-CIO, Local 3512, or other exclusive representative, including an assurance of confidentiality in all incoming telephone calls to union officials or exclusive representatives.

WE WILL, upon request by the American Federation of Government Employees, AFL-CIO, Local 3512, made within a reasonable time, meet, confer and negotiate as to the matters above described, to the extent consonant with law and regulations, including those dealing with restrictions on use of FTS facilities, concerning any proposed procedures for the answering of incoming calls to union officials received within and without the office now set aside for exclusive use of the Union.

(Agency of Activity)

Dated _____ By _____
(Signature)

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.

July 14, 1978

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE AND
INTERNAL REVENUE SERVICE,
SOUTH CAROLINA DISTRICT OFFICE
A/SLMR No. 1081

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 55 alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by revoking the eligibility of two employees to serve in the capacity of Acting Group Manager in retaliation for their cancelling U.S. Government Savings Bond allotments.

The Administrative Law Judge concluded that the Respondents' conduct was violative of Section 19(a)(1) and (2) of the Order. In this regard, he found that the Respondents' removal of the two employees from the list of those eligible to serve as Acting Group Manager was taken as a reprisal for their discontinuing their savings bond allotments. He further found that as the employees' bond cancellations constituted activity sponsored by the NTEU, undertaken to support the NTEU's attempt to secure a favorable agreement with the Respondent, such activity was protected by Section 1(a) of the Order.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations. Accordingly, he ordered the Respondent to cease and desist from engaging in the conduct found violative of the Order and to take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE AND
INTERNAL REVENUE SERVICE,
SOUTH CAROLINA DISTRICT OFFICE

Respondent

and

Case No. 40-8063(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 55

Complainant

DECISION AND ORDER

On May 12, 1978, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Internal Revenue Service and Internal Revenue Service, South Carolina District Office shall:

1. Cease and desist from:

(a) Adversely affecting the eligibility of employees Dan Brown and Roger Bremer to serve as Acting Group Manager, or discriminating against them in any manner with regard to hiring, tenure, promotion, or other conditions of employment in order to discourage membership in or activities on behalf of National Treasury Employees Union and NTEU Chapter 55, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

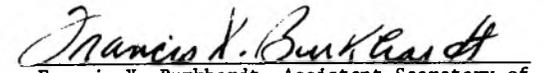
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Reinstate employees Dan Brown and Roger Bremer to eligibility to serve as Acting Group Manager.

(b) Post at the Greenville, South Carolina, facility of the Internal Revenue Service, South Carolina District Office, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
July 14, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT adversely affect the eligibility of employees Dan Brown and Roger Bremer to serve as Acting Group Manager, or discriminate against them in any manner with regard to hiring, tenure, promotion, or other conditions of employment in order to discourage membership in or activities on behalf of National Treasury Employees Union and NTEU Chapter 55, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL reinstate Dan Brown and Roger Bremer to eligibility to serve as Acting Group Manager.

(Agency or Activity)

Dated: _____ By: _____ (Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300 - 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



In the Matter of

INTERNAL REVENUE SERVICE AND
INTERNAL REVENUE SERVICE SOUTH
CAROLINA DISTRICT OFFICE,
Respondents

and

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 55,
Complainants

Case No. 40-8063 (CA)

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and

LAWRENCE K.G. POOLE
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3445 Peachtree Road, N.E.
Atlanta, Georgia 32326
For the Complainants

Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding arises under Executive Order 11491, as amended (hereinafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter referred to as the Assistant Secretary), a Notice of Hearing on Complaint issued on September 27, 1977 with reference to alleged violations of Sections 19(a)(1) and (2) of the Order. The complaint, filed on July 17, 1977 by the National Treasury Employees Union and NTEU Chapter 55 (hereinafter referred to as the Union or Complainant) alleged that Internal Revenue Service and Internal Revenue Service South Carolina District (hereinafter referred to as the Activity or Respondent) violated the Order by revoking two employees' eligibility to serve in the capacity of Acting Group Manager in retaliation for their cancelling U.S. Government savings bond allotments.

At the hearing held on November 9, 1977 the parties were represented and afforded full opportunity to adduce evidence, and call, examine and cross-examine witnesses and argue orally. Briefs were filed by the parties and have been duly considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following findings of fact and conclusions of law.

Findings and Conclusions

At all times material hereto the Union has been the exclusive collective bargaining representative of various employees located within the Activity's Columbia, South Carolina District. During the Fall of 1976 the Activity and the Union were engaged in negotiations for a new multi-district agreement. The Union concluded that an impasse in negotiations had occurred and by letter to all members dated November 2, 1977, the Union's President urged that members show a common resolve, solidarity and support for the Union's objectives by, inter alia, notifying the Activity's Personnel Office that they were cancelling their U.S. saving bond allotments. Some of the Activity's supervisory employees, including Herman Lesslie, a Greenville, South Carolina Group Manager, retained their membership in the Union and accordingly, they also received a copy of the Union's November 2 letter announcing the bond cancellation drive.

Dan Brown and Roger Bremer, employees of the Activity's Columbia District, Greenville Group 1, audit unit, responded to the Union's appeal and in support thereof, cancelled their bond allotments. The cancellations were transmitted through a local Union steward to the Activity on November 15, 1976. At this time Revenue Agent Brown and Bremer worked in Group Manager Lesslie's unit and were authorized to act as Group Manager in Lesslie's absence. Employees deemed qualified to be Acting Group Manager were designated on a list posted by Lesslie. Brown had been frequently designated Acting Group Manager, his latest designation having occurred during a three day period in early November. Bremer was less senior in service than Brown and others qualified for Acting Group Manager and accordingly, had never been given an opportunity to act for Lesslie in that position.

On November 16, 1976, Lesslie received a telephone call from his superior, J.T. Epting, Audit Division Chief. Epting told Lesslie that Brown and Bremer could no longer be designated as Acting Group Manager. Lesslie asked for the reasons this action was being taken and Epting informed him that he could probably "guess why." At this time Epting was aware that Brown and Bremer had cancelled their bond allotments. Thereupon, Lesslie on November 16 published another list of employees eligible to act as Group Manager in his absence. The November 16 list simply revised the prior list which had been in effect since June 26, 1976 by deleting Brown and Bremer's names, leaving two employees on the eligibility list.

On that same day Brown questioned Lesslie as to why his name was not included among those eligible to serve as Acting Group Manager. Lesslie replied that Epting ordered him to remove Brown's name and acknowledged not knowing Epting's motive. Lesslie indicated that he thought the Review Staff 1/ had complained that Brown and Bremer made direct contacts with that group without getting the necessary clearance and accordingly, checked into the matter. Review Staff informed Lesslie that it made no complaints about Brown or Bremer. Brown suggested that Epting ordered his removal from the list because he cancelled his bond allotment and Lesslie replied that perhaps, that was the reason.

1/ Review Staff examines Audit Division cases to assure that proper and accurate procedures have been followed and provides assistance to Agents in resolving technical problems.

Agent Bremer 2/ met with Lesslie on November 17, 1976 and questioned his removal from the Acting Group Manager list. Lesslie said he had received a telephone call and was told to remove him. Lesslie did not disclose that it was Epting who called. Bremer asked why had the party calling ordered him removal and Lesslie said that he also asked that question and was told, "guess why." Bremer said he felt the action was taken in retaliation for cancelling his bond allotment. According to Bremer's undisputed testimony:

"(Lesslie) in effect told me that he didn't know that what he had just done in removing me was retaliatory, but he did tell me he had gone to the trouble of calling review staff to find out what it was that I had done that warranted my removal and that review staff didn't know why I was being removed."

The record evidence establishes and I find that Brown and Bremer's work competency, habits and performance met the Activity's standards for Acting Group Manager eligibility throughout the period June 26 through November 16, 1976. In addition, I reject the various explanations offered by Respondent regarding the reasons why Brown and Bremer were removed from the list of those employees eligible to serve as Acting Group Manager, such as inordinate or unauthorized contacts with Review Staff, poor attendance or excess utilization of time in disposing cases. 3/ Accordingly, based upon the Activity's knowledge of Brown and Bremer's bond allotment cancellations and the reason therefore, the timing of the Activity's action taken the very next day after the cancellations and the lack of any credible or persuasive reason for such action, I find and conclude that the Activity's removing employees Brown and Bremer from the list of those eligible to serve as Acting Group Manager,

2/ At the time of the hearing Bremer was on leave without pay status, having made application for disability retirement in May 1977.

3/ Neither Lesslie nor Epting testified at the hearing, Epting having died sometime previous thereto. However, internal agency memoranda from Lesslie and Epting, dated November 20, 1976 and December 14, 1976 respectively, were offered and received in evidence without objection.

therefore depriving them of being afforded an opportunity to serve in that capacity, 4/ was taken as a reprisal for their discontinuing their savings bond allotments.

I further find and conclude that Brown and Bremer's bond cancellations, sponsored by the Union and undertaken to support the Union's attempt to secure a favorable agreement with the Activity, was conduct protected by Section 1(a) of the Order. 5/ In these circumstances I conclude that the Activity's action against Brown and Bremer constituted a violation of Sections 19(a)(1) and (2) of the Order, as alleged.

Respondent contends in its brief that assuming a reprisal for engaging in protected activity occurred, no violation of the Order can be found herein since by choosing to cancel their bond allotments, Brown and Bremer aligned themselves with the Union and thereby created a conflict of interest if allowed to serve in the position of acting group manager. Respondent argues that "(i)t is widely known that the purchasing of bonds is an activity greatly encouraged by the United States Government, especially in its role as an employer. As with any other management program, the bond program is disseminated through and managed by agency management." Thus, Respondent concludes it was not obligated to have a manager who was "actively campaigning" against a management program.

However, there is no evidence in this case that, at the Activity, it was a group manager's responsibility to support and encourage the purchase of savings bonds by payroll deduction. Nor can cancelling a bond allotment under the circumstances herein be equated so readily to "actively campaigning" against a management program. Moreover, the record evidence does not indicate that this "conflict of interest" consideration was any part of Respondent's reason

4/ When being considered for promotion into a management position, more favorable consideration is given to an employee who has served as an acting manager than to an employee who has not served in that capacity. Being found eligible to serve as a manager is, obviously, a necessary prerequisite to actual service.

5/ Section 1(a) of the Order provides, in relevant part, that employees ". . . (have) the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right."

for finding Brown and Bremer's ineligibility to act as group manager. Indeed, this contention appears for the first time in Respondent's post-hearing brief. Accordingly, it is rejected.

Recommendations

Having found that Respondent has engaged in conduct violative of Sections 19(a)(1) and (2) of the Order through the revoking of employees Brown and Bremer's eligibility to serve as Acting Group Manager, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Order.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Internal Revenue Service and Internal Revenue Service South Carolina District Office, shall:

1. Cease and desist from:

(a) Adversely affecting the eligibility of Dan Brown or Roger Bremer to serve as Acting Group Manager or discriminating against them in any manner with regard to hire, tenure, promotion, or other conditions of employment in order to discourage membership in or activities on behalf of National Treasury Employees Union and NTEU Chapter 55, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purpose and policies of the Order:

(a) Reinstate Dan Brown and Roger Bremer to eligibility to serve as Acting Group Manager.

(b) Post at the Greenville, South Carolina facility of the Internal Revenue Service South Carolina District Office, copies of the enclosed notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director, and shall be posted and maintained by him for 60 consecutive days thereafter,

in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.


SALVATORE J. ARRIGO
Administrative Law Judge

Dated: 12 MAY 1978
Washington, D.C.

SJA:mjm

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT adversely affect the eligibility of Dan Brown or Roger Bremer to serve as Acting Group Manager or discriminate against them in any manner with regard to hire, tenure, promotion, or other conditions of employment in order to discourage membership in or activities on behalf of National Treasury Employees Union and NTEU Chapter 55, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL reinstate Dan Brown and Roger Bremer to eligibility to serve as Acting Group Manager.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300 - 1371 Peachtree Street, N.E., Atlanta, Georgia 30309

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, REGION V-B,
CHICAGO, ILLINOIS
A/SLMR No. 1082

This case involved a petition for consolidation of units filed by Local 3272, American Federation of Government Employees, AFL-CIO (AFGE Local 3272) seeking to consolidate eight units for which it is the current exclusive representative into a consolidated unit consisting of all nonprofessional employees of the Bureau of Field Operations, Social Security Administration Region V-B District and Branch Offices located in Flint, Lansing, Traverse City, Muskegon, Kalamazoo, Jackson, Mt. Pleasant and Grand Rapids, Michigan. The Activity contended, essentially, that the proposed consolidated unit was not appropriate because it does not meet the criteria established by Section 10(b) of the Order.

The Assistant Secretary noted that in its review of appeals from certain of the Assistant Secretary's decisions involving the consolidation of units, the Federal Labor Relations Council (Council) construed the Assistant Secretary's establishment of a presumption in favor of consolidation "---as a recognition and affirmation of the strong policy in the Federal labor-management relations program of facilitating consolidation---." Based on the facts and policy considerations involved, the Assistant Secretary found that the proposed consolidated unit was appropriate for the purpose of exclusive recognition under the Order. He noted that all employees in the unit sought share a common mission, common overall supervision, uniform job classifications, essentially common working conditions and uniform personnel policies and labor relations practices. Under these circumstances, the Assistant Secretary found that the employees in the petitioned for consolidated unit shared a clear and identifiable community of interest.

Furthermore, he found that as all employees are serviced by the same personnel office, and the Assistant Regional Commissioner for Field Operations has the responsibility for providing regional leadership and line supervision in Region V-B, the proposed consolidated unit would promote effective dealings. Moreover, noting that the Assistant Regional Commissioner for Field Operations coordinates the operation of the components within the proposed consolidated unit, and provides leadership and direction over all the components in the proposed unit, the Assistant Secretary found that the proposed consolidated

unit would promote the efficiency of the agency's operations. Finally, the Assistant Secretary noted that the petitioned for consolidated unit, which provided for bargaining in a single unit, rather than in the existing eight bargaining units, would promote a more comprehensive bargaining unit structure and reduce fragmentation.

Accordingly, the Assistant Secretary directed an election in the consolidated unit found appropriate.

A/SLMR No. 1082

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, REGION V-B,
CHICAGO, ILLINOIS

Activity

and

Case No. 52-7445(UC)

LOCAL 3272, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Charles Latham. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon consideration of the entire record in the subject case, including briefs filed by the parties, the Assistant Secretary finds:

The Petitioner, Local 3272, American Federation of Government Employees, AFL-CIO, herein called AFGE Local 3272, seeks to consolidate eight units for which it is the current exclusive representative into a consolidated unit consisting of all nonprofessional employees of Social Security Administration (SSA) District and Branch Offices located in Flint, Lansing, Traverse City, Muskegon, Kalamazoo, Jackson, Mt. Pleasant and Grand Rapids, Michigan, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in Executive Order 11491, as amended. The Activity contends that the proposed consolidated unit is not appropriate for the purpose of exclusive recognition because it does not meet the criteria established by Section 10(b) of the Order as the employees in the existing units do not share a community of interest separate and apart from employees in other District Offices within SSA Region V-B. It further asserts that the proposed consolidated unit is not geographically or administratively coherent and, therefore, would not promote effective dealings and efficiency of agency operations, and that it is based solely upon AFGE Local 3272's extent of organization in that a sizeable proportion of the employees excluded are in existing bargaining units represented by other AFGE locals in other districts within the same geographical area. If the consolidated unit petitioned for is found to be appropriate, the Activity requests that an election be held.

The Regional Office of Region V-B of the Bureau of Field Operations of the SSA is located in Chicago, Illinois, is under the direction of an Assistant Regional Commissioner for Field Operations, 1/ and covers the States of Michigan and Ohio. Region V-B is further divided into Area Offices located in Areas 7, 8 and 14. The Area Offices, which are headed by Area Directors, are further divided into District Offices, Branch Offices and Teleservice Centers which have managers who report to their respective Area Directors. Area Directors, as well as District Managers, perform their duties under the general administrative supervision and direction of the Assistant Regional Commissioner. District Managers have been delegated and effectively exercise day-to-day authority over the District Offices, including the authority to bargain with labor organizations, to handle grievances, and to negotiate with labor organizations for agreements covering employees of their facilities, but they are responsible to the Assistant Regional Commissioner. 2/

Of the existing units represented by AFGE Local 3272 in Region V-B, seven are located within Area 8 and one is located within Area 14. The record reveals that all district and branch offices include employees with similar job classifications, performing similar work, and that all employees throughout Region V-B enjoy common overall supervision, uniform personnel policies and practices and essentially similar working conditions, which may vary from area to area depending upon the workload.

In its review of appeals from certain of the Assistant Secretary's decisions involving the consolidation of units, 3/ the Federal Labor Relations Council (Council) construed the Assistant Secretary's establishment of a presumption in favor of consolidations "---as a recognition and affirmation of the strong policy in the Federal labor-management relations program of facilitating consolidation---." The Council noted that such affirmation accurately reflected its policy as set forth in its 1975 Report and Recommendations of facilitating the consolidation of existing units which conform to the appropriate unit criteria contained in Section 10(b) of the Order.

Noting particularly the clear policy pronouncement of the Council in the consolidation of units area, I find that the petitioned for consolidated unit, which encompasses all of the units in Region V-B represented exclusively by AFGE Local 3272, is appropriate for the purpose of exclusive recognition

1/ The Assistant Regional Commissioner for Field Operations was formerly known as the Regional Representative.

2/ The record discloses that personnel services for all employees are provided by the Regional Personnel Office of the Department of Health, Education, and Welfare.

3/ Education Division, Department of Health, Education and Welfare, Washington, D.C., A/SLMR No. 822 (1977), FLRC No. 77A-88; Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, A/SLMR No. 831 (1977), FLRC No. 77A-112; and Bureau of Field Operations, Office of Program Operations, Social Security Administration, Department of Health, Education and Welfare, Chicago Region V-A, A/SLMR No. 876 (1977), FLRC No. 77A-136.

under the Order. Thus, all the employees within the proposed consolidated unit share common overall supervision, essentially similar job classifications and working conditions, and uniform personnel policies and labor relations practices. Under these circumstances, I find that the employees in the proposed consolidated unit share a clear and identifiable community of interest. Further, as all employees of Region V-B are serviced by the same personnel office and the Assistant Regional Commissioner, who serves as a member of the SSA Regional Commissioner's executive staff, has the responsibility for providing regional leadership and line supervision for planning, organizing and directing district, branch and teleservice operations in Region V-B, I find that the proposed consolidated unit will promote effective dealings. Moreover, as the Assistant Regional Commissioner coordinates the operations of the components within the proposed consolidated unit, and provides regional leadership and line direction for these units, I find that the proposed consolidated unit will promote the efficiency of the agency's operations. Finally, I find that the proposed consolidated unit, which provides for bargaining in a single unit, rather than in the existing eight bargaining units, will promote a more comprehensive bargaining unit structure and reduce fragmentation.

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended: 4/

All employees of the Bureau of Field Operations, Social Security Administration Region V-B District and Branch Offices located in Flint, Lansing, Traverse City, Muskegon, Kalamazoo, Jackson, Mt. Pleasant, and Grand Rapids, Michigan, excluding professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in Executive Order 11491, as amended.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall

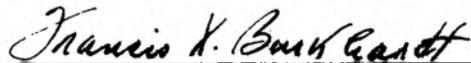
4/ Cf. Bureau of Field Operations, Office of Program Operations, Social Security Administration, Department of Health, Education, and Welfare, Chicago Region V-A, A/SLMR No. 876 (1977), FLRC No. 77A-136, cited in footnote 3 above, in which a consolidated unit consisting of all the units in SSA Region V-A, represented by another local of the AFGE, was found appropriate for the purpose of exclusive recognition.

July 21, 1978

supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during the period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented in the proposed consolidated unit by Local 3272, American Federation of Government Employees, AFL-CIO.

Dated, Washington, D.C.

July 20, 1978



Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION HOSPITAL,
LINCOLN, NEBRASKA
A/SLMR No.1083

This consolidated proceeding arose upon the filing of two unfair labor practice complaints by Local 2219, American Federation of Government Employees, AFL-CIO (Complainant). One complaint alleged, in substance, that the Respondent had refused to bargain about the establishment of a new tour of duty in the Respondent's operating room late shift in violation of Section 19(a)(1) and (6) of the Order. The second complaint alleged, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order when it decided to continue the revised schedule permanently despite an oral promise made by a supervisor of the Respondent to certain members of the operating room staff that it would maintain the revised hours only for a trial three month period after which the impact of the change would be reviewed before a decision would be made on a permanent change.

The Administrative Law Judge found that the Respondent had not violated Section 19(a)(1) and (6) of the Order. He recommended dismissal of the first complaint as it was inconsistent with the second complaint which conceded that the change in tours of duty had been agreed to by the Complainant. He also recommended dismissal of the second complaint finding: that the supervisor who allegedly promised to review the change before it was permanently implemented lacked the authority to bind the Respondent to such a promise; that even if there was an agreement to reconsider the change, the Respondent had fulfilled its bargaining obligation when it held meetings with the Complainant's members subsequent to the effective date of the change; that the establishment of a new tour of duty was integrally related to and consequently determinative of the Respondent's staffing patterns, and, thus, was not a subject on which the Respondent was required to negotiate except with respect to impact, but that the Complainant never requested such impact negotiation; and that, in any event, there was nothing remaining to negotiate on impact.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaints be dismissed.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,
LINCOLN, NEBRASKA

Respondent

and

Case Nos. 60-5180(CA) and
60-5404(CA)

LOCAL 2219, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On May 9, 1978, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled consolidated proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaints and recommending that the complaints be dismissed in their entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject cases, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 60-5180(CA) and 60-5404(CA) be, and they hereby are, dismissed.

Dated, Washington, D.C.

July 21, 1978

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

In the Matter of :

VETERANS ADMINISTRATION HOSPITAL :
LINCOLN, NEBRASKA

Respondent :

and :

LOCAL 2219, AMERICAN FEDERATION :
OF GOVERNMENT EMPLOYEES, AFL-CIO
Complainant :

. :

VETERANS ADMINISTRATION HOSPITAL, :
LINCOLN, NEBRASKA

Respondent :

and :

LOCAL 2219, AMERICAN FEDERATION :
OF GOVERNMENT EMPLOYEES, AFL-CIO
Complainant :

. :

Appearances:

Gerald M. Hegarty
President, AFGE Local 2219
Veterans Administration Hospital
600 South 70th Street
Lincoln, Nebraska 68510
For the Complainant

James E. Adams, Attorney
Donald W. Mirsch
Labor-Relations Specialist
Charles M. Johnston
Assistant General Counsel
Veterans Administration
810 Vermont Avenue, N.W.
Washington, D.C.

Richard S. Moses
V.A. District Counsel
100 Centennial Mall North
Room 135
Lincoln, Nebraska 68502
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

These cases arise under Executive Order 11491 as amended. Case No. 60-5180 ("the first case") was initiated by a complaint dated May 9, 1977 and filed May 16, 1977. Case No. 60-5404 ("the second case") was initiated by a complaint dated September 15, 1977 and filed September 19, 1977. In the first case the complaint alleged a violation of Sections 19(a)(1) and (6) of the Executive Order by the Respondent changing the working hours of certain employees on December 1, 1976 without negotiating with the Complainant, their collective representative. In the second case the complaint, by the same Complainant signed by the same officer against the same Respondent, alleged a violation of Sections 19(a)(1) and (6) by the Respondent advising the personnel involved that it had decided to continue the revised hours despite an agreement on November 2, 1976 with the Complainant to put the revised hours in effect for a period of 90 days after which the impact of the change would be reviewed by the Respondent and the employees involved before a decision would be made on a permanent change.

On November 23, 1977 the Regional Administrator issued an order consolidating the cases and the same day issued a Notice of Hearing for a hearing to be held December 15, 1977 in Lincoln, Nebraska. Hearings were held on that day in that City. Both sides were represented and presented witnesses who were examined and cross-examined and offered exhibits which were received in evidence. Both parties made closing arguments and filed timely briefs.

Facts

The Complainant is the certified exclusive representative of a unit of Respondent's employees, including non-supervisory nurses. Ten employees in the unit are employed in the operating room. Five of them are Registered Nurses and five are nursing assistants known as Technicians. Their immediate supervisor is a supervisory Registered Nurse.

As provided in the collective agreement between the parties, there are regular monthly meetings between the Complainant and management officials. 1/ There are occasional additional such

1/ J. Exh. 1, Art. 3, Sec. 5.3, p. 7.

meetings. Also, the President of the Local is authorized to consult with the chief of a service or higher authority on some matters. 2/ The agreement has a special provision for nurses; it authorizes them to discuss individual or group problems with their immediate supervisor and the next higher level supervisor. 3/ It was also accepted practice for the nurses to take up individual or group problems with higher authority than provided in the agreement.

Prior to 1976 the nurses and Technicians assigned to the operating room all worked from 7:00 A.M. to 3:30 P.M. Monday through Friday. Early in 1976 the tours of duty were changed so that four of the five RNs and Technicians continued to work from 7:00 A.M. to 3:30 P.M. but the fifth would work from 8:00 A.M. to 4:30 P.M. Which one of the nurses and Technicians would work the late shift was left to them. The Technicians preferred a regular rotation; each of them would work the late shift every fifth week, and the Respondent accepted that arrangement. The nurses preferred a more flexible arrangement. Each month a schedule would be arranged for the monthly period from the 15th of one month to the 15th of the next month. The nurses would work out among themselves who would work the late shift on which days, in accordance with their own convenience and preference, and the Respondent accepted that arrangement.

If an operation had to be performed commencing after 4:30 P.M. the Respondent would call a Registered Nurse and a Technician to report for overtime work. Sometimes the persons called, principally the Technicians, would not return the calls made to them and the operation would be performed inadequately staffed. For that reason, and to reduce the amount of overtime, the Respondent decided to change the late shift to 9:00 A.M. to 5:30 A.M., a starting and quitting time one hour later than then in effect. Shortly before November 2, 1976 the supervisory Registered Nurse in the operating room had a meeting with the others in the operating room and informed them of the intended change. The RNs indicated disapproval, and the Technicians supported the RNs.

On November 2, 1976 the Respondent had a special meeting with the Complainant to advise it of the change in the late shift effective the first Sunday after November 30. The Complainant interposed no objection and made no proposals and

2/ J. Exh. 1, Art. 3, Sec. 5.2, p. 7.
3/ J. Exh. 1, Art. 15, Sec. 8, p. 31.

did not initiate any discussions concerning the impact of the change, then or thereafter. After the formal announcement Katherine Deines, the supervisory Registered Nurse in the operating room, again met with the operating room RNs who again voiced opposition to the projected change. The opposition was based on dislike of having to work sometimes as late as 5:30 P.M. buttressed with the argument that their services were needed more between 8:00 A.M. and 9:00 A.M. than between 4:30 P.M. and 5:30 P.M. when there would normally be little or nothing to do. Deines, who had initiated the change with her superior officials, suggested to the RNs that they should not be too concerned because after about three months or so she would re-evaluate the success of the change in the tour of duty. To the knowledge of the nurses and the Complainant, Deines did not have authority to bind the Respondent to an agreement or statement of policy. No representative of the Respondent authorized to commit the Respondent to anything ever represented that the new tour of duty was being established for a trial period of three months after which it would be reconsidered in consultation with the Complainant.

Assignments to the new shift of 9:00 A.M. to 5:30 P.M. were made in the same manner as assignments had been made to the previous 8:00 A.M. to 4:30 P.M. shift, i.e., the Technicians were assigned to the late shift every fifth week, as they preferred, and the RNs worked out among themselves monthly which one of them would work the late shift on each scheduled work-day in accordance with their own needs and preferences. Each of them works the late shift about equally with the others.

Around February 1, 1977 the nurses in the operating room discussed with Deines their concern over the continuation of the new shift and over three other matters. It was agreed that Deines would arrange to have them present these "areas of concern" directly to the Hospital Director, and this was done. The nurses chose Mrs. Doris Kincheloe, one of the RNs in the operating room, to be their spokesperson at the meeting. On February 2, 1977 a meeting was held with the Hospital Director and the "areas of concern" presented and taken under advisement. On March 9, 1977 a meeting was held again. The Hospital Director stated that the 9:00 A.M. to 5:30 P.M. shift would be continued because it avoided substantial overtime. 4/

The Complainant and the Respondent have regular monthly meetings and occasional special meetings. The Chief of Nursing

4/ R. Exh. 3, item 3.

Services has regular monthly meetings with the nursing stewards. Since the announcement of the new shift on November 2, 1976 at no time has the Union attempted to negotiate concerning the impact of the establishment of the new tour of duty. The operating room nurses have discussed the new shift with management but only to oppose it, not to discuss or negotiate its impact or the procedures for implementing it. The Complainant expressly does not contend that the new tour of duty has been applied unequally or unjustly. 5/

Discussion and Conclusions

The first complaint alleges that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by changing the working hours on December 1, 1976 without negotiating. The second complaint, signed by the same Complainant official who signed the first complaint, alleges that on November 2, 1976 the Complainant agreed to the change. The first complaint should therefore be dismissed; making a change by agreement is not a refusal to negotiate.

The second complaint alleges also that management's original proposal had been to initiate the change of one of the five shifts by one hour for a 90-day period at the end of which its impact would be reviewed by management "and the employees involved" with "consideration given to both viewpoints before a decision was made on the permanent implementation of the shift change." I have found that no one with authority to bind the Respondent ever suggested such a commitment, and Deines, the Nursing Superintendent in the operating room, suggested only that she would re-evaluate the success of the change after about three months or so. There is no evidence she did not do so, and I find that she did.

Secondly, if there was such an agreement, it is not alleged, and I could not find, that it included an agreement that the Respondent would revert to the earlier late shift while "management and the employees involved" reviewed the "overall impact". Even if there was an agreement to discuss and reconsider after three months, it was fulfilled. Management and "the employees involved" reviewed the situation after two months and after three months preceding their determination that the new late shift would continue. Around February 1, 1977, two months after the commencement of the new late shift, the nurses in the operating room discussed its continuation with Deines,

5/ Tr. 152-53.

their supervisor. Deines arranged for them to discuss it further with the Hospital Director and this was done on February 2. On March 9, 1977 they met again and discussed it with the Hospital Director and he concluded that the new shift should continue in order to keep down overtime.

Furthermore, the change in the late shift was an integral part of the staffing pattern of the operating room in performing that part of the work of the agency. As such, the change was not a subject on which the Respondent was required to negotiate by the Executive Order. 6/ Its only obligation was to negotiate, on request, concerning the impact of the change of shift. But it was never requested to do so. While the change of shift was discussed a number of times, neither the Complainant nor "the employees involved" ever raised the question of impact. The only suggestion of the nurses was that the change be rescinded, a determination not required to be negotiated.

Finally, it is difficult to find an impact to negotiate. The employees had exactly the impact, qua impact, they wanted. The Technicians wanted a strict weekly rotation in the late shift, and management concurred. The RNs preferred working out monthly among themselves which of them would be assigned to the late shift on which days, and management concurred in that arrangement also. I can find nothing remaining on which to negotiate concerning the impact of the change in the late shift.

RECOMMENDATION

Both complaints should be dismissed.



MILTON KRAMER
Administrative Law Judge

Dated: May 9, 1978
Washington, D.C.

6/ AFGE Local 40 and Plum Island Animal Disease Laboratory, 1 F.L.R.C. 101, F.L.R.C. No. 71A-11; V.A. Hospital, Sheridan, Wyoming and AFGE Local 1219, A/SLMR No. 952.

MK/mm1

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

OGDEN AIR LOGISTICS CENTER,
HILL AIR FORCE BASE, UTAH
A/SLMR No. 1084

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1592 (AFGE) alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order when it implemented a new policy for lowering the average grade of unit employees without giving the AFGE an opportunity to bargain over the impact and implementation of such change.

The Administrative Law Judge found that the Respondent had not violated Section 19(a)(1) and (6) of the Order. In this regard, he found that the Respondent notified the AFGE of the proposed new policy on October 6, 1976, and requested the AFGE's comments. The AFGE did not respond to the communication of October 6, 1976, or request bargaining on the new policy or the impact it would have on unit employees before its implementation in January 1977. Under these circumstances, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 600
San Francisco, California 94105



REPLY TO SAN FRANCISCO
AREA CODE 415 556-0555

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OGDEN AIR LOGISTICS CENTER,
HILL AIR FORCE BASE, UTAH

Respondent

and

Case No. 61-3771(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1592

Complainant

DECISION AND ORDER

On May 26, 1978, Administrative Law Judge John D. Henson issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 61-3771(CA) be, and it hereby is, dismissed.

Dated, Washington D.C.
July 21, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

In the Matter of

OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES AFL-CIO, LOCAL 1592

Complainant

CASE NO. 61-3771(CA)

William E. Wade, Esquire
National Representative
American Federation of Government
Employees, AFL-CIO
96 North Lakeview Drive
Clearfield, Utah 84105
For the Complainant

Clair A. Jones
Attorney at Law
Management Representative
Ogden ALC/JA
Building 1287
Hill Air Force Base, Utah 84406
For the Respondent

Before: JOHN D. HENSON
Administrative Law Judge

1/ In the last paragraph on page four of his Recommended Decision and Order, the Administrative Law Judge inadvertently cited a date as October 6, 1977, instead of October 6, 1976. This inadvertent error is hereby corrected.

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding arises under Executive Order 11491, as amended. Pursuant to the regulations of the Assistant Secretary of Labor for Labor-Management Relations, a Notice of Hearing on Complaint was issued on December 29, 1977, with reference to alleged violations of sections 19(a)(1) and (6) of the Order.

This case was initiated by a complaint filed on October 7, 1977, by the American Federation of Government Employees AFL-CIO, Local 1592 (hereinafter the "Union") against Ogden Air Logistics Center, Hill Air Force Base, Utah (hereinafter the "Respondent").

Hearing was held in Ogden, Utah, on February 13, 1978, at which time all parties were represented and were afforded full opportunity to be heard, adduce evidence, examine and cross-examine witnesses, and argue orally. Thereafter, both parties filed briefs which have been considered. Upon the entire record, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence, I make the following findings, conclusions, and recommendations.

Issues

The issues presented for decision are as follows:

1. Did the Respondent refuse to negotiate the impact of its plan/policy of General Schedule average grade reduction? If so, was this refusal in violation of section 19(a)(1) and section 19(a)(6) of Executive Order 11491, as amended?
2. Was the union notified prior to 8 July 1977, regarding the above-mentioned plan/policy as alleged by the Respondent and denied by the Union? If the Complainant was notified, did the silence on this matter until 8 July 1977, constitute a waiver of its rights to negotiate the impact of said plan/policy?
3. The Respondent alleges that said plan/policy does not have an adverse impact on the work force. If so, is the Respondent obligated to consult, confer or negotiate on the impact of said plan/policy?

Findings of Fact

1. At all times relevant to this proceeding, the

Union was the exclusive representative of various civilian employees at Ogden Air Logistics Center, Hill Air Force Base, Utah.

2. For several years prior to 1976, Respondent had been engaged in a program to control and exercise restraint on increases in GS average grade and salary trends. Respondent's action was prompted by mandate from the President of the United States, Secretary of Defense and down through the chain of command to the Commander at the Ogden Air Logistics Center.

3. On June 26, 1974, a regulation was issued by Respondent to effectuate this mandate. The June 26, 1974, regulation is identified as AFR 40-312.

4. In 1976, it became clear to Respondent that AFR 40-312 would have to be supplemented in order to accomplish the goal of controlling the increase in the General Schedule Average Grade.

5. On October 6, 1976, Respondent mailed copies of a proposed supplement to AFR 40-312 to the various organizations at Hill Air Force Base including the Union. By letter of transmittal of the proposed supplement, Respondent requested "your coordination and/or comments on the attached proposed AFR 40-312/Ogden ALC Supplement by 15 October 1976." The Union did not respond.

6. In January, 1977, AFR 40-312/ALC Supplement 1 was published and distributed by Respondent.

7. As the months went on, Respondent became aware that the requirements of the regulation were not being achieved. It was determined that the Commanding General should issue a letter to the major organizations of Hill Air Force Base calling attention to AFR 40-312/ALC Supplement 1 and to include the goals they were to achieve as provided for in the supplement.

8. A letter was prepared for the Commanding General's signature. Clair E. Frischknecht, Chief of the Position Management Section in the Civil Personnel Office of Respondent, called Neil B. Breeden, President of the Local Union, and made an appointment to discuss the regulation. On July 11, 1977, Frischknecht went to the Union office and gave Breeden a copy of the proposed letter from the Commanding General along with a staff summary sheet, and advised him that these were, in effect, a "follow-on" to the regulation. Breeden looked at the first few pages of the documents and informed Frischknecht that he would not

concur with that letter. The following day, July 12, 1977, Breeden filed an unfair labor practice charge on which this complaint is based.

Contentions of the Parties

The Union does not challenge Respondent's decision to establish a program for reduction of average grade as being a reserved right of management under the Executive Order. However, it contends that Respondent denied the exclusive representative an opportunity to meet and confer concerning the impact and implementation of its decision by failing to notify the Union prior to issuing AFR 40-312/ALC Supplement 1.

Respondent maintains that the Union was given reasonable opportunity to meet and confer on the impact and implementation of the supplement to AFR 40-312 but that the Union waived its right to consult, confer or negotiate by failing to request consultation or bargaining on the subject. Respondent further contends that the supplemental regulation has no adverse impact on the employees.

Discussion and Conclusions

There is no dispute that the decision to establish a program of General Schedule average grade reduction was a reserved right of Respondent under the Executive Order. Both at the hearing and in its brief, the Union made it clear that it does not contend that this management retained right requires consultation.

The sole question is whether Respondent gave notice to the Union prior to implementation of its decision and whether it afforded the Union an opportunity to negotiate upon request, regarding the impact and implementation of that decision. For reasons set forth below, I conclude that Respondent did give the Union notice prior to implementation of its decision to supplement the existing regulation pertaining to General Schedule average grade reduction and that Respondent did not fail or refuse to bargain with regard to impact or implementation of that decision.

Respondent's Exhibit 2, which was received in evidence, is a copy of a letter of transmittal dated October 6, 1977, together with a copy of the proposed supplemental regulation. The subject of the letter of transmittal is "Proposed AFR 40-312/Ogden ALC Supplement 1." The letter is directed to various organizations

concerned including AFGE Local 1592, the Union herein. It states, "Request your coordination and/or comments on the attached proposed AFR 40-312/Ogden ALC Supplement by 15 October 1976." It is signed by Edwin C. Hudson, Lt. Col. USAF, Chief of Personnel.

Clair Frischknecht, Chief of the Position Management Section of Respondent's Personnel Office, testified that a draft of the proposed supplemental regulation was prepared in his office and under his direction and instructions were given to his secretary, Mary Kilburn, to transmit the proposed regulation to the various organizations for their comments. Specific instructions were given to furnish the Union a copy. He testified that he received no response from the Union.

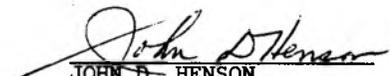
Mary Kilburn testified that she mailed a copy of the proposed regulation and request for comment to the Union on October 6, 1976. She also testified that the Union did not respond.

Neil Breeden, President of AFGE, Local 1592 testified that in the regular course of Union business that all proposed changes in existing regulations directed to the Union by management are submitted to him for his consideration. He has no recollection of receiving the proposed supplement which was mailed to the Union on October 6, 1976, and maintains that his first knowledge of Respondent's plan/policy of General Schedule average grade reduction was on July 11, 1977, when Clair Frischknecht came to the Union office with the letter prepared for the Commanding General's signature. Mr. Breeden admitted that on numerous occasions he had been mistaken about receipt of regulations from management and that it was possible that he had received the proposed supplement mailed on October 6, 1976. The record reflects that Mr. Breeden had knowledge and was consulted concerning a previous unfair labor practice charge against Respondent involving General Schedule average grade reduction which was filed on January 21, 1976. I find that Respondent notified the Union of the proposed supplement to AFR 40-312 by letter dated October 6, 1976, and requested the Union's coordination and/or comments by October 15, 1976. I further find that despite the aforementioned notice, no request for bargaining, on either the procedures to be utilized or the impact on unit employees, was ever made by the Union. In the absence of such a request, insufficient basis exists for a 19(a)(6) finding. U.S. Department of Air Force, Base, A/SLMR No. 261 (April 30, 1973); Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania, A/SLMR No. 771 (1976).

Recommendation

July 21, 1978

Having found that Respondent has not engaged in certain conduct prohibited by sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Complaint herein be dismissed in its entirety.


JOHN B. HENSON
Administrative Law Judge

Date: May 26, 1978
San Francisco, California

JDH:tl

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

PENNSYLVANIA ARMY AND AIR NATIONAL GUARD
A/SLMR No. 1085

This case involved an unfair labor practice complaint filed by the Pennsylvania State Council, Association of Civilian Technicians, Inc. (Complainant) alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order as a result of certain statements to employees made by the Commanding Officer of the facility involved.

The Administrative Law Judge concluded that the Respondent's conduct was violative of Section 19(a)(1) and (6) of the Order. In this connection, he found that remarks made by a facility Commander concerning the cancellation of four job announcements because of the Complainant's bargaining position interfered with employees in the exercise of their right to be represented by a collective bargaining agent. He also found improper the publication of the results of negotiations in such a manner as to indicate that the outcome of such negotiations were inimical to employee interests, or that employees would receive more favorable treatment if their exclusive representative refrained from dealing with the Respondent.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations. Accordingly, he ordered the Respondent to cease and desist from engaging in the conduct found violative of the Order and take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PENNSYLVANIA ARMY AND AIR NATIONAL GUARD

Respondent

and

Case No. 20-06232(CA)

PENNSYLVANIA STATE COUNCIL, ASSOCIATION OF CIVILIAN TECHNICIANS, INC.

Complainant

DECISION AND ORDER

On May 1, 1978, Administrative Law Judge Peter McC. Giesey issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, 1/ I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Pennsylvania Army and Air National Guard, shall:

1. Cease and desist from:

a. Indicating to employees that job announcements were cancelled and would not be re-announced because of the bargaining position taken by the Pennsylvania State Council, Association of Civilian Technicians, Inc., the employees' exclusive representative.

1/ The Respondent submitted an untimely brief which has not been considered. Under these circumstances, the Complainant's answering brief, for which no request to the Assistant Secretary for permission to file was made, also was not considered.

b. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

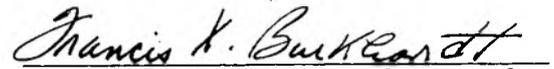
c. Dealing directly with unit employees by publishing the results of negotiations between the Pennsylvania State Council, Association of Civilian Technicians, Inc., the employees' exclusive representative, and the Pennsylvania Army and Air National Guard, in such a manner as to indicate that the outcome of such negotiations are inimical to employee interests, or that the employees would receive more favorable treatment if their exclusive representative refrains from dealing with the Pennsylvania Army and Air National Guard.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

a. Post at its Aviation Support Facility at Fort Indiantown Gap, copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer of the facility, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

b. Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
July 21, 1978


Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT indicate to employees that job announcements were cancelled and will not be re-announced because of the bargaining position taken by the Pennsylvania State Council, Association of Civilian Technicians, Inc., our employees' exclusive representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL NOT deal directly with unit employees by publishing the results of negotiations between the Pennsylvania State Council, Association of Civilian Technicians, Inc., our employees' exclusive representative, and the Pennsylvania Army and Air National Guard, in such a manner as to indicate that the outcome of such negotiations are inimical to employee interests, or that the employees would receive more favorable treatment if their exclusive representative refrains from dealing with the Pennsylvania Army and Air National Guard.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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In the Matter of

PENNSYLVANIA ARMY AND AIR NATIONAL GUARD,
Respondent

and

PENNSYLVANIA STATE COUNCIL, ASSOCIATION OF:
CIVILIAN TECHNICIANS, INC.,
Complainant
.....

Case No. 20-06232 (CA)

Leonard Spear, Esquire
Meranze, Katz, Spear & Wilderman
12th Floor, Lewis Tower Building
15th and Locust Streets
Philadelphia, Pennsylvania 19102
For the Complainant

George M. Orndoff, Major, PAANG
Hugh S. Niles, Colonel, PAANG
Department of Military Affairs
Adjutant General's Office
Commonwealth of Pennsylvania
Annville, Pennsylvania 17003
For the Respondent

Before: -PETER-MCC. GIESEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under Executive Order 11491, as amended (hereafter, "the Order") by Pennsylvania State Council, Association of Civilian Technicians, Inc. (hereafter, "Council"), the exclusive bargaining agent for employees of Pennsylvania Army and Air National Guard, against the agency.

Council complains that PAANG violated sections 19(a)(1) and (6) of the Order 1/ by, through the Commanding Officer of the facility, calling a general shop meeting on November 18, 1976 at which he stated, inter alia;

Are there any other questions? I thought there would be one thing for sure, but since nobody is going to ask, I'll bring it up. It concerns the four job announcements and why they were withdrawn. Since it was brought to my attention that there was some confusion on the subject, not only by you but my supervisors also.

The reason I cancelled the announcements was because the three union stewards did not agree with the area of consideration, and in trying to cooperate with them, even though I didn't agree with them, I went ahead and cancelled the announcements.

A hearing was held in Harrisburg, Pennsylvania, on November 17, 1977. Briefly, the record shows the following.

Statement of the Case

It is undisputed that the Commanding Officer made the remarks set forth above in the circumstances set forth.

Witnesses called by complainant stated that, following the above remarks, the Commanding Officer was asked by an employee whether the cancelled job announcements would be reissued. According to the witness, he replied that he doubted the jobs would be re-announced and that "you can thank your stewards for that." The Commanding Officer testified that he had introduced his remarks concerning the withdrawal of the job announcements by stating that he was "going to tell you my opinion - now mind you I only speak for myself... not the facility commander or State Aviation Officer, or a representative of the Adjutant General."

1/ Sec. 19. Unfair labor practices (a) Agency management shall not--

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

* * *

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order

He also stated that he had told the assembled employees about the job announcement withdrawals because he had received inquiries from employees and he wanted to "clear the air". He agreed that all employees who had responded to the announcements had been informed of the withdrawals in early November. 2/

According to the Commander, following his remarks, a union steward stated, "Colonel, what you are saying here sounds anti-union." He testified that he didn't respond because he "didn't want to get into a...contest with [the steward] over the point at that time and I wanted to see if there were any questions of relevance from the rest of the people, with the limited time I had available."

Findings of Fact and Conclusions of Law

Having considered the entire record including the testimony, exhibits and briefs of the parties and having observed the demeanor of the witnesses, I make the following findings

2/ The text of the letter informing applicants signed by the commanding officer is as follows;

1. I wish to take this opportunity to thank you for your interest in the Pennsylvania Army Aviation Program evidenced by your application to announcement #185-76.

2. The purpose of this correspondence is to inform you that this announcement is being cancelled due to objections presented by all three shop stewards at the Facility. The shop stewards' objections are:

a. That the area of consideration is not restricted to employees of AASF #1.

b. That no prior announcement was made as to what specific duties this work leader would be assigned once he was hired.

3. I regret that it has become necessary to cancel this announcement. All applicants were from the Facility and I feel that it would have resulted in a promotion for a deserving individual.

4. You are encouraged to continue to further your qualifications and apply for future promotion opportunities.

of fact, conclusions of law and recommended decision and order based thereon.

The facts are as set forth in the statement of the case. All witnesses were credible as to facts. Neither contradictions nor inconsistencies in matters of substance appear in the testimony of the various witnesses.

Briefly, PAANG argues that it "has shown through evidence and testimony that the specific remarks [alleged to] be...derogatory were made for one purpose, that of providing clarification and information as to what had happened to cause the job announcements to be withdrawn--his remarks were not directed against any person or organization."

The argument addresses an issue which is not presented. Thus, the issue is not what PAANG, its agents or counsel perceive to be the purpose of the remarks, rather the issue is what was the substance, effect and result of the remarks reasonable to be anticipated by PAANG.

It is undoubtedly true that a gratuitous explanation to bargaining unit employees to the effect that job opportunities have been lost, that their second level supervisor "doubted" that the jobs would be re-announced and that the employees could "thank your [collective bargaining agent] for that," 3/ is calculated to convey information.

However, the import of that information is in my opinion, that the bargaining agent has engaged in representation inimical to the best interest of unit employees. Were there any question concerning the meaning of the information as well the reasonably anticipated effect, it is dispelled by the Commander's earlier written notification to unit members who had sought to avail themselves of the job announcements. Thus, they were informed that the announcements had been "cancelled due to objections presented by all three shop stewards," inter alia "that the area of consideration is not restricted to employees of AASF #1" and provided also with the news that "[a]ll applicants were from the Facility and I feel it would have resulted in a promotion for a deserving individual.

The Commanding Officer impressed me as an intelligent and experienced person, a leader of men, well schooled in techniques of motivation, encouragement of desired responses and discouragement of responses and attitudes regarded as undesirable.

3/ It is undenied that this statement was made by the Commander.

The short of it is that I am convinced that he knew precisely what the effect of his remarks would be--to interfere with employees in the exercise of their right to be represented by a collective bargaining agent. The remarks themselves, regardless of effect, violate section 19(a)(1) of the Order. C.E., FAA, Airways Facilities Sector, Tampa, Florida, A/SLMR No 725. Similarly, to the extent that such remarks "encourage the bypassing of the exclusive representative and imply] that employees will receive more favorable treatment if their representative refrains from dealing with" management, the remarks violate section 19(a)(6) of the Order. Department of Defense, Norfolk Naval Shipyard, A/SLMR No. 746.

RECOMMENDATION

Having found that Pennsylvania Army and Air National Guard engaged in conduct in violation of section 19(a)(1) and (6) of the Order by discouraging its employees in the exercise of their rights to representation by a collective bargaining agent and by implying that employees will receive more favorable treatment if their representative refrains from dealing with management, I recommend that the Assistant Secretary adopt the following order.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Pennsylvania Army and Air National Guard shall:

1. Cease and desist from:
 - a. Interfering with, restraining or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended, by publishing the results of Pennsylvania State Council, Association of Civilian Technicians, Inc.'s negotiation, consultation or other communication with their employer in such a manner as to indicate that the results of such action are inimical to the interest of the employees or that the employees would receive more favorable treatment if their representative refrains from dealing with Pennsylvania Army and Air National Guard.

A P P E N D I X

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order of effectuate the purposes of

Executive Order 11491, as amended

Labor-Management Relations in the Federal Service

We hereby notify our employees that

We will not interfere with, restrain or coerce our employees by publishing the results of Pennsylvania State Council, Association of Civilian Technicians, Inc.'s negotiation, consultation or other communication with their employer in such a manner as to indicate that the results of such action are inimical to the interests of the employees.

We will not discourage membership in Pennsylvania State Council, Association of Civilian Technicians, Inc. by taking action which implies that our employees would receive more favorable treatment if their representative refrains from dealing with Pennsylvania Army and Air National Guard.

We will not in any like or related manner interfere with, restrain or coerce own employees in the exercise of rights assured by Executive Order 11491, as amended.

Pennsylvania Army and Air National Guard

By: _____
(Signature) (Title)

Dated _____

b. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following actions to effectuate the purpose of this order.

a. Post at all places where notices to employees are customarily posted 4/ copies of the attached notice marked "Appendix," on forms furnished by the Assistant Secretary of Labor for Labor Management Relations. Upon receipt of such forms, they shall be signed by a responsible management official and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Care shall be taken that such notices are not altered, defaced or covered by any other material.

b. Notify the Assistant Secretary of the steps taken in compliance with this order, in writing, within 30 days of the date of this order.


PETER MCC. GIESEY
Administrative Law Judge

Dated: May 1, 1978
Washington, D. C.

^{4/} The record indicated that the job announcements involved in this matter were published in "all places...". Accordingly, they were also withdrawn in "all places...".

July 25, 1978

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 its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL AVIATION ADMINISTRATION,
ATLANTA AIRWAY FACILITIES SECTOR,
ATLANTA, GEORGIA
A/SLMR No. 1086

This case involved a petition filed by the Professional Airways Systems Specialists (PASS) seeking an election in a unit described as all General Schedule and Wage Grade employees assigned to the Atlanta, Georgia, Airway Facilities Sector 12(a) located at the Atlanta Municipal Airport. The Activity contended that the unit sought by PASS was inappropriate as the employees do not share a community of interest separate and distinct from other Agency employees, and that such a unit would not reduce existing fragmentation or promote effective dealings and efficiency of agency operations. The Intervenor, American Federation of Government Employees, AFL-CIO, Local 3322 (AFGE), which is the current exclusive representative of the claimed unit, took the position that such unit was appropriate.

The Assistant Secretary found that the claimed unit continued to constitute an appropriate unit for the purpose of exclusive recognition under the Order. In this regard, he noted that the record did not contain any newly discovered or previously unavailable facts or changed circumstances that have occurred since the AFGE's recertification in 1976, as the result of a self-determination election order in A/SLMR No. 600. Therefore, he found that the petitioned for unit continued to constitute a comprehensive grouping of employees who share a clear and identifiable community of interest. He also found that such unit would promote effective dealings and efficiency of agency operations.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
ATLANTA AIRWAY FACILITIES SECTOR,
ATLANTA, GEORGIA

Activity

and

Case No. 40-8442(RO)

PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3322

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Annette Allen. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief submitted by the Activity, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.

2. In its amended petition, the Petitioner, Professional Airways Systems Specialists, hereinafter called PASS, seeks an election in an existing unit of all General Schedule (GS) and Wage Grade (WG) employees of the Federal Aviation Administration assigned to the Atlanta, Georgia, Airway Facilities Sector 12(a), located at the Atlanta Municipal Airport. ^{1/} The Activity contends that the unit sought is inappropriate under Section 10(b) of the Order as the employees involved do not share

^{1/} The unit description in the petition herein was amended at the hearing to change the designation for that part of the Atlanta Airway Facilities Sector located at the Atlanta Municipal Airport from 18200 to its current designation of 12(a).

a community of interest separate and distinct from the other employees in Sector 12, and that such unit would not reduce existing fragmentation or promote effective dealings and efficiency of agency operations. The Intervenor, American Federation of Government Employees, AFL-CIO, Local 3322, hereinafter called AFGE, which is the current exclusive representative of the employees in the claimed unit, takes the position that such unit is appropriate for the purpose of exclusive recognition. ^{2/}

The mission of the Federal Aviation Administration, hereinafter called FAA, is to provide a safe and expeditious flow of aircraft in the National Airspace System. The Southern Region of the FAA is headed by a Regional Director. Under his jurisdiction is the Southern Region's Airway Facilities Division, which is composed of four branches: the Program and Planning Branch, the Electronic Engineering Branch, the Maintenance Operations Branch, and the Environmental Engineering Branch. The Division also contains several sectors, of which the Activity is one, each headed by a Sector Manager who is responsible to the Division Chief. The mission of the Activity, and all airway facilities sectors, is to maintain and operate all National Airspace System facilities within the sector, assuring that performance is within established tolerances of accuracy and meets operational requirements of availability and reliability; to maintain environmental support facilities and equipment; and to effectively manage available resources. The Activity consists of four operational units: the Sector headquarters at the Atlanta Municipal Airport (Sector 12(a)), the Fulton County Sector Field Office (Sector 12(b)), the Marietta Sector Field Office (Sector 12(c)), and the Peachtree-DeKalb Sector Field Office (Sector 12(d)).

At the hearing, the parties stipulated as to the history of bargaining in the petitioned for unit. The stipulation indicates that on July 9, 1971, pursuant to a consent election agreement, AFGE Local 2123 was certified as the exclusive representative of employees in the petitioned for unit. On November 23, 1971, an amendment of certification was issued by the Regional Administrator changing the name of the exclusive representative from AFGE Local 2123 to AFGE Local 3322. On July 25, 1973, in Federal Aviation Administration, Atlanta Airway Facility, Sector 12, Atlanta, Georgia, 3 A/SLMR 366, A/SLMR No. 287 (1973), the Assistant Secretary found that the Activity had improperly refused to negotiate with the AFGE regarding the ground rules for negotiating an agreement. Negotiations between the parties subsequently were conducted in 1973 and 1974 but no agreement was reached. As a result of the self-determination election ordered in Federal Aviation Administration (FAA) and Federal Aviation Administration, Eastern Region, 5 A/SLMR 776, A/SLMR No. 600 (1975),

^{2/} The parties stipulated that there is no bar to an election in this matter.

on September 21, 1976, the AFGE was recertified as the exclusive representative of the claimed unit. 3/ Negotiations between the parties resumed in February 1977, but were terminated in May 1977. Subsequently, on September 22, 1977, the PASS filed the instant petition for the employees in the existing unit represented exclusively by the AFGE.

The parties stipulated that 53 of 79 positions in the Activity are in the claimed unit at the Sector headquarters office and that the remaining 26 positions are divided among the 3 sector field offices, noted above. Employees of the three sector field offices currently are included in a nationwide bargaining unit of Airway Facilities Division employees exclusively represented by the Federal Aviation Science and Technological Association/National Association of Government Employees, hereinafter called FASTA/NAGE. 4/ The majority of employees in the claimed unit are classified as Electronic Technicians, GS-856 series, and are responsible for maintaining air traffic control and navigational aid electronics systems to ensure continuous and reliable operation of equipment critical to the National Airspace System.

The parties also stipulated that, consistent with the FAA policy of delegating authority with respect to personnel and labor relations matters to the lowest possible level, the authority for such matters has been delegated to the Activity's Regional Director, subject to FAA and Civil Service guidelines. In this regard, the Regional Director has sole authority within the Region to negotiate collective bargaining agreements.

It is undisputed that the petitioned for unit has remained unchanged since September 1976, when the AFGE was recertified as the exclusive representative of the unit employees. In this regard, there is no evidence that, since the recertification, there has been a significant alteration in the FAA's operations or any change in the mission or functions of the employees in the unit sought which would affect the previously established appropriateness of such unit.

Based on the foregoing circumstances, I find that the petitioned for unit continues to constitute an appropriate unit for the purpose of exclusive recognition within the meaning of Section 10(b) of the Order. Thus, the record does not contain any newly discovered or previously unavailable facts or changed circumstances that have occurred since the recertification of the AFGE in September 1976; nor do the parties contend

3/ During the processing of the petitions which resulted in the Decision and Direction of Elections in A/SLMR No. 600, neither the Activity nor the FAA contended that the petitioned for unit was not appropriate for the purpose of exclusive recognition under the Order.

4/ FASTA/NAGE filed an untimely request to intervene in this matter which was denied.

otherwise. It has been previously held that the same parties cannot relitigate the same issues considered in a prior proceeding, in the absence of evidence of some intervening change in circumstances. 5/ Although the issue to which the above principle was applied involved the bargaining unit eligibility of certain employees, this principle, in my view, is also applicable to the issue herein. Thus, where, as here, the parties in a prior proceeding did not contend that the claimed unit was inappropriate, in my view, it would not effectuate the purposes and policies of the Order to reconsider, in the absence of evidence of some change in circumstances, the appropriateness of the unit which was determined in a prior proceeding involving the same parties. Under these circumstances, I find the petitioned for unit continues to constitute a grouping of employees who share a clear and identifiable community of interest. Thus, such employees share a common mission, common overall supervision, generally similar job classifications and duties, and enjoy uniform personnel policies and practices and labor relations. Further, noting that the claimed unit is coextensive with the unit represented by the AFGE since 1971 and that there is a long history of negotiations between the parties with respect to such unit, I find that it will promote effective dealings and efficiency of agency operations. 6/

Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Section 10(b) of Executive Order 11491, as amended:

All GS and WG employees of the Federal Aviation Administration assigned to the Atlanta, Georgia, Airway Facilities Sector 12(a), Atlanta Municipal Airport, excluding personnel assigned to receive training, professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

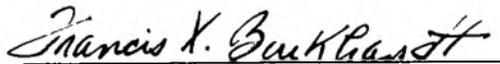
5/ Cf. United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine, A/SLMR No. 1038 (1978), and Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, A/SLMR No. 870 (1977), FLRC No. 77A-122 (1978).

6/ As noted above, there has been a long bargaining history in the petitioned for unit, but without a successfully negotiated agreement. In my view, the inability of the parties to consummate a negotiated agreement, is not, by itself, sufficient basis to conclude that such unit has failed to promote effective dealings, particularly where, as here, there is evidence of a past refusal to bargain in good faith by the Activity.

July 25, 1978

An election by secret ballot shall be conducted among the employees in the unit found appropriate as soon as possible but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below including employees who did not work during that period because they were out ill, or on vacation, or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or who were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the Professional Airways Systems Specialists; the American Federation of Government Employees, AFL-CIO, Local 3322; or neither.

Dated, Washington, D.C.
July 25, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

PENNSYLVANIA ARMY AND AIR NATIONAL GUARD
A/SLMR No. 1087

This case involved an unfair labor practice complaint filed by the Pennsylvania State Council, Association of Civilian Technicians, Inc. (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to process an employee's grievance under the negotiated grievance procedure.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (6) of the Order. He noted that a refusal to process a grievance through a negotiated grievance procedure on the basis that it is not grievable or arbitrable, if without bad faith, does not constitute an unfair labor practice, as the Complainant may seek a grievability or arbitrability determination pursuant to Section 13(d) of the Order. The Administrative Law Judge found no evidence of bad faith on the part of the Respondent herein. He noted, in this regard, that the Respondent had not refused to process the grievance under an agency procedure, and, further, that a representative of the Complainant had implied that there was some question as to whether the negotiated grievance procedure was applicable in the instant case. Accordingly, he recommended that the complaint be dismissed in its entirety.

The Assistant Secretary adopted the Administrative Law Judge findings, conclusions and recommendation, and ordered that the complaint be dismissed.

RECOMMENDED DECISION

Findings of Fact and Conclusions of Law

This case arises under Executive Order 11491 as amended (hereinafter referred to as the Order). The complaint alleges that the Pennsylvania Army and Air National Guard (hereinafter referred to as the Activity or Employer) violated Sections 19(a)(1) and (6) of the Order by refusing to process a grievance in accordance with a negotiated grievance procedure provided in a labor management relations agreement entered into by the Activity and the Pennsylvania State Council, Association of Civilian Technicians, Inc., (hereinafter referred to as the Complainant or Association). ^{1/}

Under the terms of a multi-unit labor management relations agreement, the Association is the authorized bargaining representative for all non-supervisory Pennsylvania Army and Air National Guard Wage Board and General Schedule Technicians employed in the State of Pennsylvania. ^{2/} The agreement provides a five step grievance procedure which culminates in arbitration at the option of the Association or the Employer.

^{1/} It is noted that a complaint filed on May 31, 1977, alleged violations of Sections 19(a)(1), (2), (5) and (6) of the Order, and that an amended complaint filed on December 1, 1977, refers to alleged violations of Sections 19(a)(1) and (6) of the Order. The Notice of Hearing on Complaint, dated February 15, 1978, mistakenly includes Sections 19(a)(2) and (5). However, a letter of the same date addressed to the parties by the Regional Administrator in connection with issuance of the Notice of Hearing on Complaint correctly sets forth the issue in the case as involving the question of whether the Activity violated Sections 19(a)(1) and (6) by engaging in conduct alleged in the amended complaint filed on December 1, 1977.

^{2/} The agreement became effective as of May 7, 1976, and was in effect during all periods pertinent herein.

The record reflects that the grievance in question initially related to a proposal to issue a memorandum notifying Walter Combs, a bargaining unit employee, of a ninety-day warning of unsatisfactory job performance. ^{3/} After actual issuance of the memorandum in question, the grievance took the form of an effort to effect removal of the memorandum from the file, and a controversion of the Activity's evaluation of Mr. Combs' job performance. The Association deemed these efforts to be the first step in the negotiated grievance procedure. However, the first-line supervisor refused to take any action concerning the issuance of the memorandum.

The grievance was thereafter reviewed at the second step level by the next higher supervisor, who on February 18, 1977, advised Mr. Combs' shop steward that the Activity had determined that there was sufficient justification for issuance of the memorandum. (Joint Exhibit 3). At this point the Association, through a National Representative, sought to perfect the second step of the grievance procedure by requesting from the Activity, a written decision setting forth elements of information required by the collective bargaining agreement. In addition, the Association sought to escalate the grievance to the third step. (Joint Exhibit 4). The additional details sought, together with a denial of grievability, were provided by the Activity in a March 17, 1977 memorandum signed by the second level supervisor. (Joint Exhibit 5).

^{3/} An official reprimand addressed to Mr. Combs by the Activity in connection with the incident was withdrawn and destroyed. The record revealed that the grievance in question involved the first attempt to use the negotiated grievance procedure as a basis for questioning the issuance of a ninety-day prior warning of unsatisfactory performance. (Tr. 194-195). The Complainant's National Field Representative, a former State Chairman of the Association, and chief negotiator, implied that the applicability of the grievance procedure in this type of case was not entirely free from doubt. (Tr. 192-194).

At a March 15, 1977 meeting, Colonel Paul Rosenberg, a representative of the Activity informed the Complainant, that the grievance was not grievable under the grievance procedure set out in Article VII of the collective bargaining agreement. The meeting, which lasted about two hours, was devoted primarily to the appropriate procedure to be utilized in processing the grievance. It clearly appeared that a great deal of confusion surrounded the disposition of the grievance. The Complainant took the position that the Activity should proceed to step three of the negotiated grievance procedure under the terms of the collective bargaining agreement; however, at the meeting discussion also related to the question of whether Mr. Combs should have proceeded under an entirely different procedure provided in the collective bargaining agreement for disciplinary and adverse action cases, or under a clause requiring a complete "identification of facts" in cases wherein a bargaining unit employee is made the target of a "charge, (or) defamation." ^{4/} However, neither of the last two mentioned portions of the collective bargaining agreement are claimed as a basis for the grievance filed by Mr. Combs. Instead, the Complainant relies entirely upon the ground that Article VII, Section 7.1(a) of the agreement embraces the issue posed by the grievance. This section provides:

Section 7.1 General:

(a) The purpose of this Article is to implement the provisions that pertain to grievances and to establish procedures deemed necessary for all concerned, for the

^{4/} See respectively, Articles I and XII of the agreement. (Respondent's Exhibit 1). Counsel for the Complainant acknowledged that provisions of the agreement are less than clear in this regard. (Tr. 215-216).

consideration of grievances over the interpretation or application of the agreement. A grievance means a request by a Technician or a group of Technicians in the unit for relief concerning any matter not prohibited by a statutory appeals procedure. This negotiated procedure is the exclusive procedure available to the Employer, the Association and the Technicians in the unit for the processing of grievances concerning the interpretation and application of the negotiated agreement.

The Association made it clear that the unfair labor practice complaint rests upon the Activity's refusal to process the grievance under Article VII.

The Activity denies that Section 7.1(a) can be construed as including the Combs grievance, and that therefore the grievance does not fall within the purview of the negotiated grievance procedure. ^{5/}

Although the Activity took the position that the grievance was not grievable under the contract, it offered to process the grievance under regulations promulgated by the Pennsylvania Army and Air National Guard. (Joint Exhibit 7). The alternative procedure suggested involved three steps, the first two of which closely resembled the grievance procedure set out in the collective bargaining agreement. However, the grievance

^{5/} A denial of grievability under the contract was also communicated to the Association prior to the meeting of March 15, 1977 (Tr. 65-66), and on March 25, 1977. (Complainant's Exhibit 3). The agency view is also reflected in letters dated April 26, 1977, June 8, 1977 and June 27, 1977, prepared by the Activity's Personnel Officer. (Respondent Exhibits 3 through 5).

Procedure provided in Pennsylvania Army and Air Force National Guard regulations differed substantially from the negotiated grievance procedure after the first two steps, and the former did not involve the possibility of arbitration. 6/

Section 6(a)(5) of the Order provides that "the Assistant Secretary shall...decide questions as to whether a grievance is subject to a negotiated grievance procedure or subject to arbitration under an agreement as provided in Section 13(d) of this Order." Section 13(d) of the Order provides:

Questions that cannot be resolved by the parties as to whether or not a grievance is on a matter for which a statutory appeal procedure exists,

6/ It is noted that the arbitration provision in the collective bargaining agreement provides that "the Employer or the Association may invoke arbitration over unit employees grievances on matters limited to the application or interpretation of this agreement....Disputes over what is subject to the grievance procedure or arbitration may be referred to the Assistant Secretary of Labor for decision...." (Respondent's Exhibit 1, Article XVIII, Section 18.1).

Prior to the February 6, 1975 amendments of Executive Order 11491, Section 13(a) of the Order limited the scope of the negotiated grievance procedure to the "consideration of grievances over the interpretation or application of the agreement." The collective bargaining agreement involved in this case was, in large measure, negotiated prior to expansion of the permissible scope of negotiated grievance procedure. Although the Association made efforts to expand the scope of the negotiated grievance procedure to the extent allowed after the February 6, 1975 amendment of Section 13(a), these efforts were either not successful or only partially successful. (Tr. 192-193).

shall be referred to the Assistant Secretary for decision. Other questions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, may by agreement of the parties be submitted to arbitration or may be referred to the Assistant Secretary for decision.

The Assistant Secretary has held that a refusal to process a grievance through a negotiated grievance procedure, if without bad faith, does not constitute an unfair labor practice, as a complainant in such cases has a right under Section 13(d) of the Order to file an application requesting the Assistant Secretary to decide questions as to grievability and arbitrability of the grievance involved. National Labor Relations Board Region 17 and National Labor Relations Board, A/SLMR No. 670 (1976); Veterans Administration Hospital, Waco, Texas, A/SLMR No. 735 (1976); Naval Air Rework Facility, A/SLMR no. 849 (1977). In U.S. Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, Assistant Secretary Case No. 42-2649 (CA), FLRC No. 75 A-82 (November 18, 1975), Report No. 91, the Council refused to disturb a ruling of the Assistant Secretary wherein the Assistant Secretary adopted the following language of an Assistant Regional Director:

[I]n the absence of bad faith, grievability and arbitrability questions...are not matters to be resolved under Section 19 [unfair labor practice procedures] of the Order.

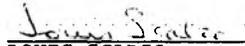
July 25, 1978

Facts developed in this case reflect no evidence of bad faith on the part of the Employer. Moreover, a representative of the Association implied that the applicability of the grievance procedure in this case is not entirely free from doubt, and it was acknowledged that the factual situation presented by the grievance was a case of first impression under the negotiated grievance procedure. Also, it must be noted that the Activity did not in fact refuse to process the grievance under agency regulations.

Based on the record it would not be possible to conclude that the Activity was in bad faith when refusing to process the grievance in accordance with the grievance procedure provided in the collective bargaining agreement.

RECOMMENDATION

Having found that the Activity did not violate Sections 19(a)(1) and (6) of the Order by refusing to process the grievance submitted, I recommend that the complaint herein be dismissed in its entirety.


LOUIS SCALZO
Administrative Law Judge

Dated: May 19, 1978
Washington, DC

LS:jp

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE AIR FORCE,
DAVIS-MONTHAN AIR FORCE BASE,
TUCSON, ARIZONA
A/SLMR No. 1088

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2924, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to negotiate with the Complainant over the implementation and impact of a reduction-in-force (RIF). The Respondent argued that under the parties' negotiated agreement it is obligated to notify the Complainant and negotiate the impact and implementation of a RIF only when ten or more permanent employees in any one competitive level are affected. The Respondent claimed that in the RIF herein, less than ten permanent employees in any one competitive level were affected.

The Administrative Law Judge concluded that the Respondent had not engaged in conduct violative of the Order. He found that as the parties' negotiated agreement limited the Respondent's obligation to notify the Complainant concerning RIFs, and that since less than ten employees in any one competitive level were affected by the subject RIF, the Respondent was not obligated to notify the Complainant in this regard. Further, the Administrative Law Judge found that there was no proof that the Respondent misinterpreted the meaning of "competitive level" to its advantage, thus limiting the number of employees in one competitive level. He therefore recommended that the complaint be dismissed.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
DAVIS-MONTHAN AIR FORCE BASE,
TUCSON, ARIZONA

Respondent

and

Case No. 72-6864(CA)

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2924, AFL-CIO

Complainant

DECISION AND ORDER

On April 18, 1978, Administrative Law Judge Edward C. Burch issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order and the Respondent filed an answering brief in opposition to the Complainant's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, including the Complainant's exceptions and the Respondent's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-6864(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
July 25, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judge

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(415) 556-05

In the Matter of

DEPARTMENT OF THE AIR FORCE
DAVIS-MONTHAN AIR FORCE BASE
TUSCON, ARIZONA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2924, AFL-CIO

Complainant

CASE NO. 72-6864 (CA)

Richard H. Webster

American Federation of Government Employees
AFL-CIO, P. O. Box 14385
Phoenix, Arizona 85603

For the Complainant

Edmund K. Brehl, Esquire

Captain, United States Air Force
Labor Relations Counsel
Tactical Air Command

For the Respondent

Before: EDWARD C. BURCH
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to an amended complaint filed by the American Federation of Government Employees, Local 2924, AFL-CIO, ("The Union"), under date of June 28, 1977, against the Department of the Air Force, Davis-Monthan Air Force Base, Tucson, Arizona, a Notice of Hearing on Complaint was issued by the Regional Administrator for the San Francisco region September 13, 1977.

The Union alleged respondent violated sections 19(a)(1) and 19(a)(6) of Executive Order 11491, as amended, by refusing to negotiate with the Union over the implementation and impact of a reduction in force (RIF) which occurred February 18, 1977, at the air force base commissary. The Union contended that in excess of ten persons of the same competitive level were affected. Respondent contended the requirement of notification was waived by the collective bargaining agreement signed in June of 1976, between respondent and the Union, which provided for notification only where the RIF affected ten or more employees of the same competitive level. It was contended fewer than ten employees of the same competitive level were here affected.

A hearing was held in Tucson, Arizona, November 10, 1977, at which time exhibits were received and witnesses examined.

Upon the basis of the entire record the following findings of fact, conclusions and recommendations are made.

Findings of Fact

The present unfair labor practice charge had its conception in 1975, while the now effective collective bargaining agreement was being negotiated. The parties, after weeks of negotiations, remained apart on many issues. One of those issues was the prior contractual provision that respondent need notify the Union of a proposed reduction in force only where ten or more employees in any one competitive level were to be affected. The Union wished to be advised, under the new agreement, so that they might negotiate on implementation and impact when any employee was to be the subject of a RIF. Respondent held out for the old provision.

A mediator was brought into the negotiations. He suggested, and both sides agreed, that the outstanding issues be reduced to five each. Otherwise the contract was to remain as before. Notification in the event of any RIF was not one of the five issues selected by the Union. Hence, the contractual provision was to remain as before. When the new agreement was signed in June of 1976, Article 5 read as follows:

MATTERS FOR CONSULTATION AND NEGOTIATION

Section 1.

It is agreed that matters appropriate for consultation and negotiation between

the parties shall include personnel policies and working conditions, including but not limited to such matters as safety, training, labor management cooperation, employee services, methods of adjusting grievances, granting leave, promotion plans, demotion practices, pay practices, reduction in force practices, and hours of work which are within the discretion of the employer. These matters relate to policy determinations only, not to individual satisfactions.

Article 27 read as follows:

REDUCTION IN FORCE

The employer agrees to notify the union of proposed reduction in force affecting ten or more permanent employees in any one competitive level. The employer further agrees that it will notify the union as far in advance as practicable giving the approximate number of employees and competitive level to be affected as known at that time, the date and action to be effected, and the reason for the reduction in force. Reduction in force, for the purpose of this paragraph, is defined in the Federal Personnel Manual. The union agrees to convey the information thus received objectively to the employees when queried.

It is clear from the evidence that the Union negotiators were not pleased with the language of Article 27. Nevertheless, the contract was signed on behalf of both the respondent and the Union June 7, 1976, and was approved by the Acting Director of Civilian Personnel June 29, 1976.

As a result of a directive from Headquarters, Air Force Commissary Services, deleting positions, a RIF was implemented by respondent on February 18, 1977. The Union was given no notification of the RIF prior to its implementation. Respondent purposely gave no notification because it had determined that fewer than ten persons of the same competitive level would be affected. Respondent concluded there was no requirement notice be given.

When word of the RIF became known the Union, not unexpectedly, was most concerned.

Union's Contentions

It is the contention of the Union that the collective bargaining agreement was signed under "extreme pressure." It is also contended that respondent misinterprets the meaning of "competitive level." It further contends management misconstrues the meaning of "affected." That is, the Union states that even if fewer than ten persons of the same competitive level are the victims of a RIF, because of seniority and "bumping rights" those actually RIF'd can take the jobs of others, thus creating a "domino" effect.

Respondent's Contentions

Respondent states that "What the Union failed to obtain at the bargaining table, it cannot now secure through these unfair labor practice proceedings." That the Union negotiators were under "extreme pressure" when the five issues were retained, and at the time the agreement was signed, is immaterial. Respondent states it does not incorrectly interpret the meaning of "competitive level" because competitive levels are determined by the provisions of the Federal Personnel Manual. Respondent admits there is a domino effect, but counters by stating that here, with the bumping rights, there were a total of 13 people affected. Of that 13, no more than eight were of the same competitive level. Finally, respondent contends this matter should be resolved under the negotiated grievance procedure rather than under the Unfair Labor Practice provisions of the Order.

Respondent's Motion to Dismiss

Respondent contends the negotiated agreement of the parties provides for the grievance procedure as the exclusive means to resolve this dispute. Article 33 of the agreement provides, in applicable part:

GRIEVANCE AND ARBITRATION PROCEDURE

Section 1.

The purpose of this article is to establish procedures for the consideration of the grievances and will be the exclusive procedure available to the employer, the union, and the employees and the units for absolving grievances. This procedure will not cover matters for which statutory appeals procedures exist. Such matters will be presented under an authorized procedure available for that purpose.

Section 2.

A grievance is defined to be any dispute or complaint between the employer and the union or an employee or employees covered by this agreement involving the interpretation or application of this agreement. The employer agrees that those policies and regulations which affect working conditions of employees in the unit shall be applied fairly and equitably insofar as they are within the employer's discretion.

Section 19(d) of the Executive Order provides, however:

Issues which can properly be raised under an appeals procedure may not be raised under this section. Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section but not under both procedures.

A like motion was made in General Services Administration, Region 5, A/SLMR No. 528. The agreement between the parties there had like language that the grievance procedure shall be the exclusive procedure available. The Assistant Secretary adopted without exception the Administrative Law Judge's recommended decision, which stated, in part:

A breach of contract can be an Unfair Labor Practice. When it is, it may be presented either as a grievance under the grievance procedure or it may be presented as an Unfair Labor Practice under the Executive Order. That is exactly what is provided in section 19(d) of the Order.

See also Department of the Navy, Portsmouth Naval Shipyard, A/SLMR No. 508.

On the basis of section 19(d) of the Executive Order and the above authority, respondent's Motion to Dismiss is denied.

Discussion, Further Findings of Fact and Conclusion

There is here no contention the Union had any right to negotiate on whether a RIF would occur. It is well established no such right exists. Department of the Navy, Great Lakes Naval Hospital, A/SLMR No. 289. It is equally well established, absent an agreement to the contrary, that there is an obligation to give notice of an impending RIF and to provide an opportunity to meet and confer as to the procedures management intends to observe in effecting the RIF (implementation) and to meet and confer in good faith concerning the impact of the RIF decision. Department of the Navy, supra; Department of the Army, Fort Monmouth, New Jersey, A/SLMR No. 679.

Article five of the collective bargaining agreement states, that as a matter of policy determination (as opposed to individual dissatisfaction) RIF is a matter for consultation and negotiation. That requirement is limited by Article 27, however, in which it is specifically provided the employer agrees to notify the Union of a proposed RIF affecting ten or more permanent employees in any one competitive level.

Article 27 was the result of difficult negotiations. It was a concession by the Union to reach an overall ultimate agreement. The Article is binding upon both parties, for it is established there can, by contract, be a waiver of what is normally an established right. Veterans Administration Center, Bath, New York, A/SLMR No. 335.

Ten employees who received rift notices were identified by the Union. There was also a general conclusion that these ten employees would have bumping rights and thus affect up to twenty employees. There was no proof, by the Union, of the actual number of employees affected. Nor was there any proof of the number of affected employees in the same competitive level. The Union admitted that of the ten who received RIF notices, not all were of the same competitive level.

29 C.F.R. § 203.15 provides:

A complainant in asserting a violation of the order shall have the burden of proving the allegations of the complaint by a preponderance of the evidence.

General conclusions, without foundation, and without establishing the numbers affected in the same competitive level, does not constitute sufficient evidence to meet the burden of proof.

Respondent, on the other hand, established that a total of thirteen employees were affected. No more than eight were in the same competitive level.

There was a general allegation by the Union that respondent misinterpreted the meaning of competitive level to its advantage, thus limiting the number of employees in one competitive level. Again, there was no proof of this assertion.

Article 27 of the negotiated agreement provides that a RIF for the purposes of the agreement, is defined in the Federal Personnel Manual. The manual, as a part of the RIF procedure, defines competitive level. In general, competitive level is defined as one where there is "similarity of duties, responsibilities, pay schedule, and terms of appointment; and similarity of requirements for experience, training, skills and aptitudes."

Karen L. Young, an employer relations specialist, a creditable witness, testified the competitive levels for this RIF were determined in the usual manner using the criteria of the Federal Personnel Manual. Her testimony established that the highest number in one competitive level affected was eight, consisting of seven store workers and one warehouseman. The remaining five affected employees fell into three other competitive levels.

In conclusion, no violation of the Executive Order has been established.

Recommendation

Having found that respondent has not engaged in conduct violative of sections 19(a)(1) and 19(a)(6) of the Executive Order, I recommend that the complaint be dismissed in its entirety.



EDWARD C. BURCH
Administrative Law Judge

Date: April 18, 1978
San Francisco, California

ECB:tl

July 26, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
NAVAL AIR REWORK FACILITY,
ALAMEDA, CALIFORNIA
A/SLMR No. 1089

This case involved eight unfair labor practice complaints filed by the International Association of Machinists and Aerospace Workers, Lodge No. 739, AFL-CIO (IAM) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by "unilaterally" announcing certain restrictions and limitations on the use of official time by IAM officers and officials without consultation with the IAM.

The Administrative Law Judge found that the Respondent had violated Section 19(a)(1) and (6) of the Order. He also found independent Section 19(a)(1) violations in three instances. In this connection, he concluded that the Respondent's interpretation of the parties' negotiated agreement, which resulted in the announced restrictions and limitations, constituted unilateral changes in conditions of employment and patent breaches of the negotiated agreement of such a magnitude as to rise to the level of unfair labor practices. The Administrative Law Judge predicated his conclusion that the Respondent violated the Order on his finding that it had interpreted the parties' negotiated agreement without prior "consultation" with the IAM. He concluded that the interpretation of the agreement was "necessary" but not a "unilateral" interpretation. Thus, he implied that by making a unilateral interpretation of the parties' negotiated agreement without bargaining with the IAM, the Respondent had, in effect, engaged in conduct which was per se violative of the Order, regardless of the reasonableness of that interpretation, and that such action constituted a clear and patent breach of the parties' negotiated agreement.

The Assistant Secretary found, contrary to the Administrative Law Judge, that the Respondent did not violate Section 19(a)(1) and (6) of the Order. He noted that a party to a negotiated agreement acts at its peril in interpreting and applying such agreement. Thus, if the Respondent's interpretation of the negotiated agreement was such that it resulted in a clear and patent breach of the terms of the agreement, then that interpretation could also rise to the level of an unfair labor practice as well as being a matter of contract interpretation. On the other hand, if the Respondent's interpretation was arguably within the terms of the negotiated agreement, then such interpretation would simply be a matter of contract interpretation to be resolved through the parties' grievance and arbitration machinery.

Under the circumstances herein, the Assistant Secretary found that as the record was insufficient to establish that the NARF's conduct constituted unilateral changes from past practices, and as it was arguable that the NARF's announcements concerning official time constituted reasonable interpretations of the parties' negotiated agreement, such announcements did not, standing alone, constitute violations of Section 19(a)(1) and (6) of the Order. Moreover, as the record did not reflect any allegations of an independent Section 19(a)(1) violation in any of the subject complaints, the Assistant Secretary did not adopt the Administrative Law Judge's findings of such independent Section 19(a)(1) violations.

Accordingly, he ordered that the complaints be dismissed in their entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL AIR REWORK FACILITY,
ALAMEDA, CALIFORNIA

Respondent

and

Case Nos. 70-5487(CA)
70-5488(CA)
70-5489(CA)
70-5490(CA)
70-5491(CA)
70-5492(CA)
70-5493(CA)
70-5494(CA)

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, LODGE No. 739, AFL-CIO

Complainant

DECISION AND ORDER

On February 3, 1978, Administrative Law Judge Ben H. Walley issued his Recommended Decision and Order in the above-entitled consolidated proceeding, finding that the Respondent had engaged in certain of the alleged unfair labor practices and recommending that it take affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge also recommended dismissal of the complaint in Case No. 70-5490(CA). Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject cases, including the Respondent's exceptions, I hereby adopt the Administrative Law Judge's, findings, conclusions and recommendations, only to the extent consistent herewith.

The Administrative Law Judge found that the unfair labor practice complaints in this matter were related to announcements alleged to have been made by the Respondent at a union-management meeting held on August 2, 1976. He noted that at the meeting the Respondent announced certain conclusions it had reached concerning the use of official time by union officers required to administer the parties' negotiated agreement. The Administrative Law Judge concluded that the Respondent's failure to negotiate or consult on these matters constituted a clear and patent breach of the parties' negotiated agreement and a violation of the

Order. Contrary to the Administrative Law Judge, I find that the Respondent's actions did not rise to the level of unfair labor practices and, therefore, the complaints herein should be dismissed in their entirety.

The Complainant, International Association of Machinists and Aerospace Workers, Lodge No. 739, AFL-CIO, hereinafter called IAM, was certified on August 1, 1975, as the exclusive representative for, among others, a unit of all Wage Grade employees at the Respondent, the Naval Air Rework Facility, Alameda, California, hereinafter called NARF. Thereafter, the parties entered into a negotiated agreement which became effective on October 15, 1975. The record indicates that the parties met on February 5, 1976, pursuant to Article VIII (Union-Management Meetings) of their negotiated agreement to discuss what, in management's view, was considered "unnecessary" and "excessive" usage of official time on the part of IAM officers and stewards. 1/ The Administrative Law Judge found that the meeting was not a negotiation on use of official time. However, he noted that there was general agreement among the parties to improve, if not eliminate, the use of "excessive" official time, although no attempt was made to define the terms "necessary" or "excessive" time. Apparently, the meeting did not achieve the desired results and the parties met again on August 2, 1976, at which time the Respondent announced several conclusions it had reached on the use of official time, as more particularly set forth by the Administrative Law Judge on page 4 of his Recommended Decision and Order and which form the basis of the instant complaints. Although the Administrative Law Judge noted that the announcements were to be implemented immediately, he made no finding, and the record is inconclusive, as to which, if any, of the announcements were, in fact, implemented. Each of the subsequently filed unfair labor practice complaints in this matter allege violations of Section 19(a)(1) and (6) of the Order relating to specific statements regarding the use of official time allegedly made by the Respondent at the meeting of August 2nd. In this regard, the IAM alleged, generally, that the NARF "unilaterally" announced restrictions and limitations on the use of official time by IAM officers and officials, and that in each instance such announcements were made "without consultation" with the IAM.

Specifically, in Case No. 70-5487(CA), the IAM alleged that the NARF improperly required that all IAM staff representatives, prior to entering a work area, must state their purpose in speaking to unit employees or management representatives prior to any representation activities.

In Case No. 70-5488(CA), the IAM alleged that the NARF improperly required all IAM stewards and officers to advise their respective

1/ Article VI, Section 4 of the parties' negotiated agreement states, in pertinent part, that stewards "shall be allowed necessary time to investigate" pending grievances. Section 5 of Article VI of the agreement states, in pertinent part, that employees involved in union representational activities "...shall guard against the use of excessive time."

supervisors of the articles and sections of the negotiated agreement giving rise to the request for union representation prior to their contacting the unit employee requesting representation. Moreover, those stewards or officers who did not identify or were unable to identify the articles and sections of the agreement, should the supervisor agree to release them, would be given only one hour to carry out their representation functions.

Case No. 70-5489(CA) concerned the allegedly improper addition of a "return time" block to the shop passes currently in use for stewards and officers and the additional requirement that stewards and officers estimate their return time to their respective work areas prior to leaving on union business.

In Case No. 70-5490(CA), the IAM alleged that the NARF improperly announced that stewards and officers were involving themselves in counseling unit employees rather than investigating complaints and that the NARF would not pay for such activity since the NARF employed paid counselors who were to be used by unit employees, not IAM representatives.

In Case No. 70-5491(CA), the IAM alleged that the NARF improperly announced that there could be no complaint by a unit employee "until something has happened adversely which is identifiable in the negotiated agreement." Thus, in the IAM's view, a supervisor would make a decision as to whether there is a bona fide complaint.

Case No. 70-5492(CA) concerned the NARF's alleged improper policy of not permitting stewards or officers to be on the clock for any time spent researching agency rules and regulations.

Finally, in Case Nos. 70-5493(CA) and 70-5494(CA), the IAM alleged that the NARF improperly imposed on stewards and officers an immediate limitation, and on the President of Lodge No. 739, a limitation by December 31, 1976, of 20 percent of scheduled work hours in administering the parties' negotiated agreement and representing bargaining unit employees.

The Administrative Law Judge concluded that the NARF's interpretations of the parties' negotiated agreement "without consultation" with the IAM, as manifested by its August 2nd announcements, constituted unilateral changes in conditions of employment and patent breaches of the parties' negotiated agreement of such a magnitude as to rise to the level of unfair labor practices. Thus, he concluded that the NARF violated Section 19(a)(1) and (6) of the Order in Case Nos. 70-5488(CA), 70-5489(CA), 70-5492(CA), 70-5493(CA) and 70-5494(CA) and independently violated Section 19(a)(1) of the Order in Case Nos. 70-5487(CA), 70-5488(CA) and 70-5491(CA). In regard to Case No. 70-5490(CA), he found that the evidence did not support the complaint and recommended that it be dismissed.

While I agree with the Administrative Law Judge's conclusion that the evidence does not support a finding of violation in Case No. 70-5490(CA),

I find, with regard to the remaining complaints, and contrary to the Administrative Law Judge, that the NARF's conduct was not violative of Section 19(a)(1) and (6) of the Order. 2/

As indicated above, the Administrative Law Judge predicated his conclusion that the NARF had violated the Order in the remaining seven complaints on the basis that the NARF had interpreted the parties' negotiated agreement without prior "consultation" or negotiation with the IAM. In this regard, he concluded that interpretation of the parties' negotiated agreement was "necessary" but that "unilateral" interpretation was improper. Thus, he implied that the NARF could interpret the agreement, but only after negotiation with the IAM.

In my view, a party to a negotiated agreement acts at its peril in interpreting and applying such agreement. Thus, if the NARF's interpretation of the negotiated agreement was such that it resulted in a clear and patent breach of the terms of the agreement, then such interpretation could rise to the level of an unfair labor practice as well as being a matter of contract interpretation. On the other hand, if the NARF's interpretation was arguably within the terms of the negotiated agreement, then such interpretation would merely be a matter of contract interpretation to be resolved through the parties' grievance and arbitration machinery. In this context, I disagree with the Administrative Law Judge's apparent conclusion that by making a "unilateral" interpretation of the parties' negotiated agreement, the NARF had, in effect, engaged in conduct which was per se violative of the Order, regardless of the reasonableness of that interpretation, and that such interpretation made without bargaining with the exclusive representative, constituted a clear and patent breach of the parties' negotiated agreement. 4/

2/ As indicated above, the Administrative Law Judge found violations of Section 19(a)(1) of the Order in Case No. 70-5487(CA), 70-5488(CA) and 70-5491(CA). Since the record reflects that there were no allegations of an independent Section 19(a)(1) violation in any of these cases, I conclude that there is no basis for his finding of such independent 19(a)(1) violations.

3/ See Watervliet Arsenal, U.S. Army Armament Command, Watervliet, New York, 6 A/SLMR 526, A/SLMR No. 726 (1976); Department of Army, Watervliet Arsenal, Watervliet, New York, 6 A/SLMR 127, A/SLMR 624 (1976); Federal Aviation Administration, Muskegan Air Traffic Control Tower, 5 A/SLMR No. 457, A/SLMR No. 534 (1975); and General Services Administration, Region 5, Public Buildings Service, Chicago Field Offices 5 A/SLMR 424, A/SLMR No. 528 (1975).

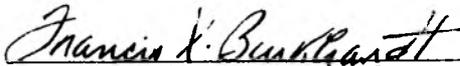
4/ Moreover, although the IAM alleged that the August 2nd announcements constituted unilateral changes in past practices or existing conditions of employment, it is noted that the Administrative Law Judge made no specific findings with respect to whether the announcements constituted changes from existing practices. I find that the evidence in this regard is inconclusive and that the IAM has not sustained its burden of proving such unilateral changes.

In regard to the Section 19(a)(1) and (6) violations alleged in Case Nos. 70-5488(CA), 70-5489(CA), 70-5492(CA), 70-5493(CA) and 70-5494(CA), I find that the language of the parties' negotiated agreement, in particular Article VI, Sections 4, 5 and 10, and Article XXVIII, is susceptible to varying reasonable interpretations. Thus, as the record is insufficient to establish that the NARF's conduct constituted unilateral changes from past practices, and as it is arguable that the NARF's August 2nd announcements in regard to the above-numbered complaints constituted reasonable interpretations of the parties' agreement, I conclude that such announcements did not, standing alone, constitute violations of Section 19(a)(1) and (6) of the Order. Accordingly, I shall order that all of the complaints herein be dismissed in their entirety.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 70-5487(CA), 70-5488(CA), 70-5489(CA), 70-5490(CA), 70-5491(CA), 70-5492(CA), 70-5493(CA) and 70-5494(CA) be, and they hereby are, dismissed.

Dated, Washington, D.C.
July 26, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

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In the Matter of)

DEPARTMENT OF THE NAVY)
NAVAL AIR REWORK FACILITY)
ALAMEDA, CALIFORNIA)

Respondent)

and)

INTERNATIONAL ASSOCIATION OF)
MACHINISTS AND AEROSPACE WORKERS,)
AFL-CIO, NAVAL AIRCRAFT LODGE NO. 739)
HAYWARD, CALIFORNIA)

Complainant)

CASE NOS.

70-5487(CA)
70-5488(CA)
70-5489(CA)
70-5490(CA)
70-5491(CA)
70-5492(CA)
70-5493(CA)
70-5494(CA)

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For the Complainant

Before: BEN H. WALLEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case(s)

On October 19, 1976, a complaint was filed on each of the aforesaid styled and numbered cases by International Association of Aerospace Workers, AFL-CIO, Naval Aircraft

Lodge No. 739, Hayward, California, 94545, (hereafter referred to as Complainant), against Naval Air Rework Facility, Department of the Navy, Naval Air Station, Alameda, California, 94501 (hereafter referred to as Respondent); each of said complaints alleging a violation of Executive Order 11491, as amended, particularly section 19(a), subsections (1) and (6), and several of said complaints additionally alleging violations of subsections (2) and (3) of said Order (violations of additional subsections are of no significance due to amendments set out below) (Asst. Sec. Ex. 1(a)1(h)).

On March 24, 1977, an amended complaint was filed in cases numbered 70-5488, '5489, '5490, '5491, '5493 and '5494; each such amendment deleting the allegations of violations of additional subsections of the Order, leaving the originals and each Amended Complaint to charge only violations of section 19(a), subsections (1) and (6) of said Order (Asst. Sec. Ex. 1(i)-1(n)).

On April 13, 1977, after due consideration and to effectuate the purposes of the Order the Regional Administrator, Labor-Management Services Administration, issued his Order consolidating all of said eight (8) cases (Asst. Sec. Ex. 1(o)), and on said date issued Notice of Consolidated Hearing on said Complaints, as amended, to be held on May 16, 1977, in San Francisco, California.

While each of the aforesaid eight (8) complaints alleges a violation of section 19(a)(1) and (6) of the Order, and although the factual situations upon which each separate complaint is founded differs somewhat from the others, they each arise out of the same meeting and have been consolidated. However, where the "factual situation" requires particular disposition to a resolution of the case, such differences will be observed to the extent considered necessary to resolve the entire problem(s).

The basic issue to be addressed and identified by the Regional Administrator was: Whether Respondent's announcements at the August 2, 1976, meeting with Complainant regarding the representational activities of unit employees constituted violations of section 19(a)(1) and (6) of the Order by unilaterally establishing general limitations on and the procedures for the use of official duty time for representational purposes for employee representatives of the I.A.M.? The "general limitations" established and the procedures for the use of official duty time will be identified as they unfold.

The hearing was held on May 16, 1977, and all parties were afforded full opportunity to be heard, to offer, examine and cross-examine witnesses, to introduce evidence considered relevant to their respective positions in the premises, and at the conclusion of the hearing to argue their position orally, which was waived, and to file briefs and argument.

After hearing the testimony of the witnesses and observing their demeanor, having reviewed the exhibits, briefs and the entire record, I make the following Findings of Fact, Conclusions and Recommendations.

Findings of Fact

1. During 1975, an agreement (hereafter referred to as such) was negotiated by and between the parties hereto under the provisions of Executive Order 11491, as amended, (hereafter referred to as Order), which was approved and became effective on October 15, 1975. At all times material to the issues here involved said agreement was in full force and effect. A copy of said agreement was offered and admitted into evidence as Union Exhibit #1.

2. According to the terms of the agreement, the Union, acting through its officers and representatives, is the exclusive representative of all employees in the unit and here involved, and Respondent, acting by and through the named individuals, is the responsible party and subject to the Decision and Order of the Assistant Secretary for Labor Management Relations.

3. The use of official duty time by the Union in the administration of the agreement was a matter for observation and inquiry from the outset and was addressed in a joint meeting on February 5, 1976. At this meeting management stated its position that if the same amount of time that had been used in the transition period should continue at the same rate, it would be considered "excessive." There was general agreement reached on a method or procedure to improve, if not eliminate the use of "excessive" time (Cl. Ex. 2 and 3) but no changes were made in the language of the original agreement. This did not accomplish the desired results and a management meeting was held on May 11, 1976, at which time management had concluded that "some of the officers continue to use excessive time in the administration of the negotiated agreement." It was decided that management must reach a mutual understanding as to what is considered "reasonable" or "necessary" time (Cl. Ex. 13). It appeared and was reported at this meeting that some of the officers were

utilizing in excess of 40 percent of their time to administer the agreement. There is nothing of record to reflect that the union was present or participated in this meeting or was informed of management's decisions or planned course of action.

Nevertheless, on August 2, 1976, a Union-Management meeting was conducted, at which time management announced certain conclusions it had reached on the use of official time by union officers required to administer the agreement. First, and specifically, every union representative will spend a majority of his time working on the product; that all union officers and the chief steward (except the President) shall spend no more than 20 percent of their time in administering the agreement; and, the President will begin immediately spending a majority of his time on the work product. Further, the President is to reduce the time spent on administering the contract to 20 percent by December 31, 1976. In addition, plant visitations by non-unit union representatives and Union officers and stewards being granted permission to leave their assigned work area to conduct authorized contractual business were addressed.

Non-Unit Union representatives were to be governed by regulations dealing with visitors. They were to register with a receptionist, "stating the nature of the business, who is to be visited, where, and for how long." He is to be escorted to the person visited, to meet only with those individuals identified to the receptionist, and cannot enter a restricted or security area without prior approval from the Division Director. Employees were to obtain permission from the supervisor prior to leaving the work area to meet with visitors during working hours.

Union officers and stewards were to comply with Article VI of the Agreement and the procedures allegedly agreed to at the meeting of February 5, 1976. Specifically, they were to obtain permission to leave their job from their supervisor and advise who they were going to see and what shop they were going to visit. The supervisors will determine if the business is appropriate and indicate on the shop pass the amount of time authorized for stewards and verbally advise officers of the time of expected return. If the union representative cannot identify the exact nature of his business, the supervisor may authorize a maximum of one hour. All employees are required to obtain permission from the supervisor to leave the job area to discuss a complaint or grievance. And, the union is authorized official duty time for researching agency rules directly related to a specific complaint or grievance.

The foregoing "limitations" and "procedures" were to become effective immediately following the meeting at which they were announced, except the delays specified, and they are the primary source of the alleged unilateral actions of management in violation of the agreement.

Conclusions

The provisions of the Agreement relevant to the use of "official duty time" by representatives of the bargaining unit are found in Article VI, sections 4, 5, 9 and 10, and the procedures for its use are generally outlined in Article VI and Article XXVIII. The language used in these articles to measure or qualify the use of time are: (1) The "necessary amount" of time; (2) shall be allowed "necessary time" to investigate; (3) guard against the use of "excessive time"; (4) conduct their business in an "efficient manner"; and (5) for certain specified duties not here involved, "shall not exceed an average of 100 hours per year." Article VI, section 5.C., particularly governs use of the Shop/Pass and Article VI, section 2 provides for the designation of twenty-one (21) shop stewards to assure each employee ready access to the services of a steward.

Obviously, the use of official time by employee representatives to process grievances was a matter of concern from the effective date of the agreement. Two meetings, one on February 5, 1976, and one on May 11, 1976, had been held in an attempt to find a "method or procedure" to reduce the amounts of such time required. Admittedly, considerable progress had been made. But, none of the contacts or meetings of the parties had ever discussed placing a "limitation" on the time to be used in processing grievances, only procedures that were thought to be a means of accelerating the service and thereby reduce the need for it.

The meeting of February 6, 1976, a joint meeting of the parties, was not a negotiation of the use of "official duty time" for processing grievances. No attempt was made to define "necessary time", "excessive time", or the use of time in an "efficient manner". The meeting of Respondent on May 11, 1976, did discuss "necessary" and "excessive" time but the decisions reached, if any, were not communicated to the union.

It was announced by Respondent on August 2, 1976, that effective immediately, the use of official time by representatives of the employees, except the union president, will be limited to not to exceed 20 percent of their time, and

the president will begin immediately spending a majority of his time on the work product and will, by December 31, 1976, reduce his representational time to 20 percent of his time. These limitations were directed to the officers of the union, the Grievance Chairman and the Chief Steward. It had been determined on May 12, 1976, that: "Overall the 29 stewards are utilizing less than 10 percent of their time in the administration of the agreement. The majority of the stewards are utilizing approximately 5 percent of their time in the administration of the agreement (Cl. Ex. 13). Actually, only two (2) stewards were identified as using an "excessive amount of time" in relation to other stewards (Cl. Ex. 8). These announcements without prior consultation as good faith bargaining, were a unilateral change in a condition of employment.

It is well settled, both under the Executive Order applicable to public employees and the National Labor Relations Act applicable to employer-employee relations in the private sector, that a unilateral change in a condition of employment without prior consultation or good faith bargaining is violative of sections 19(a)(1) and (6) of the Executive Order and sections 8(a)(1) and (5) of the National Labor Relations Act, respectively. Also, it is well settled that in the field of management prerogative, i.e., the rights reserved under section 12(b) of the Order, and employer may make unilateral changes provided that prior to the institution of such changes it gives adequate notice and upon request bargains and/or consults with the union concerning the impact on unit employees.

In the instant case there was in effect an agreement which recognized that "official duty time" may be used by unit employee representatives while investigating and resolving complaints and grievances. Since the agreement provides for the use of "official duty time" for its administration and Respondent has announced limitations on its use, the question has been raised: (1) When does the alleged breach of the terms of an agreement constitute a unilateral change in its terms that rises to the level of an unfair labor practice; or (2) when does it present a question of interpretation of an agreement to be resolved through the processes provided by the agreement, i.e., the grievance-arbitration procedure? The question was answered in General Services Administration Region 5 Public Buildings Service, Chicago Field Offices, A/SLMR No. 528, where the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge when he observed that: "(a) breach of contract can be not only a breach but under certain circumstances

can be also an unfair labor practice. For example, if sufficiently flagrant and persistent, a breach of contract may rise to the seriousness of a unilateral change in the contract and hence a violation of the Executive Order." He went on to observe that if it involved contract interpretation, if an unfair labor practice is alleged, "it must be established that the breach was so patent as to imply that the Respondent could not reasonably have thought otherwise and thereby engaged in an attempted unilateral change violative of the Order."

Respondent contends that the statements made by its representatives at the meeting held on August 2, 1976, were at most, good faith interpretation of the negotiated agreement and could not have constituted a violation of the Executive Order. Therefore, if there are differences of opinion, they should be resolved within the processes of the agreement, i.e., the grievance-arbitration procedures, relying on Department of the Air Force, Base Procurement Office, Vandenburg Air Force Base, California, FLRC No. 75A-25.

As mentioned above, the joint meeting of February 5, 1976, was a general discussion of a problem and all parties committed themselves to a solution. Considerable progress had been made but Respondent was not satisfied and it held a meeting on May 11, 1976, discussed "necessary" and "excessive" time and decided on a course of action, directed certain persons present to make specified preparations but did not communicate these decisions or procedures to the union. Instead, on August 2, 1976, without prior disclosure and to become effective immediately, it was announced by Respondent that the limitation and procedures set out above would be observed.

I find and conclude that the acts and actions of Respondent in attempting to put into effect, immediately, "limitation" on the use of official duty time, and to prescribe specific "procedures" for the use of such time, which had been under active consideration by Respondent for some three months prior thereto, to be a "patent" breach of the agreement and of such magnitude as to be tantamount to and was a unilateral change in a condition of employment, without prior consultation or good faith bargaining, and is a violation of section 19(a)(1) and (6) of the Executive Order. San Antonio Air Logistics Center, San Antonio Air Material Area (AFLC), Kelly Air Force Base, Texas, A/SLMR No. 540; Watervliet Arsenal, U. S. Army Armament Command, Watervliet, New York, A/SLMR No. 726.

Since I find that the conduct of Respondent was a patent breach of the agreement, I do not believe that Respondent is entitled to the protection of the principles enunciated in Vandenburg Air Force Case, A/SLMR No. 485, FLRC No. 75A-25, supra, nor do I believe that its actions come within the provisions of section 20 of the Order. The use of "official time" here involved was representational time authorized by the agreement and the "limitations" had not been set out therein. Interpretation was necessary, but not "unilateral" interpretation.

In summary and in addition to the foregoing, I find and conclude that the evidence of records supports the following specifics:

Case No. 70-5487:

Paragraph A - This charge is within the terms of the agreement and not a violation and should be dismissed.

Paragraph B - Insofar as I.A.M. staff representatives are required to state the "purpose" of their visits, it is a violation of section 19(a)(1) of the Order.

Case No. 70-5488, as amended:

Paragraph A - Requiring representatives to advise supervisors the particular article and section of the agreement violated and allowing supervisors to determine its appropriateness is a violation of section 19(a)(1).

Paragraph B - Failing to identify the particular article and section involved and limiting the time for representational service, without prior consultation, is a violation of section 19(a)(1) and (6).

Case No. 70-5489:

Paragraphs A and B Requiring any procedure which "limits the time" used in representational activities, without prior consultation, is a violation of section 19(a)(1) and (6).

Case No. 70-5490:

I find that the evidence of record does not support this charge and should be dismissed in its entirety.

Case No. 70-5491:

While it is true that there can be no complaint until something adverse has happened, the decision of such cannot

be reserved to a supervisor exclusively. Therefore, it is a violation of section 19(a)(1).

Case No. 70-5492:

Depriving I.A.M. staff officers of the use of official duty time to make appropriate research of agency rules and regulations, without prior consultation, is a violation of section 19(a)(1) and (6).

Case No. 70-5493:

We are not required to determine the reasonableness of the "limitation", only that it has been imposed. Therefore, the imposition of time limitations on the use of official duty time, without prior consultation, is a violation of section 19(a)(1) and (6).

Case No. 70-5494, as amended:

The imposition of time limitations on the use of official time spent in administering the agreement, without prior consultation, is a violation of section 19(a)(1) and (6).

Recommendations

Based upon the foregoing Findings of Fact and Conclusions, and therein having found that Respondent has engaged in certain conduct prohibited by section 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following Order designed to effectuate the purposes and policies of the Order.

Recommended Order

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Naval Air Rework Facility, Department of the Navy, Alameda, California 94501, shall:

1. Cease and desist from:

(a) Unilaterally changing the policy or regulations governing visitations of staff representatives of the International Association of Machinist and Aerospace Workers, AFL-CIO, as provided by Article XXVIII of the agreement entered into on October 15, 1975, as they existed on that date.

(b) Unilaterally changing the policy or regulations governing the use of official duty time by the officers of Lodge 739, International Association of Machinist and Aerospace Workers, AFL-CIO, Hayward, California 94545, and by the stewards designated by the terms of the agreement as they existed on the effective date thereof.

(c) In any like or related manner interfering with, restraining, coercing, or refusing to consult, confer, or negotiate with any employee or his authorized representative as provided by the agreement and assured by the Executive Order.

2. Take the following affirmative action to effectuate the purposes and provisions of the Order:

(a) Revoke all unilaterally established changes in policy or regulations governing use of official duty time by employee representatives in carrying out their responsibility to represent all unit employees under the terms of the agreement as assured by the Order until such time as proposed changes, pursuant to appropriate notice given to International Association of Machinist and Aerospace Workers, AFL-CIO, Lodge 739, and until after consultation and negotiation have been had thereon according to the notice, the rules and regulations, the agreement and the Executive Order.

(b) Post at its Naval Air Rework Facility, Department of the Navy, Alameda, California 94501, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, Naval Air Rework Facility, Department of the Navy, Alameda, California 94501, and they shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(c) The Commanding Officer shall, pursuant to section 203.27 of the regulations, report to the Assistant Secretary in writing within twenty (20) days from date of this Order what steps have been taken to comply with said Order.

3. Enter a proper order of dismissal of the complaint filed in Case No. 70-5490.

Dated on this 3rd day of February, 1978, in San Francisco, California.


BEN H. WALLEY
Administrative Law Judge

BHW:scm

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT make any unilateral changes in the policy or regulations governing the visitations of staff representatives of the International Association of Machinist and Aerospace Workers, AFL-CIO, or the use of official duty time by officers of Lodge 739, I.A.M.A.W., or any of the stewards designated to represent unit employees by the Labor Agreement entered into on October 15, 1975, unless and until there have been proposed changes, pursuant to appropriate notice, and until after consultation and negotiating as provided by said agreement and the Executive Order.

WE WILL NOT in any like or related manner interfere with, restrain, coerce, or refuse to consult, confer, or negotiate with any employee or his authorized representative as provided by the agreement and assured by the Order.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, 450 Golden Gate Avenue, San Francisco, California 94102.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION HOSPITAL,
MINNEAPOLIS, MINNESOTA
A/SLMR No. 1090

This case involved an unfair labor practice complaint filed by Sidney M. Sanford, an individual, alleging that the Respondent violated Section 19(a)(1) and (2) of the Order when it dismissed him from his employment as a Purchase and Hire (P&H) employee in reprisal for his union activity.

The Complainant was the President of the International Brotherhood of Electrical Workers, Local 292, AFL-CIO (IBEW). He was hired through the IBEW's hiring hall, along with four other electricians, to work as a temporary, or P&H, employee of the Respondent. Other than occasional use by the Respondent of the IBEW hiring hall to obtain temporary or intermittent employees, there is no collective bargaining relationship between the IBEW and the Respondent. During the Complainant's second week on the job, it became clear to the electrician foreman that Sanford would be seeking approximately four hours leave without pay (P&H employees get no regular Federal benefits) on a recurring weekly basis to do work involved with his union office, but unrelated to the Activity. The foreman indicated that the Activity's work precluded the granting of regular, recurring leave and if the Complainant were to maintain his request, the foreman would have to ask him to resign. The foreman indicated that he had never been asked for recurring leave by a P&H employee during his 11 year tenure.

The Administrative Law Judge concluded that there was no basis for the complaint. In so doing, he found that there was no evidence of animus, and that there was no discrimination against the Complainant, as his termination occurred because his request for recurring leave was inconsistent with the requirements of the job for which he had been hired.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,
MINNEAPOLIS, MINNESOTA

Respondent

and

Case No. 51-4260(CA)

SIDNEY M. SANFORD

Complainant

DECISION AND ORDER

On May 25, 1978, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions, 1/ and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 51-4260(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
July 26, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1/ In reaching the disposition herein, it was considered unnecessary to pass upon the Administrative Law Judge's conclusions to the extent that he implies there can be no finding of a Section 19(a)(2) violation in the absence of evidence of disparate treatment.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of

VETERANS ADMINISTRATION HOSPITAL,
MINNEAPOLIS, MINNESOTA

Respondent

and

Case No. 51-4260 (CA)

SIDNEY M. SANFORD

Complainant

Appearances:

Bradley J. Gillan, Esq.
Peterson, Engberg and Peterson
700 Title Insurance Building
Minneapolis, Minnesota 55401
For the Complainant

James C. Klein, Esq.
Office of the General Counsel
Veterans Administration
810 Vermont Avenue, N.W.
Washington, D.C. 20420
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated September 27, 1977 and filed September 29, 1977, alleging a violation of Sections 19(a)(1) and (2) of the Executive Order. The violation was alleged to consist of discriminatorily terminating the Complainant's employment with the Respondent because his duties as President of a local of the International Brotherhood of Electrical Workers required him to take a few hours off from

work for the Respondent every Monday to attend to those duties. This termination was alleged to have been taken in reprisal for his activities as President of the IBEW local. The Respondent filed an extensive response to the complaint dated October 26, 1977 in the nature of a brief and a motion to dismiss.

On December 6, 1977 the Acting Regional Administrator issued a Notice of Hearing to be held February 9, 1977 in Minneapolis, Minnesota. A hearing was held on that day in that City. Both parties were represented by counsel. They presented witnesses who were examined and cross-examined and offered exhibits which with two exceptions were received in evidence. Both parties made closing arguments and timely filed well-reasoned briefs on March 13, 1978.

Preliminary Procedural Matter

At the beginning of the hearing counsel for the Complainant requested that after the completion of the testimony at that session the hearing be recessed instead of being closed to give him an opportunity to obtain employee records from the Respondent to show that Respondent's termination of Sanford was discriminatory, and perhaps offer additional testimony at a reconvened hearing. He stated that he had been retained only the day before the hearing. The request was denied. 1/ The request was renewed near the close of the testimony and again denied. 2/

After the briefs were filed counsel for the Complainant wrote to me concerning the same subject in a letter dated March 28 and received April 3, 1978. I answered in a letter dated April 6. Under date of April 10 counsel for Complainant responded to my answer. The record is reopened to make copies of those letters part of the record as Exhibits ALJ-1, ALJ-2, and ALJ-3, and the record is again closed.

Facts

The Respondent, in accordance with Veterans Administration regulations, sometimes employs employees in the various construction trades on an intermittent or temporary basis for the duration of a construction or remodeling project. Such employees are known as "Purchase and Hire" (P & H) employees. The Respondent obtains such employees by calling the hiring hall of the local union of the craft in which it seeks P & H employees. Such employees are paid at a rate above the prevailing scale because they get no credit toward a Government

1/ Tr. 14-16.
2/ Tr. 119-20.

pension, do not receive annual or sick leave, get no paid holidays, and no help toward medical or hospital insurance.

In July 1977 the Respondent was about to commence a series of interrelated reconstruction projects, the second and subsequent project dependent on the completion of the one before. The projects were beyond the workload capacity of its permanent employees and it added some P & H employees for the project. It called the hiring hall of Local 292, International Brotherhood of Electrical Workers and asked for five electricians. On July 18, 1977 they reported to John T. Massey, the Respondent's Electrician Foreman. He told them that, unlike the hours on many union construction projects in the area, the hours of work were 8:00 A.M. to 4:30 P.M. and that the workweek was a five-day week Monday through Friday.

One of the five electricians was Sidney M. Sanford. He had worked for the Respondent as a P & H electrician about seven years earlier. At that time also Massey was his foreman. In the meantime he had become President of Local 292, IBEW. The Local had about 3,000 members about half of whom worked, when employed, in electrical construction work. Sanford's duties as President required him to take Monday afternoons off from work to attend to payroll matters, dealing with the bank, and other matters. Occasionally, he would have to take other time off to attend trustees' meetings; he was a trustee of several union funds. Massey makes the decisions on granting or denying leave to P & H electricians.

Local 292, IBEW does not represent any employees of the Respondent nor is it seeking to do so. There are four units of Respondent's employees represented by labor organizations. P and H employees are not included in any of the units.

The day Sanford reported for work, Monday, July 18, he told Massey he would need some time off that afternoon to attend to some business. He did not disclose the nature of the business. Massey assented, and Sanford signed off for the afternoon. (P & H employees did not accumulate leave and were not paid for time they signed off from work.) On Thursday of that week he took a couple of hours off, without asking for or obtaining leave, to attend a union trustees meeting; he simply signed off from work.

The following Monday Sanford again signed for and took the afternoon off without obtaining or asking for Massey's approval. The next day Massey spoke to Sanford about his recurrent absences and was told by Sanford that he had to have every Monday afternoon off to attend to his duties as

President of Local 292, IBEW, and asked to be let off the afternoon of the following Monday. Massey denied permission and told Sanford that the job was a five-day job 8:00 A.M. to 4:30 P.M. Sanford persisted that he had to have every Monday afternoon off. Massey suggested Sanford take care of his union business after 4:30 P.M. and Sanford replied that he could not because some of it involved visits to the bank which was closed at that time. Massey told Sanford to think about it over night and decide whether to give up the union business or resign from his employment. The next morning (Wednesday) Sanford told Massey he still had to have every Monday afternoon off. Massey suggested Sanford again think about it over night. The next morning (Thursday) Sanford again said he had to have Monday afternoons off and Massey advised him he would have to resign his P & H job or be terminated. Sanford said he needed time off that day for a dental appointment, and Massey consented.

Sanford refused to resign and termination papers were prepared. The termination form 3/ had typewritten on it:

"Employee refused to work a 40 hr. tour of duty. He insisted on 4 hrs. off every Monday. He was given the option of resigning or being terminated and he chose to be terminated."

The form was presented to Sanford. He changed the word "refused" in the above-quoted statement to "unable because of union duties", and signed the form. He was terminated July 29, 1977. He was replaced by another electrician from the union hiring hall.

In his unfair-labor-practice charge preceding his complaint Sanford stated that he had to have a few hours off every Monday. 4/ He stated also that the Respondent had advance notice that he would take time off every Monday to attend to his union duties, but there is no evidence to sustain that statement, not even in his own direct testimony, and I find that the Respondent did not have advance notice.

The series of projects for which Sanford and the other P & H employees were hired was considered urgent. The first step was to remodel some space for an enlarged pharmacy.

3/ Exh. C-2.
4/ Tr. 47; Exh. A/S 2-A.

The materials occupying that space were moved temporarily elsewhere. When the pharmacy moved to its new space its old space was going to be remodelled for another function to be moved in, and so forth. A delay in completion of the new pharmacy would thus delay all subsequent steps.

Much of the electrical work in the new pharmacy required two men to perform. When one of them left the other would either be assigned to other non-urgent work or he would get one of the regular maintenance men to help him.

When Sanford was a P & H employee seven years earlier he was not President of his local. He did not have difficulty getting time off occasionally. During his 1977 employment others did not have difficulty getting time off occasionally. Massey had been Electrician Foreman for eleven years. Never before had a P & H electrician asked for time off on a regular basis. He felt that the nature of the P & H work did not permit the employment of an electrician who could not normally work the regular 40-hour week, and Respondent's Chief of Engineering Service was of the same view.

Massey was a member of IBEW in the District of Columbia for four years before he entered Government service. After entering Government service he organized an A.F.G.E. local in Salisbury, North Carolina. He is a member of an A.F.G.E. local which is the exclusive representative of a unit of Respondent's employees.

Discussion and Conclusions

The complaint alleges a violation of Sections 19(a)(1) and (2) of the Executive Order. Sanford was the only P & H electrician who had ever asked Massey for regular recurrent time off during the eleven years he had been Electrician Foreman. Assuming the other elements of a 19(a)(2) violation were present, there was no discrimination; no one else similarly situated was treated differently because there was no one else similarly situated. There was thus no violation of Section 19(a)(2). 5/

5/ Department of the Treasury, Internal Revenue Service and IRS Chicago District and National Treasury Employees Union and NTEU Chapter 10, A/SLMR No. 1042.

Nor was there a violation of Section 19(a)(1). That Section interdicts an agency from interfering with, restraining, or coercing an employee in the exercise of his rights "assured by this Order." We need not decide whether the right assured by Section 1(a) of the Order "freely and without fear of penalty or reprisal to ... assist a labor organization" is without limitation with respect to the relationship between the "labor organization" and the agency or activity. Here there was no relationship between IBEW and the Respondent other than the fact that the Respondent sometimes called the IBEW hiring hall to obtain temporary or intermittent employees. IBEW did not represent any of Respondent's employees nor was it seeking to do so. Sanford happened to be President of Local 292 of IBEW, and it was that "labor organization" he insisted on assisting while taking time off from his job with the Respondent.

While Local 292 does not represent nor is it seeking to represent any of Respondent's employees, I take judicial notice that some other locals of IBEW do represent some Government employees. Even if we assume that the right of a Government employee to assist a "labor organization" extends to include the right of an employee of Respondent to assist Local 292 -- even if we assume (contrary to fact) that Local 292 was the certified exclusive representative of a unit of Respondent's employees including Sanford, -- the right to assist a labor organization is not without limit. 6/ At least when there is absent any agreement providing otherwise, it is limited by the obligation of the employee to perform his job.

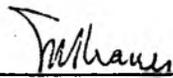
The Complainant alleges, and his brief argues, that Sanford's termination was in reprisal for his engaging in performing his duties as President of Local 292. Such assertion implies anti-union animus on the part of Massey. But the evidence does not sustain such assertion. What evidence there is in the record indicates the contrary. The record is persuasive that Massey was of the sincere belief that the nature of the P & H job for which Sanford was hired was inconsistent with Sanford regularly on a recurrent basis taking off at least a few hours a week, and

6/ Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base and National Federation of Federal Employees, Local Union 1001, FLRC No. 75A-25, A/SLMR No. 485, A/SLMR No. 767.

his superior, the Chief of Engineering Services, concurred. Yet Sanford refused to work the regular scheduled workweek. His employment was terminated for that reason, and the fact that his refusal was based on his desire to assist Local 292 is simply coincidental and irrelevant. He has failed to sustain his burden of proof 7/ that he was terminated because of his union activities.

RECOMMENDATION

The complaint should be dismissed.


 MILTON KRAMER
 Administrative Law Judge

Dated: May 25, 1978
 Washington, D.C.

7/ 29 C.F.R. § 203.15; Department of the Navy, Hunters Point Naval Shipyard and Robert Blueford, A/SLMR No. 373.

MK/mml

July 26, 1978

A/SLMR No. 1091

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
INTERNAL REVENUE SERVICE

Respondent

and

Case No. 22-7717(CA)
A/SLMR No. 998

INTERNAL REVENUE SERVICE
A/SLMR No. 1091

On March 3, 1978, the Assistant Secretary issued his Decision and Order in Internal Revenue Service, A/SLMR No. 998, in which he found, among other things, that the Respondent violated Section 19(a)(1) and (6) of the Order based on unilateral changes in certain personnel policies and practices after the expiration of the parties' negotiated agreement. Except for those provisions based solely on the existence of the agreement, the Assistant Secretary found that the items cancelled by the Respondent had become terms and conditions of employment which survived the agreement and, therefore, could not be changed unilaterally after the agreement expired, without affording the Complainants, the National Treasury Employees Union, Chapter 8, et al., an opportunity to invoke the processes of the Federal Service Impasses Panel. He based his determination on the rationale expressed in Internal Revenue Service, Ogden Service Center, and Internal Revenue Service, et al., A/SLMR No. 806 (1977), and Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 859 (1977).

On March 17, 1978, the Federal Labor Relations Council (Council) issued its consolidated Decision on Appeals in A/SLMR Nos. 806 and 859 (FLRC Nos. 77A-40 and 77A-92), remanding the cases to the Assistant Secretary for action consistent with its decision. In view of the rationale expressed in the Council's decision, the Assistant Secretary reconsidered his Decision in A/SLMR No. 998, and concluded that a contrary result to that reached in A/SLMR No. 998 was not warranted. Thus, he found that the Respondent's conduct in the instant case violated Section 19(a)(1) and (6) of the Order, and modified his order in A/SLMR No. 998 consistent with the principles enunciated by the Council.

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 8, ET AL.

Complainants

SUPPLEMENTAL DECISION AND ORDER

On March 3, 1978, the Assistant Secretary issued his Decision and Order in the above-entitled proceeding, finding, in agreement with the Administrative Law Judge, that the Respondent violated Section 19(a)(1) and (6) of the Order based on unilateral changes in certain personnel policies and practices after the expiration of the parties' negotiated agreement. Except for those provisions based solely on the existence of the negotiated agreement, the Assistant Secretary found that the items cancelled by the Respondent had become terms and conditions of employment which survived the agreement and, therefore, could not be changed unilaterally after the agreement expired without affording the Complainants an opportunity to invoke the processes of the Federal Service Impasses Panel (Panel). The Assistant Secretary based his determination on the rationale expressed in Internal Revenue Service, Ogden Service Center, and Internal Revenue Service, et al., A/SLMR No. 806 (1977), and Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 859 (1977).

On March 17, 1978, the Federal Labor Relations Council (Council) issued its consolidated Decision on Appeals in A/SLMR Nos. 806 and 859 (FLRC Nos. 77A-40 and 77A-92), remanding the cases to the Assistant Secretary for action consistent with its decision. In view of the rationale expressed in the Council's decision, I granted a Motion for Reconsideration in the instant case filed by the Respondent and joined in by the Complainants.

In the Council's view, upon the expiration of a negotiated agreement, existing personnel policies and practices and matters affecting working conditions within the meaning of Section 11(a) of the Order, whether or not included in a negotiated agreement, continue as established, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order. The Council noted, however, in this connection, that agency management retains the right, upon the expiration of a negotiated agreement, to unilaterally change those matters contained therein which are excepted from the obligation to negotiate by Section 11(b) of the Order. Similarly, those agency regulations issued during the term of a negotiated agreement which were not operative with respect to the bargaining unit during such term, become effective, as mandated by Section 12(a) of the Order, upon the expiration of the agreement. The Council also found that where the parties are renegotiating a comprehensive collective bargaining agreement and reach impasse, changes may not be effected upon expiration of their prior agreement unless adequate notice is provided prior to the implementation of such otherwise negotiable changes in personnel policies and practices and other matters affecting working conditions, so as to afford the other party a reasonable period in which to invoke the processes of the Panel. If the Panel's processes are invoked within a reasonable period of time of such notice, the parties must adhere to established personnel policies and practices and matters affecting working conditions, including those contained in the expired agreement, to the maximum extent possible.

Applying the foregoing principles enunciated by the Council to the circumstances of the instant case, I find that a contrary result to that reached in A/SLMR No. 998 is not warranted. Thus, the evidence establishes that following the expiration of the parties' negotiated agreement, the Respondent herein unilaterally terminated certain provisions of the parties' expired negotiated agreement, including such items as the contractual grievance procedure and non-advisory arbitration, which were mandatory subjects of bargaining within the ambit of Section 11(a) of the Order. ^{1/} Further, the evidence establishes that, prior to its action, the Respondent failed to afford the Complainants a reasonable opportunity to invoke the services of the Panel, although the latter had expressed an intent to do so.

Under all of these circumstances, I find that the Respondent's conduct violated Section 19(a)(1) and (6) of the Order. In connection with this finding, I shall modify the order in A/SLMR No. 998 consistent with the principles enunciated by the Council.

^{1/} See Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, A/SLMR No. 1049 (1978). There is no evidence that an agency regulation had been issued during the term of the parties' negotiated agreement mandating the Respondent's termination of Section 11(a) matters upon the expiration of such agreement.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service shall:

1. Cease and desist from:

(a) Making unilateral changes in existing personnel policies and practices and matters affecting working conditions within the ambit of Section 11(a) of the Order, after the expiration of a negotiated agreement and in the absence of a bargaining impasse, or, if a bargaining impasse exists, without affording the National Treasury Employees Union, Chapter 8, et al., or any other exclusive representative, the opportunity to invoke the services of the Federal Service Impasses Panel at a time prior to the implementation of such changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

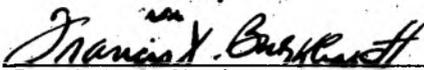
(a) Proceed to grievance-nonadvisory arbitration in any case in which the past refusal to do so was predicated upon the expiration of the Multi-District Agreement between the Internal Revenue Service and the National Treasury Employees Union, Chapter 8, et al., upon appropriate request, within 21 days after the date of this order.

(b) To the extent consonant with law and regulations, restore all benefits, including annual leave, denied due to unilateral changes in existing personnel policies and practices and matters affecting working conditions within the ambit of Section 11(a) of the Order after the expiration of the May 3, 1974, negotiated agreement for the period November 8, 1975, to December 23, 1975.

(c) Post at the District Offices of the Internal Revenue Service that were parties to said Multi-District Agreement, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of each said District Office and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Said Directors shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days of the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
July 26, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A SUPPLEMENTAL DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT make unilateral changes in existing personnel policies and practices and matters affecting working conditions within the ambit of Section 11(a) of the Order, after the expiration of a negotiated agreement and in the absence of a bargaining impasse, or, if a bargaining impasse exists, without affording the National Treasury Employees Union, Chapter 8, et al., or any other exclusive representative, the opportunity to invoke the services of the Federal Service Impasses Panel at a time prior to the implementation of such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL proceed to grievance-nonadvisory arbitration in any case in which the past refusal to do so was predicated upon the expiration of the Multi-District Agreement between the Internal Revenue Service and the National Treasury Employees Union, Chapter 8, et al., upon appropriate request, within 21 days of this order.

WF WILL, to the extent consonant with law and regulations, restore all benefits, including annual leave, denied due to unilateral changes in existing personnel policies and practices and matters affecting working conditions within the ambit of Section 11(a) of the Order after the expiration of the May 3, 1974, negotiated agreement, for the period November 8, 1975, to December 23, 1975.

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

.....
In the Matter of :
INTERNAL REVENUE SERVICE :
Respondent :
and :
NATIONAL TREASURY EMPLOYEES UNION, :
CHAPTER 8, ET AL. :
Complainants :
.....

Case No. 22-7717(CA)

Appearances:

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1730 K Street, N.W.
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For the Complainants

Michael Sussman, Attorney
Stuart E. Seigel, Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This case arises under Executive Order 11491 as amended. It was initiated by a complaint filed January 10, 1977 alleging a violation of Sections 19(a)(1) and (6) of the Executive Order. The violation was alleged to consist of the Respondent unilaterally declaring terminated 61 provisions of an expired Multi-District agreement when the Complainant advised the Respondent that negotiations were at an impasse and that it intended to request the services of the Federal Service Impasses Panel.

The Respondent filed a response to the complaint in which it stated that the provisions of the agreement that were cancelled were those that concern benefits or duties accruing directly to the Complainant as an institution, which benefits and duties arose solely from the negotiated agreement and did not survive the expiration of the agreement. The response argued that the cancellation of such rights of the union therefore was not in violation of the Executive Order.

On April 14, 1977 the Acting Regional Administrator issued a Notice of Hearing to be held in Washington, D.C. on May 31, 1977. Pursuant to an Order Rescheduling Hearing, a hearing was held in Washington on June 15, 1977. Both parties were represented by counsel. They introduced a stipulation and joint exhibits. The Complainant offered in evidence thirteen exhibits, the authenticity of which the Respondent conceded, but the admissibility of which the Respondent opposed. Eleven of them were received in evidence. Neither party offered any witnesses and both waived closing argument. Both sides filed briefs.

FACTS

1. On June 8, 1976, the Internal Revenue Service acting on behalf of 57 IRS District Offices throughout the United States, and the National Treasury Employees Union acting on behalf of its chapters and joint councils that represented unit employees of IRS in those 57 offices, began negotiations on a successor collective bargaining to replace the Multi-District Agreement covering approximately 30,000 employees in the aforementioned 57 IRS District Offices.

2. The agreement sought to be negotiated would be the third such multi-unit agreement between the parties and was to be known as Multi-District Agreement III (MDA III).

3. The parties met and negotiated on approximately 40 separate occasions between June and September 1976 in an effort to reach agreement.

4. The expiration date of MDA II was August 3, 1976. On July 28, 1976 the parties were still in negotiation on MDA III and they extended MDA II to September 3, 1976. On August 27, 1976 they again extended it subject to either party filing a request with the Federal Service Impasses Panel. The August 27 agreement extended MDA II "until such time as the Union invokes Impasse as provided for in Executive Order 11491, as amended" and further provided:

"... Each party reserves the right, subsequent to the termination of 'mediation' or the termination of direct negotiations between the parties, to serve upon the other party in writing a five-day notice of termination of this extension agreement. The agreement will then terminate at midnight of the fifth (5th) calendar day after receipt by either party of a notice of termination. The Union agrees to give the Employer five (5) days notice in writing prior to exercising its right to invoke the Impasse Procedures referred to above. ..."

5. On November 2, 1976, NTEU National President, Vincent L. Connery, informed the Commissioner of the Internal Revenue Service, Donald C. Alexander, that NTEU was terminating the August 27 extension and informed him that it would be proceeding to the Federal Service Impasses Panel by filing a request with FSIP after five days as provided in the August 27 extension agreement.

6. By letter dated November 5, 1976 Billy J. Brown, IRS Director of Personnel, acknowledged the NTEU communication of November 2 and informed NTEU President Connery that IRS considered the contract terminated and that the termination ended the "institutional benefits" to the Union contained in the contract. A list of the "institutional benefits" was attached. It stated also that other benefits in the agreement that accrue to individual employees would continue in effect. 1/

7. On November 8, 1976 NTEU by letter to Commissioner Alexander charged IRS with violating Sections 19(a)(1) and (6) of the Executive Order by its letter of November 5, 1976.

8. On November 8, 1976 NTEU by letter to Commissioner Alexander requested a meeting with IRS to discuss the IRS letter of November 5, 1976 and its attachment.

9. On November 19, 1976 a meeting was held by representatives of IRS and NTEU to try to resolve the issues raised by the IRS letter of November 5, 1976 and the NTEU unfair-labor-practice charge of November 8, 1976. No agreement was reached.

10. On December 7, 1976 the IRS Director of the Personnel Division by letter informed the NTEU National President of

1/ J. Exh. 6.

the IRS final decision that no violation of the Executive Order had occurred.

11. On December 17, 1976 NTEU President Connery executed the complaint in this case and the same day NTEU General Counsel Tobias mailed it to the Area Director. It was filed January 10, 1977.

12. On December 23, 1976 the parties agreed that effective that date MDA II would again become effective immediately "until the implementation date of the Multi-District III agreement" which had been negotiated and was pending ratification. MDA III was ratified and became effective May 1, 1977, replacing the reinstated MDA II.

13. During the period MDA II was not in effect preceding the effective date of MDA III, November 8 to December 23, 1975, the Respondent denied to the Complainant what it considered "institutional benefits" of MDA II. Thus administrative time to stewards was denied on three occasions, 2/ IRS denied permission to post a union publication on a bulletin board, 3/ it denied permission to hold a chapter meeting in an IRS meeting room, and it held grievances not subject to arbitration if the grievance was filed during that period although arbitration was not invoked until after MDA II was reinstated on December 23, 1976. 4/

DISCUSSION

I. The Proper Parties

I. The Agency contends that the complaint should be dismissed because not filed against the proper parties, i.e., the exclusive recognition is by 57 separate District Offices which have the bargaining relationship, either certified or recognized, and they are indispensable parties, while the complaint here is against the National Internal Revenue Service.

The conduct complained of was directed by the National IRS which also engaged in the negotiations on behalf of the District Offices. It was the National IRS office that declared the "institutional benefits" terminated at the expiration of MDA II, and determined its consequences.

2/ C. Exhs. 2, 4, 11.
3/ C. Exh. 9.
4/ C. Exhs. 3, 5, 6, 7, 8.

A priori, and on the authority of several decisions of the Assistant Secretary, 5/ an agency need not have a bargaining relationship with a union to commit a violation of section 19(a)(1) of the Executive Order. Just about anyone could be guilty of interfering with, restraining, or coercing an employee in the exercise of his rights assured by the Executive Order. So at most this position of the Respondent could plausibly have been directed only to dismissing the complaint with respect to its 19(a)(6) aspect, -- for whatever purpose that would have served.

But since the decision of the Federal Labor Relations Council in Naval Air Rework Facility, Pensacola, Florida and Secretary of the Navy and American Federation of Government Employees, AFL-CIO, Local 1960, FLRC No. 76A-37 (May 4, 1977) and of the Assistant Secretary in the same case on remand, A/SLMR No. 873 (August 4, 1977), it is settled that agency management above the organizational level of exclusive recognition commits a violation of section 19(a)(6) as well as 19(a)(1) when it is responsible for the improper conduct alleged.

The complaint should not be dismissed for failure to name the appropriate respondent.

II. The Merits

II. The Respondent contends that for the period MDA II expired and was not extended or reinstated by agreement, it expired "in its entirety, and nothing is left." 6/ It concedes, however, that the terms of the agreement that were required subjects of bargaining became established working conditions and could not be changed unilaterally without bargaining for their rescission. It takes the position that the provisions of the agreement it declared of no effect were only those that conferred "institutional benefits", i.e., benefits to the union which existed only because of the existence of the agreement. The Assistant Secretary has addressed himself to this problem or related problems at least three times.

In U.S. Army Corps of Engineers, Philadelphia District and American Federation of Government Employees, Local 902, AFL-CIO, A/SLMR No. 673 (June 23, 1976), the parties engaged in good faith bargaining until they reached impasse. Neither

5/ See e.g., the Adjutant General, State of Illinois, Illinois Air National Guard and Illinois Air Chapter, A.C.T., National Guard Bureau and Illinois Air Chapter, A.C.T., A/SLMR No. 598, fn. 4.
6/ Respondent's brief, p. 16.

party invoked the services of the Federal Service Impasses Panel. The Assistant Secretary said that in such situation the agency had the right unilaterally to change existing conditions of employment which change did not exceed the scope of the change it proposed during the negotiations. The agency did make a change that did not exceed the scope of what it proposed. However, it did so abruptly without notice to the union in time to give it "ample opportunity" to invoke the services of the Panel. The union then invoked the services of the Panel and filed a complaint under the Executive Order. The Assistant Secretary held that such conduct by the agency violated Sections 19(a)(1) and (6) of the Executive Order. The reason it was found to be such a violation was that the union must be given an opportunity to invoke such services and if it does "it will effectuate the purposes of the Order to require that the parties must, in the absence of an overriding exigency, maintain the status quo and permit the processes of the Panel to run its course before a unilateral change in terms or conditions of employment can be effectuated."

It is observed that in the instant case the Complainant was under contractual obligation to give the Respondent five days notice of its intent to invoke the services of FSIP. ^{7/} It did so on November 2, 1976, and only three days later, before the Complainant could lawfully carry out its intent, the Respondent by letter of November 5 advised the Complainant that what it considered "institutional benefits" conferred by the agreement were no longer in effect. ^{8/} (It is observed also that among what the Respondent designated as "institutional benefits" no longer in effect was the right of an employee to invoke arbitration of a grievance if he was unsuccessful in the preceding four steps of processing the grievance as provided in the agreement.)

Internal Revenue Service, Ogden Service Center, et al. and National Treasury Employees Union, NTEU Chapter No. 066, et al., A/SLMR No. 806 was decided March 1, 1977, after the critical events in this case, and the parties did not have the benefit of its teaching to guide their conduct

So far as the issues in that case are relevant to the issues in this case, the material facts are the same in both cases except that that case did not involve the question

^{7/} Exh. J 4.
^{8/} Exh. J 6.

of resort to FSIP. The agreement that expired in that case was a Multi-Center Agreement (MCA) instead of a Multi-District Agreement. The Internal Revenue Service declared certain provisions of MCA no longer in effect. Among them were provisions for administrative leave for union representatives to prepare grievances, posting on bulletin boards, permission to the union to address new employees and training classes, and the allowance of appeals of grievances to arbitration. The Administrative Law Judge recommended that the unilateral termination of such arrangements upon expiration of the agreement be held not violative of the Executive Order. In disagreement with the ALJ the Assistant Secretary held:

"... the unilateral elimination of those agreement provisions characterized by the Respondent as 'institutional benefits' accruing to the union qua union was violative of Section 19(a)(1) and (6) of the Order. Thus, in my view, only those rights and privileges which are based solely on the existence of a written agreement -- e.g., checkoff privileges -- in effect, terminated with the expiration of a negotiated agreement. On the other hand, other rights and privileges accorded to exclusive representatives continue in effect until such time as they as they are modified or eliminated pursuant to negotiations or changed after a good faith bargaining impasse has been reached. Under these circumstances, I find that the Respondent Service Centers' unilateral elimination of other agreement provisions related to the NTEU's rights, such as posting privileges, etc., constituted an improper unilateral change in personnel policies and practices in violation of Section 19(a)(1) and (6) of the Order." [Footnotes omitted.]

A still later decision of the Assistant Secretary involving essentially the same parties, is Department of the Treasury, Internal Revenue Service, Brookhaven Service Center and National Treasury Employees Union and Chapter 099, NTEU, A/SLMR No. 859, decided June 29, 1977. In that case the underlying facts were the same as in A/SLMR No. 806, i.e., the same MCA had expired. The Respondent had refused arbitration as the last step in grievance procedure because of its position that with the expiration of the agreement that provision

had become inoperative as an "institutional benefit" of the expired agreement. The Assistant Secretary held:

"... arbitration is not one of those rights or privileges uniquely tied to a written agreement which terminates upon the expiration of a Federal sector negotiated agreement. Rather ... arbitration, once agreed upon by the parties as the final step for the settling of disputes arising under a negotiated agreement, continues thereafter as a term and condition of employment . . ."

The Assistant Secretary added a footnote that this holding did not mean that an activity could not unilaterally change a condition of employment if such change did not exceed the scope of its proposals in prior negotiations and the parties had bargained to impasse over such proposal and the matters had not been submitted to FSIP, citing U.S. Army Corps of Engineers, Philadelphia District, supra.

I conclude that very little contained in an expired agreement expires with the agreement automatically other than the dues withholding provisions. The provisions the Respondent asserted were no longer effective after expiration are set forth in the attachment to Joint Exhibit 6. It would unreasonably prolong this Recommended Decision to discuss them seriatim. The complaint describes them as some 61 separate provisions in the "MDA II". On the basis of the decisions discussed above, I conclude that only Article 34, providing for advisory arbitration of adverse actions which the Complainant concedes expired with the expiration of the agreement; 9/ the last sentence of Article 35, Section 3(A), authorizing the union to initiate a grievance when it believes it has been denied a right under the agreement; Article 37, providing for a Labor-Management Relations Committee consisting of representatives of the union and representatives of Management; and Article 38, providing for dues withholding, expired with the expiration of the agreement. 10/ I do not consider those provisions to be included in the phrase

9/ Plaintiff's brief, p. 12, fn. 4.

10/ Article 35, Section 3B, providing that the Union would have the right to be present at formal discussions between an employee and management concerning a grievance, survives not because it is a provision of the agreement but because it is mandated by the last sentence of Section 10(e) of the Executive Order.

"terms or conditions of employment" as used in U.S. Army Corps of Engineers, Philadelphia District, supra, and hence not within the interdiction of that case against an agency unilaterally changing a contract provision after impasse without giving the union an opportunity to invoke the services of the Federal Service Impasses Panel. Also, Article 39, setting forth the duration and termination of the agreement, became obsolete with its expiration.

III. The Remedy

The complaint complains of "some 61 separate provisions in the" MDA that were unilaterally cancelled. The charge preceding the complaint charged a violation of Sections 19(a)(1) and (6) in the Respondent announcing its intention to ignore 61 provisions of the expired agreement.

The Respondent objected to the admission in evidence of eleven Complainant exhibits showing eleven instances of the Respondent carrying out its announced intention, on the ground that they postdated the original charge and in most cases the complaint. I do not believe it would further the purposes of the Order or the Regulations to require a charge and complaint to sustain an unfair labor practice allegation when an agency announces its intention to commit an unfair labor practice and then to require another charge and complaint to permit the complainant to show each instance of the agency carrying out its announced intention. Such evidence is not so much evidence of an additional unfair labor practice but is more in the nature of evidence of the damages flowing from the originally alleged unfair labor practice.

Some of the instances of improperly carrying out the announced unlawful intention are irremediable, such as denying bulletin posting and denying space for a union meeting, except insofar as ordering the Respondent to desist from such conduct in the future should the same situation arise again may be considered remedial. The denial of administrative leave to a steward to discuss a grievance or present it, which was authorized by the agreement but denied on the ground that "institutional benefits" had terminated is remediable if the steward took annual leave, by restoring such leave. The refusal to proceed to arbitration with a grievance can be remedied to the extent that the Respondent can be ordered to proceed to arbitration upon request of the Complainant made within 21 days 11/ of the date of the order in this case.

11/ The period allowed for invoking arbitration in MDA II. Jt. Exh. 1, Art. 36, Section 8.

RECOMMENDATION

Accordingly, I recommend that the Assistant Secretary order the Respondent to cease and desist similarly to the cease and desist order in A/SLMR No. 806, order the Respondent to restore annual leave charged to employees when administrative leave was authorized by the agreement but denied because of the expiration of MDA II, and order the Respondent to proceed to arbitration if requested by the Complainant within 21 days in any case in which the past refusal to do so was predicated on the expiration of MDA II.

A proposed Order so ordering is attached hereto as Attachment A, and a notice to be posted is attached hereto as Appendix A.



MILTON KRAMER
Administrative Law Judge

Dated: October 6, 1977
Washington, D.C.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations issued thereunder, the Assistant Secretary of Labor for Labor-Management Relations orders that the Internal Revenue Service shall:

1. Cease and desist from:

(a) Making unilateral changes in personnel policies and practices after the expiration of a negotiated agreement containing such personnel policies and practices in the absence of a bargaining impasse over such policies and practices.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Restore annual leave charged to employees when administrative leave was authorized by the Multi-District Agreement dated May 3, 1974 between it and the National Treasury Employees Union but denied because of the expiration of that Agreement.

(b) Upon request of said Union or its chapters within 21 days after the date of this order, proceed to arbitration in any case in which the past refusal to do so was predicated on the expiration of said Agreement.

(c) Post at the District Offices of the Internal Revenue Service that were parties to said Multi-District Agreement, copies of the attached notice marked "Appendix A" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Director of each said District Office and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notice to employees are customarily posted. Said Directors shall take reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

Attachment A (cont'd)

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days of the date of this Order, what steps have been taken to comply herewith.

FRANCIS X. BURKHARDT
Assistant Secretary fo Labor for
Labor Management Relations

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

We hereby notify our employees that:

WE WILL NOT make any change in the negotiated grievance-arbitration, the negotiated provision concerning administrative leave to a steward to prepare or present a grievance, the negotiated provision for the posting of union notices, the negotiated provision for the use of agency space for the holding of a union meeting, or any other term or condition of employment which is not based solely on the existence of a written agreement, following the expiration of the negotiated agreement, without notifying and upon request meeting and conferring on such matters with the National Treasury Employees Union, the exclusive representative of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 questions concerning this Notice of compliance with its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

July 27, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE AND
BROOKHAVEN SERVICE CENTER
A/SLMR No. 1092

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 99 (Complainants) alleging that the Respondents, the Internal Revenue Service (IRS) and its Brookhaven Service Center, violated Section 19(a)(1) of the Order by denying four employees their designated choice of representatives as their personal representative in an agency grievance procedure solely on the basis that their chosen representatives were affiliated with the Complainants. The Complainants contended essentially that a meeting between employees and management involving grievances filed under the IRS' grievance procedure constituted a formal discussion within the meaning of Section 10(e) of the Order and that employees involved in such a procedure are entitled to union representation. Conversely, the Respondents took the position that the Order does not provide an employee with a protected right to union representation in an agency grievance procedure, and that the denial of such representation under the particular circumstances of this case was not violative of the Order.

The Respondents denied the individual employees representation by the NTEU in a grievance filed under the IRS' grievance procedure on the basis that such representation presented a potential conflict of interest. In denying such representation, the Respondents relied on recent amendments to Part 771 Agency Grievance System of title 5 of the Code of Federal Regulations, which, among other things, modified Part 771 to permit an agency to disallow an employee's selection of a representative "...on the grounds of conflict of interest or conflict of position."

The Assistant Secretary found that the Respondents' conduct in denying the four employees involved representation by the Complainants under the IRS' grievance procedure was not violative of Section 19(a)(1) of the Order. He noted that the Respondents' conduct was based on provisions contained in the regulations of an appropriate authority outside the IRS, in this instance the Civil Service Commission (Commission), whose regulations regulate agency grievance systems. He noted further that, absent evidence of anti-union motivation, the enforcement of the rules governing the IRS' grievance procedure, which procedure is the creation of the IRS pursuant to the requirements of the Commission, is the responsibility of the IRS and the Commission. And where, as in the instant case, the Commission has specifically regulated agency grievance procedures by

providing that an agency head may deny employees a particular representative on the grounds of conflict of interest or conflict of position, the Assistant Secretary concluded the unfair labor practice procedures of the Order cannot, in effect, be utilized to police the agency's application of the Commission's regulations.

Accordingly, the Assistant Secretary found, under the particular circumstances of this case, that the Respondents' conduct in denying employees their choice of representation based on the provisions of the Code of Federal Regulations was not violative of Section 19(a)(1) of the Order, and he ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE AND
BROOKHAVEN SERVICE CENTER

Respondents

and

Case No. 22-07995(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 99

Complainants

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator Hilary M. Sheply's Order Transferring Case to the Assistant Secretary of Labor in accordance with Sections 203.5(b), 203.7(a)(4) and 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits and briefs, the Assistant Secretary finds:

The complaint herein alleges that the Internal Revenue Service and its Brookhaven Service Center, hereinafter called Respondents, violated Section 19(a)(1) of the Order by denying four employees their designated choice of representatives as their personal representative in an agency grievance procedure solely on the basis that their chosen representatives were affiliated with the National Treasury Employees Union (NTEU) and NTEU Chapter 99, hereinafter called NTEU or Complainants. The Complainants contend essentially that a meeting between an employee and management concerning an agency grievance constitutes a formal discussion within the meaning of Section 10(e) of the Order and that therefore the affected employees in this matter are entitled to union representation in the processing of their agency grievances. The Respondents contend, on the other hand, that the Order does not provide an employee with a protected right to union representation in an agency grievance procedure and that the denial of such representation under the particular circumstances of this case was not violative of the Order.

The undisputed facts, as stipulated by the parties, are as follows:

Four bargaining unit employees at the Internal Revenue Service's (IRS) Brookhaven Service Center applied for promotion to supervisory positions during November and December 1976. In accordance with the

Internal Revenue Manual, each applicant's supervisor prepared a Performance Evaluation and a Report of Managerial Potential for each applicant to be utilized in evaluating them in connection with the applied for supervisory positions. After receiving copies of their evaluations and reports, the four applicants filed agency grievances under the IRS' grievance procedure contesting their promotion evaluations. Each of the four applicants designated an NTEU National Field Representative and/or an NTEU Chapter 99 Union Representative as her representative. Thereafter, the Brookhaven Service Center Director advised each of the four applicants that he was denying their request for union representation. In this regard, he stated, that, "Since you have applied for a supervisory position, Union representation on this agency grievance would present a potential conflict of interest." ^{1/}

The NTEU's General Counsel, Robert Tobias, appealed the denials of the representatives of said applicants to Billy J. Brown, the Director of the IRS' Personnel Division. Mr. Brown responded to each employee by affirming the Brookhaven Service Center Director's denials of their designated NTEU representatives. He based his decision on amendments published on November 2, 1976, to Part 771 Agency Grievance System of title 5, Code of Federal Regulations. In this regard, Section 771.105 now provides, in part:

§771.105 Presentation of a grievance

...

(c) The agency shall have the right:

(1)

...

(2) To disallow any selection the employee makes with regard to a representative on the grounds of conflict of interest or conflict of position.

(d) The employee shall have the right to challenge the decision to disallow his/her choice of representative to the head of the agency or a person the head of the agency has designated in accordance with the procedures described in the agency grievance procedure...The decision [of the agency head or his designee] will be final.

Prior to the above amendments of the Code, an employee's right to be represented by a representative of his own choosing was not qualified in this manner.

^{1/} He also informed the employees that, "You may have a representative of your own choosing as long as that individual is not a steward or official of NTEU."

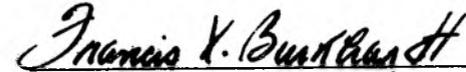
FINDINGS AND CONCLUSIONS

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-07995(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.

July 27, 1978



Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

Under the particular circumstances of this case, I find that the Respondents' conduct in denying the four employees involved herein representation by the Complainants under the IRS' grievance procedure was not violative of Section 19(a)(1) of the Order. Thus, as indicated above, the Respondents' refusal to permit the NTEU to represent the employees involved in the IRS' grievance procedure was based on certain provisions contained in the regulations of an appropriate authority outside the IRS, the Civil Service Commission, whose regulations regulate agency grievance systems. The Commission's regulations provide, in effect, that an agency shall have the right to disallow any selection which an employee makes with regard to a representative on the grounds of conflict of interest or conflict of position and that, upon challenge of the decision to disallow the choice of representative to the head of the agency or his/her designee, the decision of the agency head or his/her designee will be final.

In accordance with the foregoing Civil Service Commission's procedure, the Complainants herein appealed the determination of the Brookhaven Service Center Director denying the employees' request for union representation to the Director of the IRS' Personnel Division. The latter affirmed the Center Director's decision that union representation in the circumstances involved would present a potential conflict of interest.

While I might disagree with the Respondents' application of the Civil Service Commission's regulations in the instant proceeding, I find that, absent evidence of anti-union motivation ^{2/}, the enforcement of the rules governing IRS' grievance procedure, which procedure is the creation of the IRS pursuant to the requirements of the Civil Service Commission, is the responsibility of the IRS and the Civil Service Commission. ^{3/} And where, as here, the Commission has specifically regulated agency grievance procedures by providing that an agency head may deny employees a particular representative on the grounds of conflict of interest or conflict of position, in my view, the unfair labor practice procedures of the Order cannot, in effect, be utilized to police the agency's application of the Commission's regulations.

Accordingly, under the particular circumstances herein, I find that the Respondents' conduct in denying four employees their choice of representation based on the provisions of Part 771 of title 5 of the Code of Federal Regulations was not violative of Section 19(a)(1) of the Order, and I shall, therefore, order that the subject complaint be dismissed in its entirety.

^{2/} There was no allegation of anti-union motivation in this matter.

^{3/} Cf. Office of Economic Opportunity, Region V, Chicago, Illinois.
3 A/SLMR 668, A/SLMR No. 334 (1973).

July 28, 1978

A/SLMR No. 1093

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION,
CONCORD, CALIFORNIA
A/SLMR No. 1093

DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION,
CONCORD, CALIFORNIA

Respondent

and

Case No. 70-5722(CA)

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1931, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to consult and confer with the Complainant before changing a policy and practice of furnishing copies of certain documents upon request. The Respondent contended there was no established past practice in this regard, and, in addition, with respect to the X118C rating schedules, that the material was confidential.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1931, AFL-CIO

Complainant

The Administrative Law Judge found, with the exception of the X118C rating schedules, that the practice of furnishing copies had matured into a term and condition of employment and that prior to changing such a term and condition of employment, the Respondent should have given the Complainant an opportunity to consult, confer, or negotiate. He found the X118C rating schedules to be confidential material which the Respondent could properly deny the Complainant without affording it an opportunity to negotiate.

DECISION AND ORDER

On May 25, 1978, Administrative Law Judge Thomas Schneider issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in conduct which was violative of Section 19(a)(1) and (6) of the Order and recommending that it cease and desist therefrom. ^{1/} No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations, and ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, as modified herein.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Navy, Naval Weapons Station, Concord, California, shall:

^{1/} In his proposed remedial order, the Administrative Law Judge did not recommend that the Respondent take any affirmative action.

1. Cease and desist from:

(a) Instituting a change in the policy and practice of furnishing the American Federation of Government Employees, Local 1931, AFL-CIO, the exclusive representative of certain of its employees, upon request, copies of documents such as those sought by the Union in its March 5, 1977, request, with the exception of XI18C rating schedules, without first affording such representative notice and an opportunity to meet and confer concerning a proposed change in such policy and practice.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

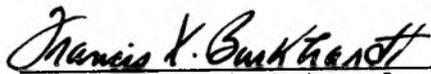
2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, furnish the American Federation of Government Employees, Local 1931, AFL-CIO, with copies of all documents sought in its March 5, 1977, letter, with the exception of the XI18C rating schedules.

(b) Post at its facility at the Department of the Navy, Naval Weapons Station, Concord, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, Department of the Navy, Naval Weapons Station, Concord, California, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
July 28, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

-2-

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a change in the policy and practice of furnishing the American Federation of Government Employees, Local 1931, AFL-CIO, the exclusive representative of certain of our employees, upon request, copies of documents such as those sought by the Union in its March 5, 1977, request, with the exception of XI18C rating schedules, without first affording such representative notice and an opportunity to meet and confer concerning a proposed change in such policy and practice.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, furnish the American Federation of Government Employees, Local 1931, AFL-CIO, with copies of all documents sought in its March 5, 1977, letter, with the exception of the XI18C rating schedules.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Rm. 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 600
San Francisco, California 94105



REPLY TO SAN FRANCISCO
AREA CODE 415 556-0555

RECOMMENDED DECISION AND ORDER

This proceeding is brought under Executive Order 11491, as amended (the "Order") by the American Federation of Government Employees, Local 1931, AFL-CIO, (the "Union") against the Department of the Navy, Naval Weapons Station, Concord, California (the "Activity"). In its amended complaint, filed September 26, 1977, the Union charged the Activity with violating sections 19(a), (1) and (6) of the Order by failing to confer and consult with the Union before changing a policy and practice of furnishing the Union duplicated copies of certain materials upon request.

A hearing was held in San Francisco, California, on January 9, 1978, and briefs were filed by both sides thereafter. Based upon the evidence and arguments presented I make the following findings of fact and conclusions and recommended order.

Findings of Fact and Conclusions

At all material times, the Union was the recognized exclusive representative of all employees as defined in the basic agreement between the parties, dated March 19, 1974.

In the years prior to March 5, 1977, various Union officials would from time to time request copies of various documents from Activity management. The kinds of documents requested would include federal wage standards, position descriptions, excerpts from the Federal Personnel Manual, regulations, copies of "X118C's", and other material. These requests were usually granted to the extent that the Activity had the material from which copies could be made. In particular, Mr. A. Compaglia, the Supervisory Labor Relations Specialist who spoke for the Commanding Officer on labor management relations, was very cooperative. On occasion, if he was busy he would suggest to the requesting Union official that he take the material to be copied to the copier and make the desired copies himself. (Unfortunately, at the time of hearing Mr. Compaglia was incapacitated so that he could not testify personally. However, his sworn statement was introduced and considered.)

On March 5, 1977, Mr. Wilfred J. Scott, President of the Union by letter requested the following information:

A copy of the Federal Wage Standard for a Motor Vehicle Operator

In the Matter of

DEPARTMENT OF THE NAVY
NAVAL WEAPONS STATION,
CONCORD

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 1931
AFL-CIO

Complainant

CASE NO. 70-5722 (CA)

Wilfred P. Scott
President
American Federation of
Government Employees
Local 1931
Concord Naval Weapons Station
P. O. Box 5548
Concord, California 94524
For the Complainant

A. S. Calcagno
Labor Relations Advisor
Western Field Division
Office of Civilian Personnel
Department of the Navy
525 Market Street, Suite 3522
San Francisco, California 94105
For the Respondent

Before: THOMAS SCHNEIDER
Administrative Law Judge

A copy of an X118C for a Motor Vehicle Operator
A copy of the position description for a Mobile
Equipment Server
A copy of the position description for a Blocker
and Bracer
A copy of the Federal Wage Standard for a Blocker
and Bracer
A copy of a X118C for a Blocker and Bracer
A copy of the Federal Wage Standard for a
Wharfbuilder, WG 46-03909
A copy of an X118C for a Wharfbuilder, WG
46-039-09

The letter further requested "that this information
be provided immediately in order that we may assist
employees in processing their Reduction-In-Force
appeals." The documents requested were not more than
three or four pages each.

On March 7, 1977, Mr. Compaglia responded with the
following letter:

From: Supervisory Labor Relations Specialist,
Naval Weapons Station, Concord, CA 94520
To: President, AFGE Local 1931, Naval Weapons
Station, Concord, CA 94520

Subj: Documents Request

Ref: (a) AFGE ltr of 5 Mar 77

1. Reference (a) requests extensive dupli-
cation on services of various classifica-
tion standards and sections of X-118. Code
06 will not reproduce these documents in that
(a) they are available for review in Code 06
and you have readily available access to them,
and (b) you have previously received the copies
of the requested information on Wharfbuilder
(May 1976), Motor Vehicle Operator (24 November
1976) and Blocker and Bracer (given to O.C.
Brown in 1975).

2. Extensive duplication requests are
quite costly and unreasonable where alterna-
tives exist. The current financial situa-
tion at this Station precludes unnecessary
expenditures, and thus your cooperation is
requested.

ALBERT R. COMPAGLIA

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It is this letter of refusal that triggered this
unfair labor practice charge. The Union contends that
the refusal to furnish the requested copies was retalia-
tion for the Union having filed nine unfair labor prac-
tice complaints shortly before. The Activity contends
that it was never its practice to furnish copies on
demand. In any event, it is agreed that the parties did
not negotiate concerning the subject of copying prior to
the Activity's letter of March 7, 1977. It should be
noted that effective September 23, 1977, i.e., six months
after the beginning of the controversy, the parties exe-
cuted a written agreement regarding the use of copying
machines, which includes a provision that the Union will
pay four cents per copy when it uses the Activity's
machines.

The fact of this agreement shows that the use of
copying machines is a subject that can be negotiated. It
does not, of course, show what the practice had been
prior to its execution.

It should be noted that there is no dispute here
about access to information (except X118C's as noted
below). The Activity has always been willing to give the
Union access to documents. At issue is the furnishing of
copies.

It is well established that once a practice has
matured into a term and condition of employment manage-
ment may not unilaterally change it without consulting
with the union. Veterans Administration, Veteran Admini-
stration Regional Office, New York Region and American
Federation of Government Employees, Local Union 1151,
AFL-CIO, A/SLMR No. 694; Internal Revenue Service, Off-
ice of the Regional Commissioner, Western Region and
National Treasury Employees' Union, A/SLMR No. 473.

As noted above, prior to March 1977, the Union had
usually obtained copies it requested. The Activity
contends, however, that there was no established prac-
tice. It contends that there was no practice to furnish
X118C's because this was confidential material. X118C's
were described at the hearing as something akin to a job
grading sheet for a particular job, in the nature of
testing material. Since several credible witnesses
testified that this was confidential material, at least
to the extent that it could not be copied although on
occasion it could be examined, and since Civil Service
Commission Regional Letter No. 75-6 makes rating sched-
ules confidential to this extent, I conclude that it was
proper to deny the Union copies of X118C's, regardless

-4-

of past practice and even without an opportunity to negotiate on this point.

The evidence presented by the Activity pertained largely to reasons why the Union was refused the copies it requested in March 1977.

Several of the Activity's witnesses gave the impression that it was entirely discretionary with them to determine whether the Union needed a copy of a given document. Such discretion cannot be exercised in this context. The policy underlying the Order is to provide "employees an opportunity to participate in the formulation and implementation of personnel policies and practices", and to maintain "cooperative relationships between labor organizations and management officials." Order, Preamble. This implies more equality between the Union and Management than these witnesses acknowledged. If a Union is to represent employees effectively, its officials must in the first instance decide what they need to do the job. It is not for management to decide that a copy of this regulation or that job description is irrelevant to the Union's task.

One Personnel Management Specialist testified it was his policy not to furnish copies of materials unless he had extra copies or he felt there was need for it. But the weight of the evidence indicates that, in fact, requests for copies were almost always honored by at least some management personnel, unless the requested matter was privileged.

The Activity contended that the Union was not entitled to the copies it requested because it was not representing employees who had appeals pending. An Activity witness testified that in the past he had supplied the Union with copies of documents, but generally only when appeals were pending. Here the evidence shows that there was an immediate need for the information sought because 25 or 30 employees were threatened with a reduction in force and the Union had to help them decide whether to appeal. Whether an appeal had actually been filed is an immaterial technicality in the instant case.

The Activity also contends that it was past practice to refuse to give the Union copies of material the Union already had. But the evidence showed only one instance in which the Union was refused a copy of a Civilian Manpower Management Instruction, (Tr. 54) because it had just recently been given a copy of the identical instruction. That was an exception to the practice of general

cooperation, not a negation of the practice itself. At times there had been discussions as to whether a particular item was necessary, but these discussions were always settled amicably.

Furthermore, I find that position descriptions and wage standards are periodically changed, and that the most convenient way of determining the currency of these documents is to get a copy of the latest version.

The Activity contends that the items requested in May of 1977 were unusually lengthy. At most they amounted to 30-40 pages. This argument seems contrived.

Several witnesses testified to the conclusion that there was no change in policy concerning copies in March of 1977. However, the specifics prior to that time show that copies were furnished and the Activity's letter of March 7, 1977, shows that copies would not be as readily furnished thereafter.

Therefore, with the exception of X118C's, I find that the practice of furnishing copies had matured into a term and condition of employment. Prior to changing such a term and condition, the Activity should have given the Union an opportunity to consult, confer or negotiate. Order, Section 19(a)(6).

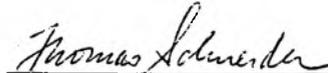
Recommended Order

It is recommended that the Activity be directed by the Assistant Secretary to cease and desist from:

(a) changing existing terms and conditions of employment without first meeting and conferring with the American Federation of Government Employees, Local 1931, AFL-CIO;

(b) in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended; and to post a notice of its intent in the form attached as "Exhibit A" in conspicuous places at the station including all bulletin boards where notices to employees are customarily posted. Respondent should be directed to take reasonable steps to insure that such notices remain posted for 60 days and are not altered, defaced, or covered.

Dated on the 25th day of May 1978 in San Francisco,
California.


THOMAS SCHNEIDER
Administrative Law Judge

TS:tl

EXHIBIT A
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change existing terms and conditions of employment without first meeting and conferring with the American Federation of Government Employees, Local 1931, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights, as provided in section 19(a)(1) of Executive Order 11491.

(Agency of Activity)

Dated: _____ By: _____

(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 question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061 Federal Building, 450 Golden Gate Avenue, San Francisco, California, 94102.

July 31, 1978

A/SLMR No. 1094

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION,
REGION 3
A/SLMR No. 1094

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Council of Locals 1497 and 2195 (AFGE) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order when one of its supervisors made disparaging remarks to employees about the AFGE.

The Administrative Law Judge concluded that the Respondent's conduct was violative of Section 19(a)(1) of the Order. In this regard, he found that the statements made by the Respondent's supervisor to several employees who were members of the AFGE were imbued with hostility, disdain and disparagement to the AFGE, and that said statements demeaned the AFGE and tended to convey to employees the futility of union representation and discouraged employees from exercising rights granted under Section 1(a) of the Order. However, he recommended dismissal of the Section 19(a)(2) allegation in the complaint as no evidence was adduced to support such allegation.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations. Accordingly, he ordered the Respondent to cease and desist from engaging in the conduct found violative of the Order and to take certain affirmative actions. He also ordered that portion of the complaint alleging a violation of Section 19(a)(2) of the Order be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 3

Respondent

and

Case No. 22-08494(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL OF LOCALS
1497 and 2195

Complainant

DECISION AND ORDER

On May 31, 1978, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in conduct which was violative of Section 19(a)(1) of the Order and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge also found that the Respondent's conduct was not violative of Section 19(a)(2) of the Order and recommended that that aspect of the complaint be dismissed. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that General Services Administration, Region 3, shall:

1. Cease and desist from:

(a) Making disparaging or demeaning remarks to employees about the American Federation of Government Employees, Council of Locals 1497 and 2195, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

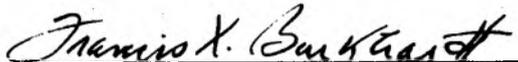
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Post at its Woodlawn, Maryland, facility, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Regional Administrator, General Services Administration, Region 3, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Regional Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of the order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges violation of Section 19(a)(2) of the Order, be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 31, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT make disparaging or demeaning remarks to employees about the American Federation of Government Employees, Council of Locals 1497 and 2195, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....

In the Matter of .

GENERAL SERVICES ADMINISTRATION, .
REGION 3, .
Respondent .

and .

AMERICAN FEDERATION OF GOVERNMENT .
EMPLOYEES, COUNCIL OF LOCALS .
1497 and 2195 .
Complainant .

.....

Case No. 22-08494 (CA)

WILLIAM NAZDIN, NATIONAL REPRESENTATIVE
American Federation of Government
Employees
Star Route 3, Box 135
LaPlata, Maryland 20646
For the Complainant

EDWARD P. DENNEY, LABOR MANAGEMENT
RELATIONS OFFICER,
General Services Administration, Region 3
Room 1034, 7th & D Streets, S.W.
Washington, D.C. 20407
For the Respondent

Before: SALVATORE J. ARRIGO
Administrative Law Judges

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding arises under the provisions of Executive Order 11491, as amended (hereinafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter referred to as the Assistant Secretary), a Notice of Hearing on Complaint issued on January 19, 1978 with reference to alleged violations of Sections 19(a)(1) and (2) of the Order. The

complaint, filed on August 25, 1977 by American Federation of Government Employees, Council of Locals 1497 and 2195 (hereinafter referred to as the Union or Complainant) asserted that General Services Administration, Region 3, violated the Order when one of its supervisor's allegedly made disparaging remarks to employees about the Union.

At the hearing held on February 28, 1978 the parties were represented and afforded full opportunity to adduce evidence and call, examine and cross-examine witnesses and argue orally. Complainant filed a brief which has been duly considered.

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

Findings of Fact and Conclusions of Law

At all times material hereto the Union has been the exclusive collective bargaining representative of various of the Activity's employees including carpenter shop employees at the Activity's Woodlawn, Maryland facility. In May 1977 the carpenter shop was comprised of approximately seven employees including Kenneth Rollins, the shop foreman.

While at work in the carpenter shop on May 24, 1977 employee Ralph Caldwell, a Union member, received notice that he was being transferred from the Woodlawn facility to the Activity's facility at Ft. Meade, Maryland. Caldwell was opposed to being transferred to Ft. Meade and relayed his discontent to his personal friend and foreman, Kenneth Rollins. 1/ During this conversation Rollins informed Caldwell that he had done all he could to keep Caldwell at Woodlawn and commented to the effect, "you pay all that money to the Union, why don't you get your money's worth and get the Union to do something for you." 2/

1/ Caldwell had previously lived near Ft. Meade and moved to the Woodlawn area several years ago upon being transferred to the Woodlawn facility.

2/ At some undisclosed previous time Rollins expressed the opinion to Caldwell that the Union wasn't doing him much good and Caldwell was wasting his money. Such testimony was vague and without reference to specific date of occurrence and accordingly, will not be relied upon in this decision.

At about that same time, Union President Elder Phenecie was observed walking in a hallway adjoining the carpenter shop and Rollins told Caldwell to go and get the matter "straightened out."

Caldwell left Rollins, called for Phenecie and engaged Phenecie in a conversation a few yards from Rollins office where Rollins and Caldwell had concluded their discussion. Caldwell told Phenecie that he was unhappy with the transfer and wanted to have a meeting at the facility with one of the Union's National representatives to discuss the matter. Phenecie responded that a meeting would have to be arranged for someplace other than the Woodlawn facility. Caldwell loudly complained that he was getting no help from the Union regarding the transfer and demanded that Phenecie get a National representative to the facility immediately. Phenecie countered that he couldn't get the National representative to the facility right then but would call and see if he could contact him and arrange a meeting somewhere. Caldwell bitterly complained that he had paid his Union dues for years and the first time he asked for help, the Union could not get a representative to the facility.

Rollins was observing the discussion from the doorway of his office and remarked something to the effect: "See, the 'f____' 3/ Union isn't going to do you any good. They spend all your money to go to Las Vegas, so they can't help you out, Ralph. You should join our union. It only costs \$60 a year and we have parties and all." 4/ Phenecie left and later arranged for a meeting between Caldwell and a National representative at another location.

The record reveals that around the same period of time as the May 24, 1977 incident, described above, carpenter shop employee and Union member Oliver Adair returned from his lunch break one or two minutes late on several occasions.

3/ Obscenity deleted.

4/ Although Rollins denied having made this statement, I credit the testimony of Phenecie as supported in part by employee Vass and, to a degree, Caldwell.

The Las Vegas reference relates to the location of the Union's prior National Convention which Phenecie attended as a delegate.

As to the remarks concerning "our Union," the record does not establish the existence of any organization with which Rollins might have been associated. However, Rollins statement might have been merely a cutting remark made simply to annoy Caldwell and Phenecie.

When this occurred, Adair was informed by Rollins that such lateness would be recorded and when sufficiently accumulated, Adair would be "charged" for this time. Rollins told Adair that he could go to the "f____" 5/ or "god damned" Union about the matter if he wished to, but it would do no good. 6/

The Union contends that Rollins employed "special vulgarity" to insult the Union. The use of profanity and obscenities was not uncommon in the carpenter shop nor was Rollins a stranger to such use. Frequently, such words are used from habit and are not intended to nor do they convey an insult or deprecation. Thus, in assessing such language, the words themselves are not as important as the thrust of the entire statement under consideration.

In all the circumstances herein, I conclude that Rollins' remarks made to Caldwell and Phenecie while together on May 24, 1977, and Rollins' remarks to Adair around that same time, violated Section 19(a)(1) of the Order. 7/ Rollins' statements were imbued with hostility, disdain and disparagement to the Union. Such pejorative remarks in these circumstances demeaned the Union and tended to convey to employees the futility of union representation and discourage employees from exercising rights granted under Section 1(a) of the Order. 8/ Accordingly, by such conduct the Activity interfered with, restrained and coerced employees within the meaning of Section 19(a)(1) of the Order. 9/

5/ Obscenity deleted.

6/ Other remarks to the effect that the Union was no good, allegedly made by Rollins at undisclosed times are not relied on herein due to the vagueness of the testimony with regard thereto.

7/ No evidence was adduced to support the allegation that Respondent violated Section 19(a)(2) of the Order. Therefore, I shall recommend that allegation be dismissed.

8/ Section 1(a) of the Order provides, in relevant part, that employees ". . . (have) the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right."

9/ Cf. Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania, 6 A/SLMR 719, A/SLMR No. 771 and U.S. Army Headquarters, etc. Ft. Jackson, South Carolina, 3 A/SLMR 61, A/SLMR No. 242.

Recommendations

Having found that Respondent has engaged in conduct violative of Section 19(a)(1) of the Order, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that General Services Administration shall:

1. Cease and desist from:

(a) Making disparaging or demeaning remarks to employees about American Federation of Government Employees, Council of Locals 1497 and 2195.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order.

(a) Post at its Woodlawn, Maryland facility, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Regional Administrator, General Services Administration, Region 3, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Regional Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of the order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges additional violations of Section 19(a)(2) of the Order, be, and it hereby is, dismissed.


SALVATORE J. ARRIGO
Administrative Law Judge

Dated: 31 MAY 1978
Washington, D.C.

SJA:mjm

APPENDIX

August 4, 1978

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT make disparaging or demeaning remarks to employees about American Federation of Government Employees, Council of Locals 1497 and 2195.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

OGDEN AIR LOGISTICS CENTER,
HILL AIR FORCE BASE, UTAH
A/SLMR No. 1095

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1592, (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order when a supervisor told the Complainant's Vice President, among other things, that if he had any influence he would not promote the Vice President due to the fact that his union activities took too much time from work.

The Administrative Law Judge found that the supervisor had violated Section 19(a)(1) of the Order by indicating to the employee that if he had any influence, the employee would not be promoted due to time spent on union business. In addition, she found that such statement made in the presence of numerous employees had a "chilling effect" on all employees and improperly penalized employees who, as union representatives, are exercising rights assured under the Order. However, the Administrative Law Judge dismissed the Section 19(a)(1) and (2) allegation based on the failure to promote, finding that there was insufficient evidence to establish that the Respondent failed to promote the employee in question due to his union activity.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge, and ordered the Respondent to cease and desist from the conduct found violative of the Order and to take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OGDEN AIR LOGISTICS CENTER,
HILL AIR FORCE BASE, UTAH

Respondent

and

Case No. 61-3751(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1592

Complainant

DECISION AND ORDER

On May 25, 1978, Administrative Law Judge Joan Wieder issued her Recommended Decision and Order in the above entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge also recommended dismissal of certain other aspects of the complaint. No exceptions were filed with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER 1/

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Ogden Air Logistics Center, Hill Air Force Base, Utah, shall:

1/ The recommended order and appendix of the Administrative Law Judge have been slightly modified for the purpose of clarification.

1. Cease and desist from:

(a) Interfering with, restraining, or coercing John Darlington, AFGE Local 1592 Vice President, or any other union official or other employee, in the exercise of their right to assist a labor organization assured by Executive Order 11491, as amended, by making adverse or derogatory remarks regarding employee union activities or affiliation.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Post at its facility at Hill Air Force Base, Utah, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges a violation of Section 19(a)(1) and (2) of the Order based on the failure to promote the alleged discriminatee, be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 4, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce John Darlington, AFGE Local 1592 Vice President, or any other union official or other employee, in the exercise of their right to assist a labor organization assured by Executive Order 11491, as amended, by making adverse or derogatory remarks regarding employee union activities or affiliation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 600
San Francisco, California 94105



REPLY TO SAN FRANCISCO
AREA CODE 415 556-0555

In the Matter of

OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH
Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES AFL-CIO,
LOCAL 1591
Complainant

CASE NO. 61-3751(CA)

Clare A. Jones, Esquire
Advisor, Ogden Air Logistics Center
DOB, USAF
Hill Air Force Base, Utah 84406
For the Respondent

William E. Wade
National Representative
AFGE
96 North Lakeview Drive
Clearfield, Utah 84015
For the Complainant

Before: JOAN WIEDER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint, filed October 3, 1977, as amended February 13, 1978, under Executive Order 11491, as amended, by Local 1592, American Federation of Government Employees, AFL-CIO, (hereinafter called the Union or Complainant), against the Ogden Air Logistics Center, Hill Air Force Base, (hereinafter called the Respondent or Air Force), a Notice of Hearing on complaint was issued by the

Assistant Regional Director for the Kansas City Region on February 16, 1978.

The complaint alleges that the Air Force violated sections 19(a)(1) and (2) of the Executive Order when Mr. Ted. D. Keeling, a supervisor, stated to Mr. John Darlington, AFGE Local 1592 Vice President, that, in essence, if he had any influence, he would not promote Mr. Darlington to Wage Grade-8 missile loader due to Mr. Darlington's union activities which took too much work time and his failure to rotate shifts because of his union position.

A hearing was held in the captioned matter on March 30, 1978, at Hill Air Force Base, Utah. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, I make the following findings of fact, conclusions, and recommendations:

Findings of Fact

Mr. John Darlington worked at the Air Freight Terminal at Hill Air Force Base from September 1966 to May or June 1977. Mr. Darlington has been a union steward or officer since 1967 or 1968, and stated that during 1976 and the first part of 1977, he did spend quite a bit of time on union grievances and arbitrations.

At the time Mr. Darlington was hired, he had a handicapped code 30 due to impaired vision. The appointment as an aircraft loader was made with knowledge of Mr. Darlington's handicap. The handicap resulted in a restriction to daylight driving of motor pool vehicles. There is no evidence that the vision problem in any way affected his job performance. Mr. Darlington received high work appraisals in the last few years. The duties of an aircraft loader at times included assisting in the loading and unloading of missiles, when the missile loading and aircraft loading crews worked together. Consequently, Darlington participated in the loading and unloading of missiles.

In July of 1976, Mr. Darlington developed a seizure disorder and was placed under additional medical restrictions including prohibition from working above the ground, working or moving equipment or machinery, and moving aircraft. As a result of medical examinations by a doctor of his choice, Mr. Darlington was informed by the

dispensary that he was subject to the above restrictions plus he could not work on scaffolds or ladders, and he would not be permitted to drive a government vehicle at all. These stated restrictions pertained to most of the duties performed by a missile loader and Mr. Darlington stated that the medical restrictions could have been a primary reason for his not being selected for a promotion from aircraft loader to missile loader. Mr. Darlington believes, to the best of his recollection, that he participated in the loading and unloading of missiles at least once after the imposition of these more extensive work restrictions. As of May 2, 1977, Mr. Darlington was terminated as an aircraft loader and placed in the handicapped program, which found him a position as a GS-4 Supply Clerk.

Prior to Mr. Darlington's placement in the handicapped program, he was a Wage Grade-7 aircraft loader who was placed on at least two promotion profiles for consideration for advancement to a Wage Grade-8 missile loader. The exact dates of the promotion profiles were not placed in evidence, but it appears they were prepared and issued prior to April 20, 1977.

On April 20, 1977, Mr. Darlington was in the lunchroom on a break or during lunch with approximately 10 co-workers and a supervisor, Mr. Ted Keeling. Mr. Keeling was an aircraft loading foreman. Darlington and Keeling were close friends since approximately 1966. During the break, Darlington mentioned to Keeling that he had been on several promotion profiles but was never promoted to a missile loader. Mr. Keeling indicated that if he had any influence, Mr. Darlington would not be promoted and gave as his reasons that that Darlington spent too much time on union business and he would not change shifts. Darlington did not change shifts pursuant to provisions of the union agreement. Neither Darlington nor his supervisors knew how much time he devoted to union-related activities but during 1976 and 1977 he was on leave without pay to perform his union obligations. Darlington did not know how the supervisors worked around his absences but stated he recognized that the absences did create problems.

The nonsupervisory employees who testified did not know how selections for promotions to Wage Grade-8 missile loaders were made. Several foremen who testified also were unclear regarding the mechanics of the selection process. Therefore, neither Mr. Darlington nor the other members of the crew present at the conversation, or who were subsequently privy to the incident, knew if Mr. Keeling influenced or actually made the selection of the individuals promoted.

The statement was not mere banter between friends. An aircraft freight loader present, Lloyd A. Green, believed Mr. Keeling was quite serious in his statement, that he was not joking and further that he had never heard much joking between Keeling and Darlington.

Another co-worker of Darlington, William A. Lefflar, Jr., noticed Darlington was agitated right after the above-described conversation and asked Keeling approximately 15 to 20 minutes after the actual incident what had transpired. Keeling told him, in essence, that he said to Darlington that he spends too much time on union business and not enough time on the job. Therefore, if it was up to Keeling, Darlington would never be promoted to Wage Grade-8 missile loader, due to Keeling's concern that Darlington was not sufficiently reliable because of his union activities to assume the position. The recitation of what had previously transpired gave no indication of joking or mere friendly advice.

It appears that Mr. Keeling received an official reprimand regarding his statements to Mr. Darlington, but there is no indication that the reprimand was a matter of general knowledge to the members of the Union who overheard the original conversation or were later informed of the statement.

The evidence regarding the method of selections for advancement from the promotion profile is conflicting. However, the general consensus appears to be that aircraft loading foremen do not directly vote on promotions to missile loaders. However, an aircraft missile loading foreman prior to voting on a selection might discuss an individual with the various supervisors at the air freight terminal, including aircraft loading foremen such as Mr. Keeling. Consequently any adverse comment by the warehouse or aircraft loading foreman could have a derogatory influence on possible selections for promotion. The missile loading foremen do render their opinions on the individual employees named on the promotion profile privately to the shift manager. Then, the shift manager makes the final decision. The shift manager at the time of the incident herein involved, Everett Lee Mackey, testified that he also might ask an aircraft loading or warehouse foreman's opinion in determining who to promote. Therefore, it must be concluded that an aircraft loading or warehouse foreman could influence the promotion decision. However, there is no evidence that Mr. Keeling ever shared his opinion with fellow supervisors and the shift manager does not think he received any input from Keeling. The shift manager does not recall failing to promote Mr. Darlington due to his union activities. He recalls choosing the individual he felt was most

qualified, even though he had less time at the air freight terminal than Darlington. There was no showing that Darlington was more qualified than any of the individuals selected.

The evidence does indicate that Darlington was a good employee and at one time was assigned as a group leader supervising other employees. However, it was not demonstrated that the position of group leader was considered qualifying experience for promotion to a missile loader, or that those individuals chosen for promotion did not have the same or similar qualifying experience.

Analysis and Conclusions

Section 1(a) of the Executive Order guarantees each employee the right, freely and without fear of penalty or reprisal, to join and assist a labor organization. The right to assist a labor organization "extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative; including presentation of its views to officers of the executive branch... or other appropriate authority." Abridgement of these rights with respect to hiring, tenure, promotion or interference by restraint or coercion is violative of section 19(a)(1) and (2) of the Order.

Section 12(b) of the Order provides, in part, that agency management officials retain the right, in accordance with applicable law and regulations, to direct employees of the Agency; to hire, promote, transfer, assign and retain employees in positions within the Agency, and to suspend, demote, discharge, or take other discipline action against employees; to maintain the efficiency of government operations entrusted to them; and, to determine the methods, means, and personnel by which such operations are to be conducted.

In this proceeding, there is no allegation by the Activity that Mr. Darlington acted in a manner while performing union duties, which resulted in a conflict of interest or was otherwise incompatible with law or with his official duties.

The complaint alleges, essentially, that the discrimination was established verbally during the work break at the lunchroom. The record clearly established that a supervisor, Mr. Keeling, informed Mr. Darlington that in Keeling's view, Darlington's advancement potential was severely circumscribed if not nonexistent due to Darlington's authorized union representational duties.

Mr. Keeling indicated that if he had anything to do with it (which was possible due to his supervisory position) Darlington would not be promoted to a missile loader as long as he continued to be extremely active and spent what Keeling felt to be an undue amount of time on union representational duties.

Although there is an indication that the Activity did reprimand Mr. Keeling for making the statement, there is no clear showing that the Activity disavowed the statement of Mr. Keeling. The record also fails to show that the other members of the unit were informed of the Activity's displeasure with Mr. Keeling's statement. Consequently, the statement of Mr. Keeling, as a supervisor, must be attributed to the Activity.

It is clear from the record that Mr. Darlington was given what was amounted to a carte blanche to perform representational duties. There was no question, or evidence, that Darlington or Local 1592 agreed to surrender Darlington's career opportunities as a trade-off for his being permitted to devote time to union activities during the work day. Thus, for a supervisor to state to Darlington in the presence of a substantial number of fellow employees, that his career opportunities were greatly circumscribed as long as he continued to perform his authorized union duties is interference with, restraint and coercion of Mr. Darlington, as well as the other employees present, in the exercise of their rights assured by this Order to join and assist a labor organization.

Assuming, for the moment, that Mr. Keeling at the time he made the statement may not have had an actual impact upon Mr. Darlington's promotion potential, does not alter the conclusion that the Order was violated. The evidence clearly demonstrates that the employees did not know how promotion profiles were compiled and how the individuals listed thereon were subsequently chosen for advancement to missile loaders. Therefore, the statement to Mr. Darlington would, and is hereby found to have had a restraining and coercive effect upon those employees present at the discussion as well as those later informed of the statement. Accordingly, I find that the Respondent's conduct on April 20, 1977, was violative of section 19(a) (1) of the Order.

Complainant also seeks a finding that Darlington's failure to receive a promotion to Wage Grade-8 missile loader was based upon union animus. Section 203.15 of the regulations imposes upon the Complainant the burden of proving the allegations of the complaint by a preponderance of the evidence. The Complainant has failed to sustain this burden regarding the allegation that

Darlington was not promoted because of his union activities.

The finding that Respondent was aware of Darlington's union activities and the existence of a statement by an agent of Respondent indicative of animus toward Darlington's union responsibilities is insufficient to support a conclusion that the selections for promotion were discriminatory. The record is devoid of any evidence regarding Darlington's performance compared to those of his colleagues. There is complete lack of any evidence that the merit promotion system was not followed. The only evidence that Darlington was singled out for praise was his assignment as a team leader, but how long-lived that assignment was, how many team leaders were appointed by Respondent, whether the position of team leader was considered qualifying experience for promotion to missile loader, and whether those appointed to the position of missile loader also had team leader experience, were facts not placed in evidence.

There is also a complete lack of evidence that Keeling communicated his opinions to any other supervisor. The supervisors that were called to testify either stated that they did not discuss the matter with Keeling or the question was never asked. Those supervisors that were in the decision making position regarding Darlington's promotion were not shown to have any union animus or to have been influenced in any way by his union activities.

The nonselection of Darlington cannot be found lacking in justification so as to give rise to the inference that the only explanation reasonably inferred from the facts were his union activities. Darlington's medical problems with the attendant work restrictions as well as the plethora of other valid judgmental factors which enter into the decision to promote an individual could as readily, if not more likely, have been the basis for the nonselection.

In conclusion, I find that the record will not support a finding that Respondent failed to promote Mr. Darlington due to his union activities. In these circumstances I am constrained to recommend that the complaint as to a violation of sections 19(a)(1) and 19(a)(2) of the Executive Order based on Respondents failure or refusal to select John Darlington to fill a Wage Grade-8 vacancy position for missile loader be dismissed.

Recommended Order

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the Regulations, the

Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah shall:

1. Cease and desist from:

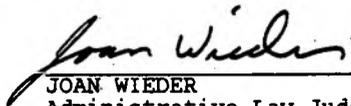
(a) Interfering with, restraining, or coercing AFGE Local 1592 Vice President, or any other union official or steward, in the exercise of the right to assist a labor organization.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their right assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Post at its facility at Hill Air Force Base, Utah copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this Order as to what steps have been taken to comply herewith.



JOAN WIEDER
Administrative Law Judge

Dated: May 25, 1978
San Francisco, California

JW:scm

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce John Darlington, or any other employee, by making any adverse or derogatory remark or comment, regarding the employees' union activities or union affiliation.

WE WILL NOT interfere with, restrain, or coerce John Darlington, or any other employee, in the exercise of their rights assured by Executive Order 11491, as amended, to join and assist a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice of compliance with any of its provisions, they must communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

August 4, 1978

A/SLMR No. 1096

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
A/SLMR No. 1096

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to negotiate with the AFGE concerning changes in personnel policies and practices or other matters affecting working conditions which could result from the implementation of four draft directives concerning various personnel policies which the Respondent had submitted to the AFGE for comment. The Respondent took the position, based on its interpretation of the parties' negotiated agreement, that it was only required to consult, but not to negotiate, with the AFGE concerning these changes.

The Administrative Law Judge concluded that the negotiated agreement did not constitute a clear and unmistakable waiver by the AFGE of its right to negotiate pursuant to Section 11(a) of the Order. Consequently, he concluded that the Respondent's attempt, at a meeting on June 11, 1976, to limit the discussion concerning the draft directives to "consultation," rather than negotiation, constituted a refusal to bargain in violation of Section 19(a)(1) and (6) of the Order.

The Assistant Secretary adopted the Administrative Law Judge's finding of violation. In so doing, he noted that evidence of conduct subsequent to the alleged refusal to bargain should have been admitted into the record as such evidence could be utilized to demonstrate that the alleged refusal had been cured. Under the circumstances of this case, however, the Respondent was not found to have been prejudiced by the Administrative Law Judge's ruling. Accordingly, the Assistant Secretary ordered the Respondent to cease and desist from engaging in the conduct found violative of the Order and to take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

Respondent

and

Case No. 22-07808(CA)

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On April 14, 1978, Administrative Law Judge Edwin A. Bernstein issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendations, as modified herein.

At the June 11, 1976, meeting between the parties, the Respondent, based on its interpretation of the negotiated agreement, stated that it was required only to consult, but not to negotiate, with the Complainant concerning changes in personnel policies and practices or other matters affecting working conditions which could result from the implementation of four draft directives concerning various personnel policies which it had

1/ In reaching the disposition herein, I find it unnecessary to pass upon the Administrative Law Judge's finding, at page 7 of his Recommended Decision and Order, that the Respondent made submission by the Complainant of written comments on the four draft directives involved herein a prerequisite to further discussions.

submitted to the Complainant. The Complainant's position was that the negotiated agreement did not constitute a clear and unmistakable waiver of its right to negotiate in this regard pursuant to Section 11(a) of the Order. After reviewing the agreement, the Administrative Law Judge found that it did not constitute a waiver by the Complainant of its right to negotiate. Consequently, he concluded that the Respondent's attempt at the June 11, 1976, meeting to limit the discussion concerning the draft directives to "consultation," rather than negotiation, constituted a refusal to bargain in violation of Section 19(a)(1) and (6) of the Order.

To refute the contention that it had refused to bargain on June 11, 1976, the Respondent attempted to introduce evidence at the hearing that it had engaged in continuing discussions with the Complainant regarding the directives at issue. The Administrative Law Judge, however, sustained the Respondent's objections to the receipt of certain evidence relating to events subsequent to the June 11, 1976, meeting. In my view, evidence of conduct subsequent to the alleged refusal to bargain should have been admitted into the record in this matter as such evidence could be utilized to demonstrate that an alleged refusal to bargain had been cured by the Respondent's subsequent conduct. To this end, therefore, I find that the Administrative Law Judge should have received the proffered evidence. However, for the reasons stated below, I find that the Respondent was not prejudiced by the Administrative Law Judge's ruling.

The Administrative Law Judge found, and I agree, that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to negotiate on June 11, 1976, based on its incorrect interpretation of the parties' negotiated agreement. My review of the record, including exhibits placed in the rejected exhibits file and certain testimony which was admitted into evidence regarding the subsequent meetings, shows that the Respondent at no time abandoned its position that the parties' negotiated agreement constituted a waiver by the Complainant of its bargaining rights set forth in the Order. In my opinion, by basing its defense to the instant complaint on its interpretation of the agreement the Respondent acted at its peril, and the finding herein, that the parties' negotiated agreement did not constitute a clear and unmistakable waiver, in effect, nullifies the Respondent's defense. Thus, under the particular circumstances of this case, I find that a mere willingness by the Respondent to engage in further "consultations" did not cure its improper refusal to meet and confer in good faith within the meaning of Section 11(a) of the Order. 2/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Equal Employment Opportunity Commission shall:

2/ Compare NASA, Kennedy Space Center, Kennedy Space Center, Florida, 2 A/SLMR 566, A/SLMR No. 223 (1972), where the parties negotiated regarding terms and conditions of employment, irrespective of the positions they took vis-a-vis their bargaining obligations.

-2-

1. Cease and desist from:

(a) Refusing to negotiate with the American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals, with regard to changes in personnel policies, practices, and matters affecting working conditions, including proposed directives relating to such matters.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

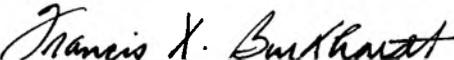
(a) Rescind the draft directives regarding Disciplinary Actions and Upward Mobility and, if published, rescind the draft directives regarding Selection Procedures and Appointment Authority and EEOC Policies and Procedures.

(b) Upon request, meet and confer in good faith with the American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals, concerning personnel policies, practices, and matters affecting working conditions of employees represented by the National Council, including proposed directives relating to such matters.

(c) Post at its facilities copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Chair and shall be posted and maintained by the Chair for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Chair shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days of the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
August 4, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

-3-

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to negotiate with the American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals, with regard to changes in personnel policies, practices, and matters affecting working conditions, including proposed directives relating to such matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Executive Order.

WE WILL rescind the directives regarding Disciplinary Actions and Upward Mobility and, if published, rescind the directives regarding Selection Procedures and Appointment Authority and EEOC Policies and Procedures.

WE WILL, upon request, meet and confer in good faith with the American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals, concerning personnel policies, practices, and working conditions affecting the employees represented by the National Council, including proposed directives relating to such matters.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of :

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION :
Respondent :

and :

AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, AFL-CIO :
Complainant :

Case No. 22-07808 (CA)

.....
LeRoy B. Curtis, Esquire
Chief, Labor Management Relations Branch
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

For the Respondent

Raymond J. Malloy, Esquire
Assistant General Counsel
American Federation of Government Employees,
AFL-CIO
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005

For the Complainant

Before: EDWIN S. BERNSTEIN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding was initiated upon the filing of a complaint by American Federation of Government Employees, AFL-CIO ("the Union") against Equal Employment Opportunity Commission ("the Agency") on March 2, 1977.

The complaint alleged that the Agency violated Sections 19(a) (1) and (6) of Executive Order 11491, as amended ("the Executive Order") by refusing the Union's request to meet, confer, consult and negotiate regarding proposed personnel regulations and directives.

By letter decision dated May 13, 1977, the Regional Administrator for the Philadelphia Region determined that a reasonable basis for the complaint was established with regard to four proposed policies and procedures: the Upward Mobility Program, EEOC Policies and Procedures, Disciplinary Actions, and Selection Procedures and Appointment Authority. On June 29, 1977 the Regional Administrator issued a Notice of Hearing with respect to alleged violations of Sections 19(a) (1) (6) of the Executive Order regarding these four proposed policies and procedures.

A hearing was held before me in Washington, D.C. on September 1 and 6, 1977. Both parties were present and were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to adduce relevant evidence, and to file briefs.

Upon the entire record in this case and my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendation.

Findings of Fact

On July 6, 1971, American Federation of Government Employees, AFL-CIO ("AFGE") was granted exclusive recognition to represent all employees in the bargaining unit at the U.S. Equal Employment Opportunity Commission ("EEOC"). The parties negotiated the National Labor Management Agreement, effective June 29, 1974. In a Memorandum of Understanding dated April 28, 1975, the parties agreed that pending AFGE's establishment of a Council of Locals, the authority to act on day-to-day labor-management matters was delegated to Local 2667, which was located at the headquarters office.

On September 18, 1975, AFGE's National President wrote to the Agency confirming that a National Council of EEOC Locals would be established and specifying complete authority regarding the parties' exclusive recognition agreement that would be delegated by the Union to the Council upon its establishment.

On April 26, 1976, AFGE again wrote EEOC confirming that a National Council had been established and the delegation of authority to the Council was effective as of that date. The Council consisted of eight locals with Mr. Edward Watkins as its president.

On April 28, 1976, the Agency sent the Union a draft directive concerning the Upward Mobility Program and requested the Union to submit its comments by May 14, 1976.

On May 25, 1976, the Agency sent the Union a draft directive for Disciplinary Actions and requested the Union to return the draft with its comments by June 11, 1976.

On May 26, 1976, the Agency sent the Union a draft directive for Selection Procedures and Appointment Authority and requested the Union to return the draft with its comments by June 14, 1976.

On April 28, 1976, the Agency sent the Union a draft directive for EEOC Policies and Procedures and requested the Union to return the draft with its comments by a specified date.

By memoranda dated May 14, 1976, of Mr. Watkins to Mr. LeRoy B. Curtis, Chief of the Agency's Labor Management Relations Branch, the Union requested the Agency to meet to negotiate the Upward Mobility Program and EEOC Policies and Procedures draft directives. On or about that date, Mr. Watkins made a similar written request to the Agency regarding the Disciplinary Actions draft directive.

At a preliminary meeting on June 10, 1976, the parties agreed to meet on the next day to discuss specific matters. The Agency was represented at the June 11, 1976 meeting by Robert Amoroso, Director of Administration; Beverly Gary, Director of Personnel; LeRoy Curtis; and Lonnie Crawford, then Special Assistant to the Vice-Chairperson. The Union was represented primarily by Edward Watkins and Doris O. Hildreth, a Contract Specialist.

At the June 11, 1976 meeting, the Union requested negotiations regarding the four proposed draft directives. Ms. Gary stated that the Agency was not obligated to negotiate since pursuant to Article 6 of the parties' agreement, all that was required was that the Agency "consult" with the Union. Ms. Hildreth responded, "Article 24 of the same agreement

required the parties to meet and confer on any changes in personnel policies and practices affecting working conditions." Ms. Hildreth then reiterated her demand for negotiations. Ms. Gary refused, telling the Union "You're not going to tell us how to run our agency." The discussion became heated and when it became apparent that neither party would alter its position, the parties turned to other subjects.

By letter dated June 21, 1976, the Union wrote Ethel Bent Walsh, the Agency's Vice-Chairperson:

"During the labor-management meeting that was held June 11, 1976, the question was raised by management representatives as to how the union was to respond to these draft proposals. The Union's position is that we meet and confer. Management's position is that there is no obligation for the parties to meet and confer (negotiate) with regards to such proposals."

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In the instant case there is no clear and unmistakable waiver of a right to negotiate. Therefore, the parties under Executive Order 11419, as amended, are obligated to negotiate such changes. Failure to do so would constitute an unfair labor practice."

On August 11, 1976, the Union filed an unfair labor practice charge against the Agency alleging that the Agency violated Section 19(a)(6) of the Executive Order in that the Agency refused to meet, confer and negotiate with regard to personnel practices and policies affecting working conditions. The charge specified draft directives regarding Selection Procedure and Appointment Authority, Upward Mobility and Disciplinary Actions but did not refer to EEOC Policies and Procedures.

By letter of September 15, 1976, the Agency responded to the charge stating:

"There was no intent on the part of the parties that Agency regulations would become the subject of negotiation at any time during the subject of the Agreement."

The Union filed its complaint on March 2, 1977. Although the charge did not list EEOC Policies and Procedures, the

Complaint included this draft directive as a basis for the unfair labor practice.

In response to the Union's unfair labor practice complaint, Mr. Curtis wrote on behalf of the Agency on March 22, 1977:

"It is true that the union indicated its interest in negotiating on the various matters. However, by failing to submit its comments or proposals to the agency, no basis for negotiations existed ... the agency can not agree to negotiate in a vacuum, i.e., in the absence to any specific proposals by the union ... In the absence of such affirmative union comments or proposals, the bargaining requested by the union simply can not take place."

The parties stipulated and I find that the Upward Mobility directive was published on September 10, 1976; the Disciplinary Action directive was published on September 20, 1976; and the Selection Procedures and Appointment Authority directive was never published. The parties are uncertain whether or not the EEOC Policies and Procedures Directive was ever published.

Conclusions of Law

I find that the Agency violated Sections 19(a)(1) and (6) of the Executive Order by refusing to meet, confer and negotiate with the Union's Council of EEOC Locals regarding draft directives entitled: Upward Mobility Program; EEOC Policies and Procedures; Disciplinary Actions; and Selection Procedures and Appointment Authority.

From April 26, 1976 onward, the Council was the exclusive bargaining representative of employees covered in the parties' June 29, 1974 agreement.

It is undisputed that these four draft directives contained personnel policies, practices and matters affecting working conditions. Therefore, pursuant to Section 11 of the Executive Order they were appropriate subjects for negotiation by the parties.

The Agency argued that Article 6 constituted a waiver of the Union's right to negotiate these draft directives. I

disagree.

Article 6e reads:

"No new directives on matters affecting personnel policies, practices, or working conditions shall be adopted by the EMPLOYER without prior consultation with the UNION. No substantive changes shall be made in any existing regulation concerning personnel policies, practices or working conditions without prior consultation with the UNION."

However, Article 24 of the same agreement reads:

"The EMPLOYER and UNION agree to meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions as appropriate under E.O. 11491, as amended."

The Assistant Secretary has held, "in order to establish a waiver of a right granted under the Executive Order, such waiver must be clear and unmistakable." NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223. See also: Social Security Administration, Department of Health, Education and Welfare, Wilkes-Barre Operations Branch, Wilkes-Barre, Pennsylvania, A/SLMR No. 889.

The parties' agreement in the Kennedy Space Center case like the agreement here used the term "consult". The Assistant Secretary found no waiver there and I find no waiver here. 1/

1/ In its Report and Recommendations of January 1975, the Federal Labor Relations Council commented regarding confusion that has resulted from the mis-use of the term, "consult" as follows:

Finally, we believe that the confusion which has developed over the apparent interchangeable use of the terms "consult," "meet and confer," and "negotiate" with respect to relationships between agencies and labor organizations in the Order should be eliminated. The parties to

It is clear to me that by June 11, 1976, the Union had requested the Agency to negotiate regarding all four subject draft directives. By memoranda dated May 14, 1976, which were entered into evidence, the Union requested negotiations regarding the Upward Mobility Programs and EEOC Policies and Procedures draft directives. I believe Mr. Watkins' testimony that he sent a similar memorandum to the Agency on or about the same date regarding Disciplinary Actions and in any event I am convinced by the testimony of Mr. Watkins and Ms. Hildreth, that at the June 11, 1976 meeting the Union requested negotiations regarding all of these directives.

I further find that at the June 11, 1976 meeting, the Agency clearly refused to negotiate with regard to these four draft directives. When the Agency forwarded the draft directives to the Union on April 28 and May 25 and 26, 1976, it indicated that it expected the Union to submit written comments. Mr. Curtis letter of March 22, 1977 in answer to the complaint confirmed that the Agency made such a submission a prerequisite to further discussions. However, during the June 11, 1976 meeting the Agency adopted a slightly different approach. This

1/ (continued)

exclusive recognition have an obligation to "negotiate" rather than to "consult" on negotiable issues unless they mutually have agreed to limit this obligation in any way. In the Federal labor-management relations program, "consultation" is required only as it pertains to the duty owed by agencies to labor organizations which have been accorded national consultation rights under section 9 of the Order. The term "meet and confer," as used in the Order, is intended to be construed as a synonym for "negotiate."

Report and Recommendations on the Amendment of Executive Order 11491 from the Federal Labor Relations Council, January 1975, pp. 41-42.

Also, the fact that the Council's predecessor may not have requested negotiation in other matters does not amount to waiver of the right to meet and confer.

time they spelled out their view that they were not obligated to negotiate but only to consult. Although during the hearing, I attempted to learn what the Agency meant by "consult", I never was able to elicit a clear response to such questions. However, it is clear that the Agency defined "consult" on June 11, 1976 and continues to define the word as meaning not negotiating, but something less. Thus, clearly on June 11, 1976 by adopting this incorrect interpretation of its obligations, the Agency refused to negotiate in violation of the Executive Order.

The fact that two of the draft directives may not have been published does not detract from the violations of the Executive Order. The violations consisted of the refusal to negotiate with the Union matters that were properly negotiable under the Executive Order.

I do not agree with the Agency's contention that the filing of the complaint was untimely. The applicable regulation at 29 CFR §203.2(b)(3) reads:

"A complaint must be filed within nine (9) months of the occurrence of the alleged unfair labor practice or within sixty (60) days of the service of a respondent's written final decision on the charging party whichever is the shorter period of time."

The Agency disputed the Regional Administrator's decision that the alleged unfair labor practice occurred on June 11, 1976, arguing that any such practice occurred on May 14, 1976. I find that the violations occurred on June 11, 1976 and therefore the complaint was filed within the required nine months of that date.

29 CFR §203.2(b)(1) requires a written final decision to be expressly designated as such. Since there was no designated final decision, the 60 day limitation period does not apply.

Although the Union alleged failure to negotiate regarding the EEOC Policies and Procedures draft directive in its March 2, 1977 complaint, this was not included in the August 11, 1976 charge. In its brief, the Agency argued that because the Union failed to include this in the charge, "the Department of

Labor improperly accepted AFGE's amendment of the unfair labor practice at the formal stage." However, such a failure is a procedural defect which must be objected to before the hearing. Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87; Defense General Supply Center, A/SLMR No. 821; Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 859. The Agency was aware of the defect when it received the March 2, 1977 complaint. Its failure to raise objection in its answer to the complaint or at any time before the September 1, 1977 hearing defeats the objection.

In its brief the Agency contended:

"The unfair labor practice charge of August 11, 1976, does not include an alleged violation of Section 19(a)(1) of the Order (A.S. Exh. No. 4). The Activity takes the position that this amendment of the charge at the formal stage should be dismissed to conform to section 203.2 of the Rules and Regulations of the Assistant Secretary."

While the charge alleged only violations of Section 19(a)(6), the complaint and the notice of hearing referred to violations of both Sections 19(a)(1) and (6). The refusal to negotiate violated the express language of Section 19(a)(6). However, it is also a derivative violation of Section 19(a)(1) even though that section was not referred to in the charge. Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 454. Therefore, I find that the Agency's refusal to negotiate resulted in violations of both Sections 19(a)(1) and (6) of the Executive Order.

Recommendation

Having found that Respondent has engaged in conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purposes and policies of the Executive Order.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended and Section 203.26(b) of the Regulations promulgated

thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Equal Employment Opportunity Commission shall:

1. Cease and desist from:

a. Refusing to negotiate with the National Council of EEOC Locals, AFGE with regard to changes in personnel policies, practices and matters affecting working conditions, including proposed directives relating to such matters.

b. Interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended, by refusing to negotiate with the National Council of EEOC Locals, AFGE regarding the foregoing.

c. In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Executive Order as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Executive Order:

a. Rescind the draft directives regarding Disciplinary Actions and Upward Mobility and, if published, rescind the draft directives regarding Selection Procedures and Appointment Authority and EEOC Policies and Procedures.

b. Upon request, negotiate in good faith with the National Council of EEOC Locals, AFGE concerning personnel policies, practices, and matters affecting working condition of employees represented by the National Council including proposed directives relating to such matters.

c. Post at all of its facilities copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Agency's Chairman and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Chairman shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

d. Pursuant to Section 203.27 of the Regulations

notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.


EDWIN S. BERNSTEIN
Administrative Law Judge

Dated: April 14, 1978
Washington, D.C.

ESB:le

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL rescind the directives regarding Disciplinary Actions and Upward Mobility and, if published, rescind the directives regarding Selection Procedures and Appointment Authority and EEOC Policies and Procedures.

WE WILL NOT refuse to negotiate with the National Council of EEOC Locals, AFGE with regard to changes in personnel policies, practices and matters affecting working conditions, including proposed directives relating to such matters.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Executive Order.

WE WILL upon request, negotiate in good faith with the National Council of EEOC Locals, AFGE concerning personnel policies practices, and working conditions affecting the employees represented by the National Council including proposed directives relating to such matters.

Agency

Dated: _____ By: _____
Signature

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, REGION V
A/SLMR No. 1097

This case involved a petition for clarification of unit filed by Local 3400, American Federation of Government Employees, AFL-CIO (AFGE) seeking to clarify the unit eligibility of several groups of employees. The Activity contended that the petitioned for employees are ineligible for inclusion, as 12 employees in six job categories are supervisors and the remaining seven employees are confidential employees. The AFGE, which is the exclusive representative of certain employees of the Activity, contended that none of the employees in question are supervisors or confidential employees and, therefore, they all are eligible for inclusion within its exclusively recognized unit.

The Assistant Secretary found that five of the 12 employees asserted to be supervisors are not supervisors within the meaning of the Order and should be included in the unit. He made no finding regarding the supervisory status of one employee who was no longer employed by the Activity at the time of the hearing in this case. The Assistant Secretary also found that the seven employees alleged to be confidential employees are engaged in Federal personnel work in other than a purely clerical capacity within the meaning of the Order and should be excluded on that basis.

Accordingly, the Assistant Secretary clarified the unit consistent with his findings.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, REGION V

Activity

and

Case No. 50-17023(CU)

LOCAL 3400, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Timothy P. McGough. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the Activity and the Petitioner, Local 3400, American Federation of Government Employees, AFL-CIO, herein called AFGE, the Assistant Secretary finds:

In this proceeding, the AFGE seeks to clarify the status of 19 employees to include them in its exclusively recognized unit. The Activity contends that the petitioned for employees are ineligible for inclusion in the unit on the ground that 12 employees in six job categories are supervisors and the remaining employees are confidential employees.

The AFGE was granted exclusive recognition for the unit involved herein on February 22, 1973. The unit, as subsequently clarified on June 6, 1975, is composed of all professional and nonprofessional employees of the Department of Health, Education and Welfare, Region V, including employees of the Development Center Bureau of Hearings and Appeals, Social Security Administration, Region V. All of the disputed employees are employed in the Social Security Administration Regional Office.

With respect to the 12 employees in the six job categories who the Activity contends are supervisors, the record discloses that the job descriptions of the classifications at issue do not contain supervisory

functions and that the incumbents are neither the "raters" for performance evaluation purposes of the employees they work with, nor the "selecting officials" for filling vacancies, and do not have the authority to sign off officially on leave requests. 1/ In regard to specific disputed employees, I make the following findings and conclusions:

Group 1: Senior Social Insurance Program Specialist, GS-105-13

(Senior Operations Specialist)

Sandra Bookout testified for herself and Judy Hoch 2/ with respect to Social Security Administration position No. 1943 in the Operations Branch of the Division of Operational Support.

The record reveals that generally the incumbents do not have the authority to hire employees or effectively to recommend such action. 3/ With respect to other supervisory criteria, the evidence is insufficient to establish that Group 1 incumbents normally exercise any supervisory authority requiring the use of independent judgment, or have the authority to effectively recommend such action. Under these circumstances, I find that they are not supervisors within the meaning of Section 2(c) of the Order, and should be included in the exclusively recognized unit.

Group 2: Senior Social Insurance Program Specialist, GS-105-13

(Senior Data Operations Specialist)

Jerry L. Huffman testified for himself and Ronald Zane with respect to Social Security Administration position No. 1947 in the ADP Systems Branch of the Division of Operational Support.

The evidence indicates that in one instance in the absence of his immediate supervisor, Huffman was given the authority to hire a clerical employee. However, it indicates further that the incumbents normally do not have the authority to hire employees or effectively to recommend such action. As the evidence is insufficient to establish that Group 2 incumbents normally exercise any supervisory authority requiring the use of independent judgment or have the authority to effectively recommend such action, I find that they are not supervisors within the meaning of Section 2(c) of the Order, and should be included in the exclusively recognized unit.

1/ Generally, each incumbent, a GS-13, works with three GS-12 employees and one clerical employee.

2/ The parties stipulated that only a limited number of representative witnesses from each disputed group would be called to testify at the hearing, and that unit eligibility would be determined on the basis of the testimony of such representative witnesses.

3/ On one occasion, in the absence of their immediate supervisor, Bookout and Hoch jointly hired a GS-5 employee and a GS-6 employee.

Group 3: Senior Social Insurance Operations Specialist, GS-105-13

(Senior Disability Program Operations Specialist)

Gloria J. Panama and Larry Braden each testified as to duties under Social Security Administration position No. 51409 on the Program Operations Staff under the Assistant Regional Commissioner for Disability Insurance.

Gloria J. Panama has effectively recommended two awards and has written numerous letters of commendation for signature by higher authority. According to the record, no recommendation by Panama for an award or letter of commendation has ever been disapproved. The evidence establishes that the exercise of the foregoing authority is not of a merely routine or clerical nature but rather requires the use of independent judgment. Under these circumstances, I find that Panama is a supervisor within the meaning of Section 2(c) of the Order and should be excluded from the exclusively recognized unit.

Larry Braden has the authority to recommend employee awards; however, the record reveals that he has not exercised this authority. As the evidence does not establish that Braden either exercises supervisory authority requiring the use of independent judgment, or effectively recommends such action, I find that he is not a supervisor within the meaning of Section 2(c) of the Order and should be included in the exclusively recognized unit.

Group 4: Senior Social Insurance Program Specialist, GS-105-13

(Senior Supplemental Security Income Program Operations Specialist)

Susan Crawford testified for herself and Linda White with respect to Social Security Administration position No. 1960 on the Program Operations Staff under the Assistant Regional Commissioner for Supplemental Security Income.

The record reveals that Group 4 incumbents do all the interviewing of candidates for vacant positions on the staff and make effective hiring recommendations to the hiring officer. The evidence establishes that the exercise of the foregoing authority is not of a merely routine or clerical nature but rather requires the use of independent judgment. Under these circumstances, I find that Group 4 incumbents are supervisors within the meaning of Section 2(c) of the Order and should be excluded from the exclusively recognized unit.

Group 5: Senior Social Insurance Program Analyst, GS-105-13

(Senior Disability Program Analyst)

Joel Lowery testified for himself and Terry Ashcraft with respect to Social Security Administration position No. 51508 in the Analysis and Evaluation Section of the Program Appraisal Staff under the Assistant Regional Commissioner for Disability Insurance.

The record reveals that Joel Lowery has the authority to recommend employee reassignments and has effectively exercised this authority. Further, the evidence establishes that the exercise of the foregoing authority is not of a merely routine or clerical nature but rather requires the use of independent judgment. Under these circumstances, I find that the incumbents are supervisors within the meaning of Section 2(c) of the Order and should be excluded from the exclusively recognized unit.

Group 6: Senior Social Insurance Program Specialist, GS-105-13

(Senior Retirement Survivors Insurance Program Operations Specialist)

Robert Coughlin and Anthony A. Maziarek ^{4/} each testified as to his actual duties under Social Security Administration position No. 1963 in the Office of the Assistant Regional Commissioner for Retirement and Survivors Insurance.

Robert Coughlin has effectively recommended quality increases and cash awards for employees. The record reveals that no recommendation by Coughlin for quality increases and cash awards has ever been disapproved. Recently, Coughlin effectively recommended that two professionals and one clerk-typist be hired. No recommendation by Coughlin that an individual be hired has ever been disapproved. The evidence establishes that the foregoing exercise of authority is not of a merely routine or clerical nature but rather requires the use of independent judgment. Under these circumstances, I find that Coughlin is a supervisor within the meaning of Section 2(c) of the Order and should be excluded from the exclusively recognized unit. ^{5/}

Group 7: Social Insurance Specialist (Field Operations), GS-105-12

(Field Operations Staff Specialist--FOSS)

Patricia A. Biggers testified for herself and six other employees with respect to Social Security Administration position No. 1953. The record shows that Biggers, John Doyle, Hattie Jordan, and Bobbie Matlin work for a supervisory FOSS under the Assistant Regional Commissioner for Field Operations (West) and that Faye McDonald, Louise Pernice, and Larry Soliday work for a supervisory FOSS under the Assistant Regional Commissioner for Field Operations (East).

^{4/} As the record discloses that at the time of the hearing in this matter Maziarek's position had been vacated by him, I will make no determination as to his supervisory status.

^{5/} Having found Coughlin to be a supervisor, I find it unnecessary to decide whether his effective recommendation to reorganize his immediate staff into two units rendered him a supervisor under Section 2(c) of the Order.

Group 7 employees review Equal Employment Opportunity complaint files containing "unsanitized" materials, represent management at consultation meetings with a labor organization and with a management association, give advice to the field on labor relations questions, and are involved with adverse actions, promotion actions, employee complaints or grievances, and the review of personnel relations in the field district offices.

August 15, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

I find that the character and extent of the Group 7 employees' involvement in personnel matters warrants the conclusion that they are engaged in non-clerical Federal personnel work for the Activity. As Section 10(b)(2) of the Order specifically excludes from bargaining units employees engaged in Federal personnel work in other than a purely clerical capacity, I find that the Group 7 employees at issue should be excluded on this basis from the exclusively recognized unit. 6/

DEPARTMENT OF INTERIOR,
BUREAU OF INDIAN AFFAIRS,
FLANDREAU INDIAN SCHOOL,
FLANDREAU, SOUTH DAKOTA
A/SLMR No. 1098

ORDER

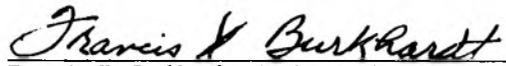
IT IS HEREBY ORDERED that the exclusively recognized unit sought to be clarified herein, represented by Local 3400, American Federation of Government Employees, AFL-CIO, be, and it hereby is, clarified by excluding from said unit Gloria J. Panama, Robert Coughlin, and the incumbents in positions in Groups 4, 5 and 7 above, and by including in said unit Larry Braden and the incumbents in positions in Groups 1 and 2 above. 7/

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 187 (Complainant) alleging that the Respondent violated Section 19(a)(1) of the Order when its Labor-Management Relations Officer threatened to have the Complainant's President and Vice-President transferred to another school as a solution to labor-management problems at the Flandreau Indian School. The Respondent denied any such threat.

The Administrative Law Judge concluded that no such threat was made by the Respondent, and recommended that the complaint be dismissed in its entirety.

Dated, Washington, D.C.
August 4, 1978

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

6/ Under these circumstances, it was considered unnecessary to decide whether Group 7 employees should be excluded from the unit on the basis that they are confidential employees. See U.S. Department of Agriculture, Farmers Home Administration, Colorado, 6 A/SLMR 6 2, A/SLMR No. 752 (1976).

7/ As indicated above, my findings regarding supervisory status run to the named incumbents in Groups 3 and 6 above, rather than to the two groups as a whole.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF INTERIOR,
BUREAU OF INDIAN AFFAIRS,
FLANDREAU INDIAN SCHOOL,
FLANDREAU, SOUTH DAKOTA

Respondent

and

Case No. 60-5291(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 187

Complainant

DECISION AND ORDER

On June 22, 1978, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 60-5291(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 15, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



In the Matter of

DEPARTMENT OF INTERIOR
FLANDREAU INDIAN SCHOOL,
FLANDREAU, SOUTH DAKOTA
Respondent

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 187
Complainant

Case No. 60-5291(CA)

Appearances:

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For the Complainant

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JOHN G. COMBS
Labor Relations Officer
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1951 Constitution Avenue, N.W.
Washington, D.C. 20245
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated July 24, 1977 and filed July 27, 1977 alleging a violation of Section 19(a)(1) of the Executive Order. The violation was alleged to consist of the Respondent's Labor-Management Relations Officer threatening to have the Complainant's President and Vice-President removed to another school as a solution to Labor-Management problems at the Flandreau Indian School. Under date of August 10, 1977 the Respondent filed a response to the complaint denying the allegations of the complaint and making certain affirmative allegations.

On January 13, 1978 the Regional Administrator issued a Notice of Hearing for a hearing to be held March 28, 1978 in Sioux Falls, South Dakota. A hearing was held on that day in that City. Both parties were represented by counsel. They presented witnesses who were examined and cross-examined and offered exhibits which with one exception were received in evidence. Both parties made closing arguments and filed briefs.

Facts

Local 187 of the National Federation of Federal Employees is the recognized exclusive representative of a unit of non-supervisory professional and non-professional employees of the Flandreau Indian School. Among the professional employees in the unit are four guidance counselors under the immediate supervision of Carol Anderson, Education Specialist. She, in turn, is under the immediate supervision of Harold LaRoche, Pupil Personnel Services Director. At all relevant times George V. Renville, one of the guidance counsellors, was President of Local 187 and John J. Brown, another of the guidance counsellors, was Vice-President of the Local.

The Flandreau Indian School is under the immediate direction of a Superintendent who reports to the Area Director of the Aberdeen Area Office of the Bureau of Indian Affairs.

For some time relations between Renville and Brown on the one hand and LaRoche and Anderson on the other hand had been bad and getting worse. In 1976 Renville and Brown filed a grievance complainant of continuous harassment by LaRoche and Anderson. The grievance was processed through

the agency-prescribed grievance procedure. It came before a Department of the Interior Administrative Law Judge who made Findings and Recommendations. 1/ She found that the grievants had been harassed in a number of respects, none of them having any relationship to their union activities or their union offices. There was no intimation that any of the incidents was prompted by their union activities or affiliation. They pertained largely to the parties' differing views on job content and the manner of performance of the day-to-day work activities. The ALJ found that "the tone of communications from Mr. LaRoche and Miss Anderson to the grievants bespoke the attitude of impatient, critical adults toward recalcitrant children."

The ALJ found that "the onus for maintaining good working relationships is on the supervisors." As part of the remedy she recommended that Renville and Brown be relieved of supervision by LaRoche or Anderson and placed under the direct supervision of the Superintendent. This the Area Director refused to do. His office was of the view that supervision of the guidance counsellors should not be fragmented, that having the counsellors under the direct supervision of the Superintendent would be bad policy, and he was of the firm view that personnel problems are not solved by reassigning supervision.

There followed a series of correspondence from the Complainant to the Aberdeen Area Office concerning alleged improper conduct of LaRoche. Melvin Rousee, the Labor-Management Relations Officer of the Aberdeen Area Office, was unclear on just what the Complainant's dissatisfactions with LaRoche were. He told the Area Director about his uncertainties and was told to clarify what the issues were. He wrote a letter on April 8, 1977 for the signature of the Area Director to Renville suggesting that instead of his replying to each of the numerous letters they have a conference in Flandreau during the week of April 25, 1977 to clarify the issues and that Renville make such an appointment through the Superintendent. On April 12, 1977 Renville and Brown replied asking for a conference on April 26, stating that the "issues and concerns" were "all the contents" of current and past unfair labor practices, "grievances, etc. concerning Harold LaRoche and Carol Anderson", and recommending that LaRoche be given a position somewhere else and that the entire counselling function be placed directly under the Superintendent. Renville and Brown had earlier

1/ Exh. C-5.

asked that LaRoche be placed in another position at another installation.

A meeting was held April 26, 1977 as requested by Renville and Brown. It lasted from 1:00 p.m. to 5:30 p.m. Present were four people from the Aberdeen Area Office, Acting Superintendent Swenson, Renville, and Brown. Most of the time was consumed in discussing one of three points in a pending unfair-labor-practice complaint; there were also pending two other unfair-labor-practice charges and a number of grievances. The subject of transferring LaRoche was also brought up. The people from the Aberdeen Area Office were opposed to fragmenting the counsellors and Rousseau stated that if any part of the section was moved the entire section would have to be moved. He mentioned also that there would be problems in moving because moving the section would probably mean filling newly created positions and only LaRoche and Renville had Indian preference in employment and could probably be moved if they so chose. Those two names were the only names specifically mentioned in this part of the conference, but somehow Renville and Brown misunderstood Rousseau to threaten to move them out of Flandreau. Rousseau, while he did mention the possibility of moving the entire section, took the position that none of it should be moved for a variety of reasons including the firm view of the Area Director that reassignment was not a way to resolve personality conflicts.

About seven weeks later Rousseau met again with Renville and Brown (and a Department of Labor Compliance Officer) to discuss three pending unfair-labor-practice complaints or charges. (All three were resolved.) In the course of the conversation Renville said Rousseau at the April 26 meeting had threatened to move him and Brown. Rousseau said he had not meant any such threat and if he had been so understood he apologized.

The entire guidance counsellor group, including the four counsellors, their supervisor Anderson, and her supervisor LaRoche, are well educated, each of them having been awarded at least a Master's degree.

Discussion and Conclusions

Although at the hearing in this case there was vented - much disaffection on the part of Renville and Brown with the employment situation at the Flandreau Indian School, the only subject of the complaint in this case is the alleged, and denied, threat of Rousseau to transfer Renville and Brown to solve a number of labor-management problems.

I have concluded that such threat was not made although Renville, and probably Brown, understood it to have been made.

On June 16 and 17, 1977, about seven weeks after the conference at which the alleged threat took place, and more than a month before the complaint in this case was filed, the three parties met again. Renville mentioned the threat Rousseau was alleged to have made, Rousseau said he had not intended or made any such threat, and that if he had been so understood he was sorry and apologized.

In these circumstances, since I have found that the alleged threat was not made, the complaint should be dismissed.

RECOMMENDATION

The complaint should be dismissed.


MILTON KRAMER
Administrative Law Judge

Dated: JUN 22 1978
Washington, D.C.

MK/mm1

August 15, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
AUSTIN DISTRICT, AUSTIN, TEXAS
A/SLMR No. 1099

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and its Chapter 52 (Complainant) alleging that the Respondent had violated Section 19(a)(1) of the Order based on the conduct of its Audit Division Group Manager, in making certain statements to an employee concerning the "jurisdiction" of the Complainant with respect to the Respondent.

The Administrative Law Judge found that the statements had not been made and he recommended that the complaint be dismissed in its entirety. However, the Administrative Law Judge also concluded that if the statements had been made, they would not constitute a violation of the Order. In adopting the recommendation of the Administrative Law Judge that the complaint be dismissed, the Assistant Secretary noted that in view of the adoption of the Administrative Law Judge's finding that the statements had not been made, it was unnecessary for him to pass upon the Administrative Law Judge's further conclusion with respect to whether the statements would be violative of the Order if they had, in fact, been made. Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

A/SLMR No. 1099

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
AUSTIN DISTRICT, AUSTIN, TEXAS

Respondent

and

Case No. 63-7300(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 52

Complainant

DECISION AND ORDER

On June 28, 1978, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in the subject case, including the exceptions and supporting brief filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions 2/ and recommendation.

1/ In the first paragraph of page 3 of the Administrative Law Judge's Recommended Decision the date "November---19, 1976" is set forth instead of "November---16, 1976". Further, in the first line on page 8, the name "Keller" is set forth instead of the name "Medina." These inadvertent errors are hereby corrected.

2/ In view of the Administrative Law Judge's finding, to which no exception was filed, that Keller did not make the alleged statements attributed to him by the Complainant, I find it unnecessary to pass upon his further conclusion as to whether the statements would have been violative of the Order if they had, in fact, been made.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-7300(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 15, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



..... :
In the Matter of :
 :
DEPARTMENT OF THE TREASURY, :
INTERNAL REVENUE SERVICE :
AUSTIN DISTRICT, AUSTIN, TX : Case No.
Respondent/Activity : 63-7300 (CA)
and :
 :
NATIONAL TREASURY EMPLOYEES :
UNION and NTEU CHAPTER 52 :
Complainant/Representative :
..... :

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For the Respondent

Before: RHEA M. BURROW
Administrative Law Judge

RECOMMENDED DECISION

This is an unfair labor practice proceeding in which a formal hearing of record was held on March 14, 1978 in Austin, Texas pursuant to Executive Order 11491, as amended, (hereinafter referred to as the Order). The Respondent is charged with having violated Section 19(a)(1) of the Order. The complaint dated March 11, 1977 alleged:

"On December 17, 1976, Carol Keller, Group Manager, Audit Division, Internal Revenue Service, Laredo, Texas, delivered to Joe Medina, Revenue Agent, Laredo, Texas, a 60-day notice with regard to his prospective within-grade increase. As Keller handed Medina the written notice, he also gave him a copy to be furnished at his option to NTEU Chapter No. 52, and stated...'it won't do them any good. They have no jurisdiction over us.'

"Joe Medina is a member of the bargaining unit for which NTEU is the recognized exclusive bargaining representative. Manager Keller's statement tended to discourage him from exercising his protected rights under Executive Order 11491, as amended, and disparaged the union in his eyes."

Upon the basis of the entire record including the evidence adduced, the briefs submitted by the parties,^{1/} and my observation of the witnesses and judgement of their credibility, I make the following findings, conclusions and recommendations.

Findings of Fact

1. The National Treasury Employees Union (hereinafter referred to as NTEU) and its local Chapter 52, was at all times material herein, the exclusive bargaining representative for employees bargaining unit at the Department of the Treasury, Internal Revenue Service, Austin District, Austin Texas.

^{1/} In accordance with announcement at the hearing that Briefs postmarked May 1, 1978 would be considered as timely submitted, the briefs received are considered to have been timely filed.

2. On December 6, 1976, Jose Medina, a Revenue Agent at Laredo, Texas was given a memorandum dated December 2, 1976 advising him that Carol Keller, Group I (1107) RA Manger, San Antonio was unable to certify that his (Medina's) level of work performance was such as to justify a recommendation for a within grade increase at this time. Sepcific deficiencies were set forth in detail with notation that these deficiencies had previously been discussed with him on November 4, 9, and 19, 1976, and suggestions were made in the discussions and in the memorandum as to how to improve such deficiencies.

3. Jose Medina was employed at Respondents place of business in Laredo, Texas from August 1973 to August 1977. He worked as a Tax Auditor until July 1976 and thereafter as a Revenue Agent. His grade for a part of the time he was a Tax Auditor and Revenue Agent was that of a GS-9.

4. On December 17, 1976 Medina was given a memorandum by Group Manager Carol Keller dated December 10, 1976, subject: "Failure to Meet Position Standards", advising him that his pattern of performance was not meeting with the requirements of a GS-9 agent and that unless he improved to a satisfactory level during the next 60 calendar days he would have no alternative but to recommend his removal for the efficiency of the Internal Revenue Service. Various deficiencies were specified in the memorandum. Jose Medina immediately buckslipped the 60 day letter to George Sam (Union President of Chapter 25, Austin Texas) on the same day, (December 17, 1976). The last paragraph of the note to the union stated: "Keller said that the union is not even recognized since there is no agreement contract. I'm at his mercy. What can you do?"

5. In a memorandum addressed to George Sam on January 28, 1977, by Medina, the following happened on December 17, 1976 as to the 60-day letter and denial of a within grade increase:

"Mr. Keller was doing case reviews on three of my taxpayers that I was auditing and he spent most of the morning with me in the office. Just before he left at noon, on December 17, 1976, Keller called me into the conference room and issued me the 60-day letter and he advised me verbally that an 80-day letter would be given to me within a few days.

"Mr. Keller made the comment that a copy of the 60-day letter was given to me additionally just in case I

wanted the union to know about my problems. He stated, 'although Management and NTEU have no union contract, a copy of the letter is given as a formality. It won't do them any good; they have no jurisdiction over us.'

"I told Mr. Keller that I intended the Union to represent me because I was a union member and I was going to file a grievance. He said that I had the prerogative..."

6. Keller categorically denied in the answer filed in this proceeding that he made the statement attributed to him in the complaint that "...it won't do them any good. They have no jurisdiction over us." He did admit that at one of the meetings with Medina in December 1976, there was some discussion about whether Management's contract with the union may have expired.

There is one thing certain Medina did not mention the statements in the buckskip forwarded to Local Union Chapter 25, President, contemporaneous with December 17, 1976 and it first surfaced in the memorandum of January 28, 1977 more than 5 weeks after the discussion.

7. Meanwhile, between December 17, 1976 and the 60-day period for improvement Mr. Keller recommended that he be granted Union 2 training which Medina had requested. While he did not meet all of the objectives desired by the lead instructor, Mr. Keller reported he did make some improvement and he continued to work until August 17, 1977. He was not terminated by reason of any deficiencies reported and Mr. Keller continued to be his supervisor until he resigned in August 1977 to enter law school.

8. While Medina admits that he was somewhat upset and angry with his supervisor, Keller, concerning the memoranda given him in December 1976 and he felt Keller was out to get him, I do not find that Keller expressed any antagonism or ill feelings toward him. The detailed evaluations with specific suggestions for improvement and time spent with him in reviewing various aspects of his work suggested the opposite. This, coupled with the recommendation for the unit training during the 60-day period of improvement is not in my opinion the type of action demonstrated by a supervisor not interested in his improvement and welfare. However, this finding is not dispositive of the unfair labor practice controversy to be concluded on the basis of a credibility issue.

Discussions and Conclusions

Section 19 of the Order relating to Unfair Labor Practices, provides "(a) Agency management shall not - (1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order."

The parties in this proceeding stipulated that NTEU and its local Chapter 52 was at all times material herein the exclusive representative for bargaining unit employees at the Department of Treasury, Internal Revenue Service in the Austin, Texas District.

While some evidence indicated the multi center collective bargaining agreement (MCA) covering employees at the activity involved herein had expired in early 1976, the obligations were recognized as to be continued and treated so in practice. It is noted that such practice was approved by the Federal Labor Relations Council in two cases before it, FLRC Nos. 77 A-40 and 77 A-92, March 23, 1978 where it held in pertinent part that: "In our view, existing personnel policies and practices and matters affecting working conditions, whether or not they included in a negotiated agreement, continue as established upon expiration of a negotiated agreement, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon expiration of that agreement unless otherwise modified in a manner consistent with the Order."

It is undisputed that on December 17, 1976, Medina was given copies of the December 17, 1976 letter for himself and his NTEU representative concerning his failure to Meet Position Standards for job retention. It is also undisputed that when he, Medina, indicated that he intended for the union to represent him because he was a union member and was going to file grievance he was told that was his prerogative. Not only was Medina informed by Keller of entitlement to union representative on December 17, 1976, but he had also previously been informed on December 6, 1976 of such entitlement, when he was given a memorandum for himself and one for his union representative, as to his level of work performance to justify a within-grade increase.

The proof at the hearing related to remarks allegedly made at the December 17, 1976 meeting by Keller to Medina concerning failure to meet position standards for job retention and not to a 60-day notice with regard to a prospective within-grade increase; the latter occurred

on December 6, 1976. In view of the variance between proof at the hearing and that specified in the complaint as to substance of the subject matter and contents of the Notice issued December 17, 1976, the Complainant failed to establish that the alleged remarks attributed to Keller occurred in connection with the Notice as to the level of Medina's work performance to justify a within-grade increase as specified in the complaint. The Notice pertaining to the level of work performance to justify a within-grade increase was issued on December 2, 1976, delivered to Medina on December 6, 1976 and not on December 17, 1976 as alleged in the complaint; at the hearing it was undisputed that the remarks "...it won't do them any good. They have no jurisdiction over us," were not made in connection with the Notice to Medina on December 6, 1976 relating to his level of work performance to justify a within-grade increase.

The subject matter for discussion on December 17, 1976 concerned Notice as to Medina's failure to meet position standards for job retention and did not pertain to merit for a within-grade increase. The complaint is concluded to be deficient to the extent that the subject matter of the discussion on December 17, 1976 was erroneous.

It is not disputed that Keller was a former NTEU member before he was promoted to a supervisory or management position. Likewise, there is no controversy that Keller reviewed several of Medina's cases with him on the morning of December 17, 1976 and about noon on that date called him into the conference room and handed him the Notice of Failure to Meet Position Standards for job retention. A second copy of this Notice was attached for the union. Neither Medina or Keller was aware of the current status of the Union's agreement with the respondent on December 17, 1976 although both were aware there had been some previous problems. In any event, and regardless of the status of the contract, Keller testified that he acted and treated the situation in the same manner as if the agreement was in effect and that his discussion with Medina was in private as is customary in actions of this type.

The significant difference in the versions as to what happened on December 17, 1976 between Medina and Keller is that Keller categorically denies having made the remarks attributed to him by Medina that "...it won't do them any good. They have no jurisdiction over us." It is noteworthy that Medina did not refer to the

alleged remarks minutes after the discussion when he attached a copy to the December 17, 1976 Notice to Union Local President George Sam, and they first surfaced and were expressed some five weeks later. Medina admitted that he felt Keller was out to get his job and expressed that opinion to him before and after December 17, 1976. I do not find the opinion supported by the record.

While the testimony between Medina and Keller is conflicting when I review the events before, at the time of the discussion, and subsequent thereto, I find that Keller did not make the remarks in the context presented, if at all, that were attributed to him in the complaint, that is "...it won't do them any good. They have no jurisdiction over us." I conclude that Keller was the more credible witness as to the events occurring at the time of December 17, 1976 meeting.

Even if Keller had made the statement in the context presented that were attributed to him by Medina, I conclude they did not have the effect of discouraging him as an employee from exercising his rights under the Order.

In the first place, Medina took the matter up with the Union within minutes after his December 17, 1976 discussion with Keller. He testified:

"Q. So you were discouraged by Mr. Keller's statements as to your ability to go to the Union?

"A. I wasn't actually discouraged to go to them because I belonged to the Union, but I was discouraged in what he had said, because apparently there was no union contract at that time, and if that was the case I could not have adequate representation by them."

Contra to Complainant's assertion, Keller's alleged statement did not discourage or tend to discourage Medina from exercising Executive Order rights. Further, the alleged statements were not inherently coercive when analyzed as to both content and the circumstances surrounding the incident. I reflect Medina's testimony that he was not in any way discouraged. Whether or not the agreement between the Complainant and Respondent had expired, it was treated by the parties as being in effect before and after December 17, 1976. For example,

each notice given to Keller was accompanied by an additional copy for the Union; too, shortly after the December 17, 1976 Keller approved a request for training submitted by the Union on Medina's behalf. The discussion on December 17, 1976 was in the nature of a performance interview or appraisal, with only Keller and Medina present; and was not a formal discussion within the meaning of Section 10(e) of the Order.

Despite the fact that Medina had admittedly accused Keller of trying to get his job prior to December 17, 1976, Keller painstakingly prepared memoranda suggesting ways for him to improve his work. He again on December 17, 1976 worked with him on review of his cases and in the job retention memorandum given him on that date again suggested ways of improvement that would enable him to retain his position. The unusual effort expended in trying to help him, Medina, improved his status as a Revenue Agent is not that calculated to show disrespect to him or his representative. Moreover, he was advised to take his problem to NTEU. If any hostility is shown on the part of either party, it was not by Keller against Medina. I credit Keller's testimony on cross examination.

"Q. I'm confused Mr. Keller. If you can't really recall much about what you said, or what you may have said to Mr. Medina about the status of the contract, tho brought it up, whether you brought it up, whether he brought it up, and yet you are positive that you did not make these statements."

"A. I had no reason to tell Mr. Medina that the Union did not have jurisdiction over him. I didn't feel that way. It was not in my mind to tell him that when I went down there. There's no reason for me to tell him that. If he needed protection of the Union, I told him he could do or he should do whatever he felt like he needed to do in this situation.

The Complainant offered no proof at the hearing that the Union was disparaged by the alleged remarks attributed to Keller by Medina. Further, in all of the contacts and discussions between Medina and Keller, there is no reference by Medina that Keller had on any other occasion expressed anti-union bias or disdain for the Union. Therefore, reliance or disparagement is made on the basis that the alleged remarks attributed to Keller were per se disparaging. Since the alleged

remarks were not contemporaneous with December 17, 1976 and they first surfaced more than five weeks after the incident, I find it unusual that Medina could remember so well the quotes and be able to add other quotes mentioned at even more remote dates. When recalling events of remote vintage memory for the important tends to diminish and the routine or obscure become magnified. Under the circumstances in this case, I do not find that the statements attributed to Keller by Medina were made, particularly in the context depicted, or even, if made, that any more than deminimus disparagement did or could have resulted.

From the foregoing, I conclude that:

1. The Respondent did not interfere with, restrain, or coerce an employee in the exercise of the rights assured by the Order.
2. The Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of Section 19(a)(1) of the Order.

RECOMMENDATION

Upon the basis of the above findings, conclusions, and entire record, I recommend to the Assistant Secretary that the Complainant in Case No. 63-73000(CA) be dismissed in its entirety.

Rhea M. Burrow
RHEA M. BURROW
Administrative Law Judge

Dated: June 28, 1978
Washington, D.C.

RMB:jps

August 16, 1978

A/SLMR No. 1100

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF THE
ARMY, FORT POLK, LOUISIANA
A/SLMR No. 1100

UNITED STATES DEPARTMENT OF THE
ARMY, FORT POLK, LOUISIANA

Respondent

and

Case No. 64-3414(CA)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R5-168

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the National Association of Government Employees, Local R5-168 (NAGE) alleging, among other things, that the Respondent violated Section 19(a)(1) of the Order based on alleged threatening remarks made to a unit employee by the Respondent at a meeting held May 12, 1976. The complaint alleged, in this regard, that the Respondent threatened the unit employee that she would be found unqualified for her present position if she "stirred things up and dirtied up the water" by consulting the NAGE and/or by filing a grievance over the promotion she sought.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the Respondent's threat constituted a violation of Section 19(a)(1) of the Order. However, the Assistant Secretary did not adopt the Administrative Law Judge's finding of a Section 19(a)(1) violation based on an allegation that the Respondent had improperly carried out its threat. This latter allegation had been the basis for a Section 19(a)(2) complaint which was dismissed at an earlier stage in the proceeding. As the Assistant Secretary had sustained the dismissal of this portion of the complaint, he concluded that the allegation that the threat was carried out was not before him, whether treated as an alleged violation of Section 19(a)(1) or Section 19(a)(2) of the Order.

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of the Order, and take certain affirmative actions.

On May 2, 1978, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had violated Section 19(a)(1) of the Executive Order and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. 1/ The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations, as modified herein.

1/ During the course of the hearing, while questioning the Respondent's witness, Norman E. Lewis, the Administrative Law Judge made certain gratuitous remarks disparaging the witness' answers. Although I have determined that the Administrative Law Judge's comments did not prejudice the Respondent, it should be noted that I view such remarks to have been uncalled for and inappropriate.

The Administrative Law Judge found, and I agree, that the Respondent violated Section 19(a)(1) of the Order when, on May 12, 1976, the Chief of its Staffing Branch in the Civilian Personnel Office threatened Bonnie Ham, a bargaining unit employee, that she would be found unqualified for her present position if she "stirred things up and dirtied up the water" by consulting the Complainant and/or by filing a grievance over a promotion she sought. The Administrative Law Judge found that the Respondent further violated Section 19(a)(1) by carrying out its threat when it informed the Civil Service Commission that Ham was not qualified for her present position, after she consulted the Complainant and indicated her intention to file a grievance.

At an earlier stage in this proceeding, the Regional Administrator dismissed the allegation that the Respondent's May 12, 1976, threat violated Section 19(a)(1) of the Order, as well as the allegation that the Respondent carried out its threat in violation of Section 19(a)(2) of the Order. Upon a request for review seeking reversal of the Regional Administrator's dismissal of the complaint, the Assistant Secretary sustained the Regional Administrator's finding on the Section 19(a)(2) aspect of the complaint, but reinstated the Section 19(a)(1) allegation regarding the threat. Under these circumstances, I conclude that the allegation that the Respondent improperly carried out its threat was not before the Administrative Law Judge, 2/ whether treated as an alleged violation of Section 19(a)(1) or Section 19(a)(2) of the Order and, therefore, under the particular circumstances herein, I cannot adopt his finding in that regard.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Department of the Army, Fort Polk, Louisiana, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended, by threatening adverse personnel action against its employees if they consult their exclusive representative, National Association of Government Employees, Local R5-168, or file a contractual grievance.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

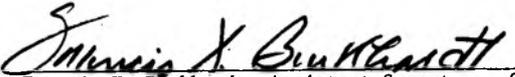
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

2/ Cf. Department of the Air Force, Offutt Air Force Base, A/SLMR No. 784 (1977), FLRC No. 77A-22 (1977).

(a) Post at its facility at Fort Polk, Louisiana, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, 5th Infantry Division, Fort Polk, Louisiana, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
August 16, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended, by threatening adverse personnel action against them if they consult their exclusive representative, National Association of Government Employees, Local R5-168, or file a contractual grievance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____ (Signature)

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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



In the Matter of

UNITED STATES DEPARTMENT OF THE ARMY, FORT POLK, LOUISIANA
Respondent

and

LOCAL R-5-168, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES (NAGE)
Complainant

Case No. 64-3414 (CA)

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For the Complainant

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For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a proceeding under Executive Order 11491, as amended (hereinafter also referred to as the "Order"), which was instituted by a charge filed on, or about, June 17, 1976; a complaint the date of filing not having shown; and a 1st Amendment to the complaint (Asst. Sec. Exh. 1) dated August 4, 1976, and filed August 25, 1976. The 1st Amendment to the complaint alleged violations of Section 19(a)(1), (2) and (4) of the Order. The

Regional Administrator dismissed the entire complaint; but, on November 11, 1977, the Assistant Secretary reversed a portion of the Regional Administrator's dismissal of the complaint and found that a reasonable basis for the 19(a)(1) allegation concerning improper statements by a representative of Respondent had been shown and, on December 29, 1977, the Acting Regional Administrator advised the parties that, inasmuch as there had been no satisfactory settlement, he was issuing a Notice of Hearing (Asst. Sec. Exh. 2). Notice of Hearing on the 19(a)(1) allegation of the complaint (Asst. Sec. Exh. 3) issued on December 29, 1977, pursuant to which a hearing before the undersigned was duly held in Leesville, Louisiana, on March 9, 1978.

Both parties were represented by counsel, all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to present evidence and testimony. At the hearing March 23, 1978, was fixed as the date for submission of briefs, in particular on the question of remedy; however, this time was subsequently extended, at the request of Complainant and for good cause shown, to April 7, 1978. Briefs were timely filed by both parties and have been carefully considered. 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 recommendation.

FINDINGS

1. In January, 1975, a job description for "Education Technician (Typing)" was issued by Respondent, dated January 6, 1975 (Res. Exh. 1). This position was announced by Respondent, on or about, January 9, 1975, and a large number of bids for the new position were received (Mrs. Bonnie L. Ham credibly testified that there were 52 applicants; and Mr. C.H. Lohfink, Area Manager (New Orleans) of the United States Civil Service Commission in a letter dated November 9, 1976 (Res. Exh. 5), stated that the file furnished by Respondent "shows that 32 applicants for the vacancy were evaluated.").

2. The job description reads, in part, as follows:

"This position has been engineered to a lower level for in-hire purposes. Upon the satisfactory completion of twelve months training, incumbent may be considered for promotion to

Education Technician, GS-1702-7, provided that official qualification requirements are met and that evaluation of position can be supported based on position qualification standards current at that time.

... (Res. Exh. 1).

3. Mrs. Bonnie L. Ham was selected for the position and began work as an Education Technician on May 11, 1976. Mrs. Ham had been employed by Louisiana State University from September 1, 1966, to April 30, 1971, and by Southwest Louisiana University from May 1, 1971, to October 29, 1971. She was initially employed by Respondent as a Secretary-Steno, GS-318-04 in 1972 and was subsequently promoted to GS-5, presumably in November, 1974 (Res. Exh. 6 appears to be in error and "Secretary-Steno, GS-318-04 from 11-74 to present" should apparently read GS-318-05 from 11-74; in any event, Mrs. Ham was a GS-5 prior to her bidding for the "Education Technicain (Typing)" position and was secretary to Director, (Industrial Operations). She had outstanding performance appraisals in 1973 and 1974. In addition, Mrs. Ham had 41 semester hours of college credits.

4. Mrs. Ham's performance as Education Technicain was excellent; she received a superior performance award; and was recommended for promotion to GS-7. Indeed, Mr. Delbert J. Wilson, Education Director, testified that he had thought her promotion to GS-7 was to be automatic upon satisfactory completion of the one year training period and Mrs. Ham had been excellent or outstanding in all phases of her job.

5. Ms. Wanda Martin, Civilian Personnel Office, Position and Pay Management, Fort Polk, testified that when she received the request for Mrs. Ham's promotion, she concluded that the position could not be upgraded to GS-7 without prior Commission (Civil Service Commission) approval and that the position should be established at GS-6 rather than GS-7; that this was discussed with Mr. Burton W. Cooley, then Chief, Staffing Branch; and that Mr. Cooley set up a meeting with Mrs. Ham and her supervisors for May 12, 1976, to discuss the one grade interval series. Ms. Martin testified that she was familiar with the Education Technician job description and was aware that it stated that the incumbent would be promoted to the 7 level upon completion of necessary training and necessary qualification requirements; but stated that she had no knowledge concerning qualification requirements.

6. In attendance at the May 12, 1976, meeting were: Mr. Cooley, Ms. Martin, Mrs. Ham, Mr. Wilson and Mr. Leland A. Slaydon, presently Senior Counselor and in 1976 was Deputy Director of Education. Messrs. Wilson and Slaydon were the immediate supervisors of Mrs. Ham; they had recommended her promotion to GS-7; and they disagreed with Mr. Cooley's desire to rewrite the job description to a GS-6. Recognizing Ms. Martin's express denial of any knowledge concerning qualification requirements, Mr. Wilson's testimony, which was fully confirmed by the testimony of Mrs. Ham, Mr. Slaydon and Ms. Martin, is most revealing. Mr. Wilson testified,

"Mr. Cooley said she did not have the qualifying experience. And Mrs. Ham disagreed and mentioned the University experience. And he said he didn't know about that, and she said, 'It's in the record.' Now some way, I don't know whether Mrs. Martin, or somebody handed -- Bonnie got the record and she thumbed through it and found it and got up and took it over and Mr. Cooley was thumbing through it, looking at it. Then I believe Mr. Cooley made the remark, this time, that it would not be considered specialized experience." (Tr. 65).

Mr. Wilson further testified that Mr. Cooley stated that Mrs. Ham's 5 year employment with LSU and SLU was not qualifying because "'it was administrative.'" (Tr. 74). Mr. Wilson then testified:

"I think in general terms, if it were administrative in a college set-up, then it would be what we're looking for.

"Q. You wanted people that understood credit-hours and semesters, and so forth"

"A. Right. And an analysis of certain reports, or attendance and reasons for doing certain things." (Tr. 74).

Mrs. Ham testified as follows:

"... Mr. Cooley said I was not qualified And so I asked Mr. Cooley why was I not qualified. And he said I lacked the

necessary specialized experience. I asked Mr. Cooley to show me what was the necessary specialized experience - which was considered specialized experience. So he showed me in the handbook, and an example was 'working for a University, in a registrar's office' as an example for my particular education technician job. 1/ And so I told Mr. Cooley, I said, 'But I have that experience in my folder. I worked for L.S.U. at Eunice for approximately 5 years, and that was what was considered specialized experience when I was hired.'

"Q. What was his response when you told him that?"

1/ The document referred to as the "X-118 Standard" (Res. Exh. 9) does give as an example work as an assistant in a college registrar's office; but even a cursory reading of this document makes plain that the controlling requirement for Specialized experience is as follows:

"This is experience which has demonstrated that the applicant has acquired and is able to apply the knowledge, skills, and abilities which are appropriate in the particular nature and grade of the position.

"Typically, such experience is ... work which is basically similar or closely related to the work of the position to be filled, or in the same specific program area with which the position is concerned or in a similar or closely related kind of program. ..." [Then follow two examples, one of which was employment in a college registrar's office]. (Res. Exh. 9).

It is obvious that place of employment, i.e., whether in a College Registrar's office or in a college Business Manager's office, is immaterial. To the contrary, the controlling consideration is whether the applicant's specialized experience "has demonstrated that the applicant has acquired and is able to apply the knowledge, skills and abilities which are appropriate to the particular nature and grade level of the position."

"A. He said it was not in my folder. And I said it was. And I asked for my folder, and I showed him where it was, in my 201 Personnel Folder." (Tr. 18-19).

7. Mr. Cooley told Mrs. Ham that if she initialed a change of the job description he would promote her to a GS-6; however Mrs. Ham stated that she believed she met all qualifications for GS-7 and when it became apparent that it was not going to be possible to resolve the disagreement at the meeting, Mr. Slaydon stated that if Mrs. Ham was dissatisfied with Mr. Cooley's opinion she had a right to file a grievance, go to the union and take the matter further. Mr. Slaydon testified that Mr. Cooley then stated,

"... if she went further and stirred things up and dirtied up the water, he might find she was not even qualified to be a GS-5" (Tr. 50).

The testimony of Mrs. Ham (Tr. 21, 28) and Mr. Wilson (Tr. 65-66) fully corroborated the testimony of Mr. Slaydon and even Ms. Martin admitted that Mr. Cooley said "'Mrs. Ham there is some question as to whether you even qualify for the 5 level.'" (Tr. 87).

8. The Inspector General Team was at Fort Polk and there was a time for complaints from civilian personnel and Mrs. Ham took the matter to the Inspector General, Colonel Chamberlain, and informed him of the meeting, including Mr. Cooley's threat. A day or two later, Colonel Chamberlain informed Mrs. Ham that he had reviewed at length her personnel folder; had met with Mr. Norman E. Lewis, Civilian Personnel Officer and Mr. Cooley's superior; had recommended that Mr. Lewis promote Mrs. Ham, stating that his review of her personnel file demonstrated, in his opinion, that she should be promoted and noting further that Mrs. Ham's 41 semester hours of college credits should, in his opinion as a previous civilian personnel officer, have been considered as specialized experience; and that Mr. Lewis would call Mrs. Ham. Mr. Lewis never called Mrs. Ham.

9. Mrs. Ham did go to the Inspector General, did consult the Union and did make known her intention to file a grievance. Whether a formal grievance had been filed on or before June 10, 1976, Mr. Lewis in his letter of June 10, 1976, to the New Orleans Branch of CSC (Res. Exh. 2), expressly acknowledged Mrs. Ham's intention to file a formal grievance and, as threatened

by Mr. Cooley on May 12, 1976, "if she went further and stirred things up and dirtied up the water", Mr. Lewis carried out Mr. Cooley's threat by representing to CSC that experience previously credited as specialized had now been found to have been "general in nature".

10. Mr. Lewis' letter of June 10, 1976, bears little relation to fact and appears largely divorced from reality. For example, he stated that "upon initiation of the promotion action, another staffing specialist questioned the employee's overall qualification to be promoted to GS-07, for the reason that she did not meet the basic qualification requirements at the time she was placed in the GS-05 position." (Res. Exh. 2, ¶ 1C.). Ms. Wanda Martin, the staffing specialist who received the promotion request, testified that she concluded that the position could not be upgraded to GS-7 without prior Commission approval and that the position should be established at GS-6 rather than GS-7. Mrs. Martin categorically denied that she had any knowledge concerning qualification requirements.

If, perchance, Mr. Lewis had reference to Mr. Cooley as the other "staffing specialist" the record shows without contradiction that when Mr. Cooley made the statement that he might "find she was not even qualified to be a GS-5" he did not know of Mrs. Ham's five years experience with two universities.

Mr. Lewis stated in his letter of June 10, 1976, "The specific experience in question is that experience gained while employed in the Business Manager's Office at Louisiana State University, Eunice Branch, during the period 9-1-66 until 4-30-71 and at Southwestern Louisiana University from 5-1-71 to 10-29-71. This experience was initially credited as specialized in qualifying Mrs. Ham for her present position. However, in comparing her description of duties in the LSU job to the X-118 Standard for GS-05 level work in the 1702 Education Technician Series, that experience is now found to have been general in nature." At the hearing, Mr. Lewis demonstrated a remarkable inability to state what the duties of an Education Technician (Typing) are, beyond typing and filing which he stated Mrs. Ham was qualified to perform; wholly failed to point to anything in Mrs. Ham's university experience which was not closely related to the duties of Education Technician (Typing); and admitted that her experience at LSU and SLU demonstrated full understanding of educational work, college credits, all the language that would be used, etc. Of course, Mr. Slayton specifically testified with respect to Mr. Cooley's comment about Mrs. Ham's 5 years of college administrative experience, "... if it were

administrative in a college set-up, then it would be what we're looking for."

11. Mr. Cooley on May 12, 1976, had offered to promote Mrs. Ham to Education Technician (Typing) GS-6 if she would agree to a revised job description. Mr. Cooley on May 12, 1976, made it clear that if Mrs. Ham did not agree to the revised job description and accept a GS-6 he might find that she was not even qualified to be a GS-5. Mr. Lewis' letter of June 10, 1976, carried out Mr. Cooley's threat, notwithstanding Colonel Chamberlain's strong recommendation to the contrary. Not only did Mr. Lewis fail to give any specific justification for his conclusionary assertions; but he, obviously, withheld any reference to Mrs. Ham's 41 semester hours of college credits, which Colonel Chamberlain believed further constituted specialized experience, and he made no effort to determine the nature of Mrs. Ham's work at LSU and SLU. Not only did Mr. Lewis not discuss the matter with Mrs. Ham; but Mrs. Ham was not even informed of the letter of June 10, 1976, until sometime after the letter had been submitted to CSC.

12. Mr. C.H. Lohfink, Area Manager, New Orleans Area Office, CSC, on July 9, 1976, responded to Mr. Lewis' letter of June 10, 1976, in part, as follows:

"On the basis of information submitted with your letter and a review of the appropriate X-118 qualification standard, it is our opinion that Mrs. Ham was not qualified for placement in the GS-1702-05 position in April, 1975, because she lacked the one year specialized experience requirement described in that standard. It is our opinion, also, that she is not now qualified for promotion to GS-1702-06 because she lacks the two years specialized experience required, or to GS-1702-7 because she lacks the three years specialized experience required." (Res. Exh. 3).

13. Mr. Lewis responded by letter dated July 30, 1976, and stated, in part, as follows:

"2. ...Credit was awarded for specialized experience gained while the applicant was employed by an education institution in a purely clerical capacity. The staffing specialist failed to differentiate between

the function of a registrar's office and a business manager's office. ...

* * * *

"4. ...this Command in coordination with management officials of the Education Center, requested that Ms. Ham be retained in the position for which she was selected. Her performance has been totally satisfactory and potential for advancement to the GS-1702-07 target level has been fully demonstrated.

"5. It is proposed to consider Mrs. Ham for promotion to the GS-06 level o/a 12 May 1977, and subsequent promotion to the target level grade of GS-07 when time in grade and qualification requirements are met.

"6. Request favorable consideration of retention in the position and crediting of experience gained since appointment to the position." (Res. Exh. 4).

14. Mr. Lohfink replied to Mr. Lewis' letter of July 30, 1976, by letter dated November 9, 1976, in which he stated, in part, as follows:

"... Mrs. Ham presumably now meets the necessary qualification requirements, but it has been determined that she entirely lacked the specialized experience requirements at the time of promotion. Commission approval of her retention depends, inter alia, on how close she was to meeting the qualification requirements at the time of promotion. ..." (Res. Exh. 5) (Emphasis in original.)

15. Mr. Cooley responded to Mr. Lohfink's letter of November 9, 1976, by letter dated January 10, 1977, in which he stated, in part, as follows:

"In evaluating these candidates against the qualification requirements and against the JREC, it is clearly evident that the

three candidates placed in the Best Qualified group possessed skills that exceeded the qualifications of the other qualified candidates. Summary of the comparisons are as follows:

- "Glenda Smith ... [declined the position]
- "Bonnie Ham ...
- "Kay Ketchum ... [has since resigned]
- (Res. Exh. 6)

16. Mr. Lohfink responded to Mr. Cooley's letter of January 10, 1977, by letter dated February 10, 1977, and stated, in part, as follows:

"This is in reference to your letter, dated January 10, 1977, and our telephone conversation of February 2, 1977, about the matter of Mrs. Bonnie Ham's selection for and retention in the position of Education Technician (Typing), GS-1702-05.

"It appears that the basic issue of whether Mrs. Ham met the specialized experience requirement at the time of her promotion has been reactivated by your reference to a submission from Mrs. Ham's former employer, an educational institution, purporting to clarify the nature and quality of her experience in that employment. Your agency must carefully assess the credibility and creditability of the information furnished and determine whether it warrants a reversal of your previous decision that Mrs. Ham was not qualified at the time of her promotion. If it is determined that Mrs. Ham was qualified on the basis of this additional information, then there was not in fact a regulatory violation in the selection of Mrs. Ham.

"If, on the other hand, the previously conceded regulatory violation remains, the following must be considered:

* * * *

5) Although Mrs. Ham lacked the specialized experience requirement at the time of her promotion in April 1975, we consider that she has acquired the necessary specialized experience during the period April 1975 to April 1976 for her present position.

"For the foregoing reasons and because of the length of time elapsing since Mrs. Ham's promotion, we approve your agency's retaining her in her present position. However, only her service in the position since April 1976, when she first met the specialized experience requirement, may be credited for promotion purposes. Otherwise, we believe she would unfairly benefit further from the initial error of your agency in selecting her for a position for which she was not qualified. ..." (Res. Exh. 7).

17. In May, 1977, Mrs. Ham was promoted to GS-6.

CONCLUSIONS

The record shows directly and clearly that Mr. Cooley, Chief of Respondent's Staffing Branch, Civilian Personnel Office, on May 12, 1976:

- a) Offered to promote Mrs. Ham to Education Technician GS-6 if she would initial a change of the job description (which provided for promotion from GS-5 to GS-7); and
- b) Told Mrs. Ham that if she did not initial the change of the job description and went further and stirred things up and dirtied up the water he might find she was not even qualified to be a GS-5.

Mrs. Ham, believing that she was qualified, and that she possessed the requisite specialized experience, as had, indeed, been determined when she was selected in April, 1975, for the job, did speak to Colonel Chamberlain, the Inspector General, did consult the Union and did make known her intention to file a grievance; and Mr. Lewis, Respondent's Civilian Personnel Officer and Mr. Cooley's superior, by letter dated June 10, 1976, to the CSC, promptly and emphatically carried out Mr. Cooley's threat of May 12, 1976.

In preparing the job description in 1975, the Civilian Personnel Office had provided for a two grade promotion, from the in-hire level of GS-5 to GS-7, upon completion of twelve months training. When Mrs. Ham's promotion request was received in 1976, Ms. Wanda Martin, Position and Pay Management, Civilian Personnel Office, concluded that the position could not be upgraded to GS-7 without prior Commission approval and, accordingly, that the position should be established at GS-6 rather than GS-7.

The job description provided for virtually automatic promotion to GS-7 upon satisfactory completion of 12 months training and Mrs. Ham's performance had been excellent and she had received a superior performance award. This was the unqualified understanding of Mr. Delbert J. Wilson, Education Director, Mr. Leland A. Slayton, presently Senior Counselor and in 1976 was Deputy Director of Education, Mrs. Ham, and even Ms. Wanda Martin. Mr. Cooley, when advised by Ms. Martin of the error in providing for a two-year promotion increment in a 1702 series job, deigned to admit error and although he offered to promote Mrs. Ham to GS-6 if she initialed a revised job description, when Mr. Slayton suggested that if Mrs. Ham was dissatisfied with Mr. Cooley's opinion she had a right to file a grievance, go to the union and take the matter further Mr. Cooley stated that if she "went further" he might find that she was not even qualified to hold the GS-5 position (as Education Technician (Typing)). Mrs. Ham did not initial the revised job description; she did "go further"; and Mr. Cooley's threat was duly carried out by Mr. Lewis' letter of June 10, 1976. Not only did Mr. Lewis carry out the threat made by Mr. Cooley on May 12, 1976, but he did so after Colonel Chamberlain, the Inspector General, had discussed the matter with him and had strongly recommended that Mrs. Ham be promoted.

That the professed basis for Respondent's assertion that Mrs. Ham lacked the specialized experience, credited upon her selection, was contrived and wholly lacking in substance is apparent. Mr. Cooley made his statement that he might find that Mrs. Ham was not even qualified to be a GS-5 without knowledge that Mrs. Ham had had 5 years experience at LSU and at SLU; when Mrs. Ham called this experience to his attention, Mr. Cooley asserted that this was administrative and did not qualify; Mr. Lewis in his letter of June 10, 1976, asserted that because Mrs. Ham's experience was in a Business Manager's office it was "general in nature"; in his letter of June 30, 1976, Mr. Lewis asserted that Mrs. Ham had been employed by an educational institution in a "purely clerical capacity. The staffing specialist failed to differentiate between the function of a registrar's office and a business manager's office". Perhaps Mr. Lewis was deluded by the example in the

"X-118 Standard"; but it should be obvious that place of employment, that is, in a Registrar's office or in a Business Manager's office, is immaterial; that the controlling consideration is whether the applicant's specialized experience "has demonstrated that the applicant has acquired and is able to apply the knowledge, skills and abilities which are appropriate to the particular nature and grade level of the position."

That purely clerical experience would not constitute specialized experience within the meaning of the "X-118 Standard" may very well be true; but it would be equally true whether such purely clerical experience was gained in a college Registrar's office or in a college Business Manager's office.

Mr. Lewis did not talk to Mrs. Ham about her work at LSU and SLU nor did he make any inquiry of either institution as to Mrs. Ham's work experience, notwithstanding that his own staffing specialist had, in 1975, determined that Mrs. Ham's experience at LSU and SLU constituted specialized experience and notwithstanding that Colonel Chamberlain, himself a former Civilian Personnel Officer, had, after careful review of Mrs. Ham's personnel file, strongly recommended that Mrs. Ham be promoted. Moreover, neither Mr. Lewis nor Mr. Cooley in any of the correspondence to Mr. Lohfink ever mentioned that Mrs. Ham had 41 semester hours of college credits, which Colonel Chamberlain concluded further constituted specialized experience, although Respondent took pains to set forth college credits of other applicants. Finally, Mr. Lohfink, in his letter of February 10, 1977, to Mr. Cooley, noted, "... a submission from Mrs. Ham's former employer, an educational institution, purporting to clarify the nature and quality of her experience in that employment." Although the actual submission was not offered in evidence or otherwise explained, Mr. Lohfink's comments with respect thereto clearly imply that Respondent's prior assertions as to the nature and quality of Mrs. Ham's work at LSU and SLU were, in fact, false and I specifically draw such inference. But equally significant, and perhaps even more significant, was the fact that Respondent purported to make "findings", contrary to the determination made by its own staffing specialist in 1975, without any effort to ascertain the facts, notwithstanding its full awareness of Mrs. Ham's assertions and the recommendation of the Inspector General, and the "findings" not only were wholly unsubstantiated and made with reckless disregard for truth, but were false and were intended to punish Mrs. Ham for the exercise of rights protected under the Order.

Thus, the record shows that Respondent on May 12, 1976, violated Section 19(a)(1) of the Order by Mr. Cooley's threat to find that Mrs. Ham was not qualified to be a GS-5 if she "went further and stirred things up and dirtied up the water" by consulting Complainant and/or by filing a grievance; that agency management thereby interfered with, restrained, and coerced Mrs. Ham in the exercise of rights assured by the Order, including specifically her right to file a grievance and her right to consult her collective bargaining representative. The record further shows that because Mrs. Ham did "go further", that is, she did consult Complainant and she did make known her intention to file a grievance, Mr. Lewis, Respondent's Civilian Personnel Officer, by letter dated June 10, 1976, carried out with alacrity Mr. Cooley's threat of May 12, 1976, and did purport to find that Mrs. Ham "was not even qualified to be a GS-5". Respondent thereby further violated Section 19(a)(1) of the Order.

As Mr. Cooley, on May 12, 1976, had offered to promote Mrs. Ham to GS-6 if she would initial a revised job description for the position of Education Technician (Typing) and thereby relinquish her presumed and apparent right to promotion to GS-7, pursuant to the original job description, it is clear, and I specifically find, that but for Respondent's wrongful action, in violation of Section 19(a)(1) of the Order, Mrs. Ham would have been promoted to GS-6 on May 12, 1976, recognizing that Respondent was foreclosed by CSC Regulations from promoting her to GS-7 without Commission approval; and I further find that but for Respondent's wrongful action, Mrs. Ham would have had not less than three years specialized experience, the requirement for GS-7, as of May 12, 1977.

REMEDY

Respondent's wrongful action, in violation of Section 19(a)(1) of the Order, on May 12, 1976, by its threat to find Mrs. Ham not qualified to be an Education Technician (Typing) GS-5 if she did not initial a revised job description and accept promotion to GS-6, whereas the job description provided for promotion to GS-7 upon satisfactory completion of 12 months training, and "went further and stirred things up and dirtied up the water" by consulting with Complainant and/or by filing a grievance; and on June 10, 1976, when it carried out its threat because Mrs. Ham had gone further and had consulted Complainant and had made known her intention to file a formal grievance, and purported to find that Mrs. Ham was not qualified to be a GS-5 by disallowing specialized experience previously

credited. Respondent's wrongful action had two immediate results. First, she was denied any promotion. Second, by disallowing the specialized experience previously credited, Respondent subjected Mrs. Ham to removal from the position she occupied, because, Respondent asserted, she should not have been selected, although Respondent subsequently requested "in coordination with management officials of the Education Center" that Mrs. Ham be retained in the position and CSC on February 10, 1977, approved.

As Respondent had the authority to promote Mrs. Ham on May 12, 1976, to GS-6, as it offered to do if she initialed a revised job description; and as Respondent wrongfully found that specialized experience, credited when Mrs. Ham was selected for the Education Technician (Typing) job in 1975, should not have been credited, in direct retaliation for Mrs. Ham's lawful and protected right under the Order to consult Complainant and/or to file a grievance, Mrs. Ham was denied promotion to GS-6 on May 12, 1976, wholly because of Respondent's wrongful action in violation of the Order and I shall recommend that her promotion to GS-6, on, or about, May 12, 1977, be made retroactive to May 12, 1976, together with all pay and allowances. For the reasons set forth herein, the record clearly shows, and I have so found, that, but for the wrongful action of Respondent, Mrs. Ham would have been promoted on May 12, 1976, to GS-6. Accordingly, the award of backpay to remedy the unfair labor practice is fully in accordance with the Decisions of the Comptroller General in No. B-180010, 54 Comp. Gen. 760 (March 19, 1975); No. B-175275, 54 Comp. Gen. 1071, 1074-1075 (June 20, 1975), No. B-180010.03, 56 Comp. Gen. 8 (October 7, 1976); Naval Air Rework Facility, Pensacola, Florida and Secretary of the Navy, Department of the Navy, Washington, D.C., A/SLMR No. 608, 6 A/SLMR 67 (1976), affd. in part and set aside in part, FLRC No. 76A-37, Report No. 125 (June 2, 1977), Supplemental Decision, A/SLMR No. 873 (August 4, 1977).

Respondent's action in disallowing credit for Mrs. Ham's specialized experience, which had been duly credited after appropriate review and analysis in 1975, was motivated wholly by Respondent's wrongful and unlawful intent to punish Mrs. Ham for her exercise of rights protected by the Order. Whether Mrs. Ham could have been promoted to GS-7, in accordance with the job description for the Education Technician (Typing) position, was not wholly within Respondent's control; but, while Commission approval was required (see, Res. Exh. 9), Respondent, but for its wrongful action in violation of the Order, could have, and should have, submitted such recommendation to the Commission. There can be no doubt that the only

remedy which could fully correct the wrongful action of Respondent would be the retroactive promotion of Mrs. Ham to GS-7 as of May 12, 1976; however, such remedy is precluded. Thus the Comptroller General, in No. B-180010, supra, has stated:

"Although every personnel action which directly affects an employee and which has been found to be an unfair labor practice may also be considered to be an unjustified or unwarranted personnel action, the remedies under the Back Pay Act are not available unless the A/SLMR can also establish that but for the wrongful action, the withdrawal of pay, allowances, and differentials would not have occurred. ..." (54 Comp. Gen. at 763).

As series 1702 is identified as one of the "exceptions" not included in the list which may be considered to be in lines of work properly classified at two-grade intervals (Res. Exh. 9, Federal Personnel Manual, Inst. 202), it cannot be said that, but for Respondent's wrongful action, Mrs. Ham would have been promoted to GS-7 on May 12, 1976, inasmuch as a two grade promotion in this series was authorized only upon prior approval of the Commission. Respondent's error in issuing the job description in 1975, pursuant to which Mrs. Ham was selected, does not negate in any manner this requirement.

Nevertheless, as Respondent's wrongful action was its disallowance of credit, duly granted in 1975 for specialized experience at the time of Mrs. Ham's selection for her present position, removal of such disallowance of credit as recommended herein, will mean that Mrs Ham began her present duties on May 11, 1975, with one year's credit for specialized experience; that, but for Respondent's wrongful action, she would have been promoted to GS-6 on May 12, 1976(and I have recommended that her promotion to GS-6 be made retroactive to May 12, 1976); and that, but for Respondent's wrongful action, she would have been eligible for promotion to GS-7 on May 12, 1977, at which time she would have had not less than 3 years specialized experience including service in the position since May 11, 1975. 2/ Accordingly, I shall further recommend that Mrs. Ham

2/ It is recognized that in his letter of July 9, 1976, Mr. Lohfink used language which could imply a determination by CSC that Mrs. Ham was not qualified for placement in the GS-1702-05 position in April, 1975; however, read in context it seems (Continued)

be promoted to GS-7, retroactive to May 12, 1977, and that she be paid in full for the difference in all pay and allowances between a GS-6, to which she was promoted on that date, and a GS-7 to which she would have been promoted but for Respondent's wrongful action. See No. B-180010,54 Comp. Gen. 760, et al., supra.

To insure full and effective remedy of Respondent's wrongful action, 3/ I shall further recommend, in addition to the customary affirmative action, including posting, that: i) Respondent expunge from Mrs. Ham's personnel record all references to the purported "finding", as set forth, for example, in Mr. Lewis' letter dated June 10, 1976, that experience initially credited as specialized experience

Footnote 2 continued from page 16.

apparent that Mr. Lohfink merely accepted the information submitted by Mr. Lewis in his letter of June 10, 1976. That Mr. Lohfink did not make, or intend to imply that he had made, any independent determination of qualification is made clear by his letter of February 10, 1977, in which he stated, inter alia,

"Your agency must ... determine whether It warrants a reversal of your previous decision that Mrs. Ham was not qualified at the time of her promotion."

Moreover, such result is fully consistent with the concluding sentence of the second paragraph of Mr. Lohfink's letter of February 10, 1977, inasmuch as there was, absent Respondent's wrongful action, no regulatory violation in the selection of Mrs. Ham.

3/ As noted herein, Mr. Lewis stated in his letter of June 10, 1976, that Mrs. Ham intended to file a formal grievance. Although it is assumed that a grievance was filed, neither party offered the grievance in evidence.

More important, Respondent has not asserted that Section 19(d) of the Order applies. Cf. Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401, 4 A/SLMR 406, (1974), set aside and remanded, FLRC No. 74A-52 (1976), Supplemental Decision and Order, A/SLMR No. 808 (1977).

was not properly credited in qualifying Mrs. Ham for her present position; and ii) Respondent restore to Mrs. Ham full credit for specialized experience initially credited in qualifying Mrs. Ham for her present position.

RECOMMENDATION

Having found that Respondent has engaged in conduct violative of Section 19(a)(1) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Executive Order:

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, 29 C.F.R. § 203.26(b), the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Department of the Army, Fort Polk, Louisiana, shall:

1. Cease and desist from:

a. Interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended, by threatening adverse personnel action, by taking adverse personnel action, by disciplining, or threatening to discipline, employees for exercising their rights assured by the Order to consult with their bargaining representative and to file grievances.

b. Taking any adverse personnel action against Bonnie Jones Ham, or any other employee, for the filing of processing of grievances pursuant to terms of a negotiated agreement or for consulting with Local R-5-168, National Association of Government Employees, or any other duly recognized labor organization, about a grievance.

c. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Section 19(a)(1) of Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

a) Rescind, withdraw and expunge from all personnel files all actions and findings, including Mr. N.E. Lewis' letter dated June 10, 1976, which disallowed specialized experience credited Bonnie Jones Ham in April, 1975, at the time of her selection for the position of Education Technician (Typing) GS-1702-05.

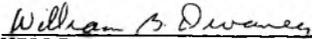
b) Restore to Bonnie Jones Ham full credit for specialized experience initially credited Bonnie Jones Ham in April, 1975, in qualifying her for the position of Education Technician (Typing) GS-1702-05.

c) Make the promotion of Bonnie Jones Ham to GS-06 retroactive to May 12, 1976, including all back pay and allowances, this being the date she would have been promoted to GS-06 but for the wrongful action of Respondent.

d) Promote Bonnie Jones Ham to GS-07 retroactive to May 12, 1977, including all back pay and allowances, this being the date she would have been promoted to GS-07 but for the wrongful action of Respondent.

e) Post at its facility at Fort Polk, Louisiana, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Civilian Personnel Officer and by the Commanding Officer, 5th Infantry Division, Fort Polk, Louisiana, and shall be posted and maintained by the latter for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to civilian employees of Fort Polk, Louisiana, are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

f) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.


WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 2, 1978
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended, by threatening adverse personnel action, by taking adverse personnel action, by disciplining, or threatening to discipline employees for exercising their rights assured by the Order to consult with their bargaining representative and to file grievances.

WE WILL NOT take any adverse personnel action against Bonnie Jones Ham, or any other employee, for the filing or processing of grievances pursuant to the terms of a negotiated agreement, or for consulting with Local R-5-168, National Association of Government Employees, or any other duly recognized labor organization, about a grievance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured by Section 19(a)(1) of Executive Order 11491, as amended.

WE WILL rescind, withdraw and expunge from all personnel files all actions and findings which disallowed specialized experience credited Bonnie Jones Ham in April, 1975, at the time of her selection for the position of Education Technician (Typing) GS-1702-05.

WE WILL restore to Bonnie Jones Ham full credit for specialized experience initially credited Bonnie Jones Ham in April, 1975, in qualifying her for the position of Education Technician (Typing) GS-1702-05

WE WILL make the promotion of Bonnie Jones Ham to GS-06 retroactive to May 12, 1976, and WE WILL promote Bonnie Jones Ham to GS-07 retroactive to May 12, 1977, together with all back pay

August 16, 1978

- 2 -

and allowances, each date being the date Bonnie Jones Ham would have been promoted in each instance but for the wrongful action of Respondent.

Dated _____ By _____
 Commanding Officer
 5th Infantry Division
 Fort Polk, Louisiana

Dated: _____ By _____
 Civilian Personnel Officer
 Fort Polk, Louisiana

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 Administrator, Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 2200, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION
 AND WELFARE, SOCIAL SECURITY
 ADMINISTRATION, BRSI, NORTHEASTERN
 PROGRAM SERVICE CENTER
 A/SLMR No. 1101

This case involved an unfair labor practice complaint filed by American Federation of Government Employees, AFL-CIO, Local 1760 (AFGE) alleging that Respondent violated Section 19(a)(1) and (6) of the Order by refusing to negotiate, on or about February 11, 1977, with the AFGE over the procedures to be followed in connection with a proposed detail of employees from one office component to another, as well as over the adverse impact of such a detail on the bargaining unit employees.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to timely notify the AFGE and afford it a reasonable opportunity to meet and confer concerning the impact and implementation of the Respondent's decision to detail certain of its employees. In reaching this conclusion, the Administrative Law Judge rejected the Respondent's defense that the AFGE is not the exclusive representative of the employees in the unit and had no standing to file the instant complaint. Rather, based upon record evidence, the Administrative Law Judge found that the AFGE is the agent of the exclusive representative, the National Office of the American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals) for the purpose of representing the Respondent's employees in local matters affecting personnel policies and practices and other working terms and conditions and, therefore, had standing to file the instant complaint. Further, the Administrative Law Judge rejected the contention of the Respondent that any obligation owed to the AFGE was restricted only to "consultation," rather than "negotiation."

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge, and ordered that the Respondent cease and desist from engaging in the conduct found violative of the Order and take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, BRSL, NORTHEASTERN
PROGRAM SERVICE CENTER

Respondent

and

Case No. 30-07725(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1760

Complainant

DECISION AND ORDER

On June 8, 1978, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendations.

1/ The Respondent excepted to certain credibility findings made by the Administrative Law Judge. In Navy Exchange, U.S. Naval Air Station Quonset Point, Rhode Island, 2 A/SLMR 377, A/SLMR No. 180 (1972), the Assistant Secretary held that as a matter of policy he would not overturn an Administrative Law Judge's resolution with respect to credibility unless the preponderance of all the relevant evidence established that such resolution clearly was incorrect. Based on a review of the record in this case, I find no basis for reversing the Administrative Law Judge's credibility findings.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education and Welfare, Social Security Administration, BRSL, Northeastern Program Service Center shall:

1. Cease and desist from:

(a) Instituting a detail or assignment of employees represented exclusively by the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), without first notifying the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the exclusively recognized labor organization, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such detail or assignment, and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

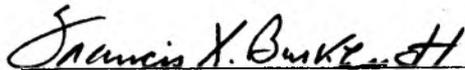
2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Notify the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Payment Center Locals), the employees' exclusive bargaining representative, of any intended detail or assignment of employees and, upon request, meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such detail or assignment, and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

(b) Post at its facility at the Northeastern Program Center copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Northeastern Program Service Center and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
August 16, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a detail or assignment of employees represented exclusively by the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), without first notifying the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the exclusively recognized labor organization, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such detail or assignment, and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), the employees' exclusive bargaining representative, of any intended detail or assignment of employees and, upon request, meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such detail or assignment, and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

Agency or Activity

Dated: _____ By: _____
Signature

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515 - 1515 Broadway, New York, New York 10036.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of
DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, BRSI, NORTHEASTERN
PROGRAM SERVICE CENTER,
Respondent
and
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1760,
Complainant
.....
Case No. 30-7725 (CA)

SAMUEL S. GOLD, ESQ.
HEW, Social Security Administration,
BRSI, Northeastern Program Service Center
1220 West Highrise Building
Baltimore, MD 21235
For the Respondent

HERBERT COLLENDER, PRESIDENT
American Federation of Government
Employees, AFL-CIO, Local 1760
P.O. Box 626
Corona-Elmhurst, NY 11373
For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on February 10, 1978 by the Acting Regional Administrator for Labor-Management Services Administration, U.S. Department of Labor, New York Region, a hearing was held before the undersigned on March 7 and April 14, 1978 at New York, New York.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order). A complaint was filed on April 14, 1977 by American Federation of Government Employees, AFL-CIO, Local 1760 (herein called Complainant) against Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center (herein called Respondent). It alleged, in substance, that Respondent violated Sections 19(a)(1) and (6) of the Order by refusing to negotiate, on or about February 11, 1977, with Complainant over the procedures to be followed in connection with a proposed detail of employees from one office component to another, as well as over the adverse impact of such a detail on the bargaining unit employees.

Respondent submitted a response to the complaint, dated May 9, 1977 wherein it alleged that: (a) there was no obligation to meet and confer with the local union over conditions of employment; (b) management was obliged merely to consult with Complainant over local matters, and it fulfilled its obligation by meeting with Complainant and consulting on this proposed detail; (c) the detail of employees had not substantial impact on employees in the bargaining unit. The alleged violations of the Order were denied.

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

1. The Bureau of Retirement and Survivor's Insurance has six program service centers located throughout the United States - one in each of six major cities. The one involved herein is the Northeastern Program Service Center. These centers review claims prepared by district offices, adjudicate and determine entitlements, and certify benefits for beneficiaries to the Treasury Department.

2. The National Council of Social Security Payment Center Locals, American Federation of Government Employees, AFL-CIO (herein called the Council) is composed of six local unions representing unit employees in each service center.

3. By letter dated February 27, 1969 J.F. Griner, National President of American Federation of Government Employees, AFL-CIO, notified the Commission of Social Security Administration that recognition will be granted to the national AFGE rather than the Council, and that the national office of AFGE is the bargaining agent for the Council.

4. By letter dated June 10, 1969 Hugh F. McKenna, Director of BRSI, advised Griner that the national office of AFGE, AFL-CIO (Council of Social Security Payment Center Locals) was granted exclusive recognition for a unit of all non-supervisory employees at the Payment Centers.

5. The Bureau and AFGE have been parties to collective bargaining agreements since 1971. The most recent written agreement was effective by its terms on March 15, 1974 for a period of two years. It was subsequently extended and continues in effect at the present time.

6. The aforesaid written agreement identifies the exclusive bargaining representative of the unit employees of the Program Centers as the national office of the American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), hereinafter referred to as the Council.

7. (a) Article 2, Section (a) of the aforesaid agreement provides, in substance, that representatives of the Bureau and Council shall meet semi-annually to confer and consult with respect to personnel policies and practices or other matters affecting working conditions.

(b) Article 2, Section (c) of the aforesaid agreement provides, in substance, that labor-management meetings in the Program Center to confer on local personnel policies, practices, and general working conditions shall be held monthly unless deferred by mutual consent.

(c) Article 2, Section (e) of the said agreement provides, in substance, that (1) the Bureau will consult with the Council on matters re personnel policies, practices and working conditions (2) the Program Center will consult with its respective Local on matters within the authority of the Regional Representatives re personnel policies, practices and working conditions.

(d) Article 30 of the aforesaid agreement provides for the negotiation of supplemental agreements at each installation (Program Center) between the Center and the Local thereat. All local supplemental agreements are deemed part of the master agreement. Provision is also made in Section (d) of this Article for the establishment of ground rules to govern negotiations.

8. Under date of March 5, 1973, McKenna sent the Council a copy of the Bureau's Instruction (SSA-BRSI Instruction 711-1) pertaining to the labor-managements relations policy of the Bureau. Under the heading, "Purpose", it is stated therein that the individual Payment Center locals are representatives of AFGE (NCSSPCL) in the respective payment centers, and, as such, the Bureau consults and negotiate with them on appropriate local matters. 1/

9. On February 10, 1977, 2/ Julius Bergman, Respondent's labor relations specialist, telephoned James Arnet, Complainant's vice-president, to inform him that management intended to establish a detail of employees to process annual reports and that Bergman wanted to discuss it with the proper union representative. Arnet suggested that Bergman speak with George Sekzer and Irwin Berger, both of whom were vice-presidents of the local union.

10. A meeting took place on February 11 which was attended by Bergman, Sekzer and Berger. The management official stated that a detail of five employees would commence on Monday, February 14 to sort and code annual reports. 3/ He added that four employees would be selected from different modules and one individual would be chosen from College Point. The union officials asked Bergman how the detail

1/ Under the heading "Bureau Relationships with the Union" the instruction, though declaring that the union's right to be consulted applies to the same subjects that are negotiable, draws a definitive distinction between negotiation and consultation.

2/ Except as otherwise stated, all dates hereinafter mentioned are in 1977.

3/ These reports are made by beneficiaries who contribute for retirement under Social Security. Each year they are coded in respect to the total earnings for the preceding year, the months in which no services were performed, and the estimate of earnings for the current year. This procedure, which has been in effect for five years, commences in February and continues until April annually.

would be selected, whether by seniority or on a voluntary basis; if members of the detail would be rotated or confined to the original selectees; whether overtime would be paid to these employees; and what procedure would be followed in sending a member from College Point. 4/ Bergman replied that he couldn't answer these questions; that he was there to advise them that the detail would take place along the lines he indicated; and that he would get back to the union later re their inquiries.

11. Later in the day, on February 11, the aforesaid respective agents of the Program Centers and Complainant met again. Bergman told the union agents the three named branch chiefs had been assigned to select the detail for the coding. When Berger asked if the union could consult with said chiefs as to the impact of the detail, Bergman said he would try to arrange a meeting in that regard later that afternoon. No such meeting was arranged.

12. Arnet spoke to Bergman on February 14, and the latter informed the union official that the detail had been implemented; that Respondent saw no need to discuss the matter further with the union.

Conclusions

In resisting the alleged violations of the Order attributed to it, Respondent contends as follows: (1) since the national office of AFGE is the bargaining agent for the employees at the Program Centers, Respondent is not obligated to bargain with the local herein (Complainant) except as to supplemental agreements in accordance with Article 30 of the written agreement; (2) in respect to daily matters affecting the Program Center, management's responsibility is limited under the contract (Article 2, Section (e)) to consultation rather than including an obligation to negotiate over such policies or working conditions; (3) the detail of employees herein by Respondent reflected no adverse impact or any adverse implementation problems as a result thereof, and it does not appear the union was unable to carry out its representational duties when the employees failed to answer the queries posed by Complainant.

4/ Employees at College Point report to work between 7-9 a.m. and leave 8 1/2 hours later. The detailee from College Point would report at 8:15 a.m., thus affecting his regular schedule.

Respondent challenges the right of Complainant to initiate this proceeding and require it to bargain over the detail of five employees to process annual reports. In effect, it contends that the local union has no standing except as to supplemental agreements, to require management to negotiate over local matters.

In dealing with a similar issue, the Assistant Secretary has declared that an activity is obligated only to meet and confer with the national exclusive representative, and not with a constituent local unless such local has been authorized to act on behalf of the exclusive representative. Bureau of the Mint, et. al., A/SLMR No. 750. In the cited case he concluded there was no specific authorization for the local union to act on behalf of the AFGE; that the sole responsibility of the activity was to meet and confer with the national union over the impact and implementation of a decision to grant two hours administrative leave; and that the contractual requirements of "consultation" with the local union on implementation of changes in shift assignment and hours of work did not apply to a one-time grant of administrative leave.

Certain factors present in the case at bar make it distinguishable from the Bureau of the Mint case, *supra*. The tenor of the agreement herein warrants a reasonable inference that local 1760 was granted the right to deal with the Program Center concerning either local matters not covered by the master agreement or changes affecting the Center. Thus, Article 2, Section (e) specifically states the Program Center will consult with its respective local as to personnel matters, practices and working conditions affecting such Center. Moreover, the agreement provides under Article 2, Section (c), that labor-management meetings at the Program Centers will be held monthly to confer on local personnel policies, practices and general working conditions.

Respondent, however, argues that its only obligation to negotiate with Complainant concerns supplemental agreements applicable to the local installation in accordance with Article 30 of the master agreement. It insists that the provisions of Article 2 merely require management to "consult" with the local union re changes in working conditions or policies, and that, except for the limitation imposed under Article 30, its obligation to negotiate extends solely to the exclusive bargaining representative, the national AFGE.

I do not agree. While it is true that the agreement allows for the negotiation of supplemental contracts at the local installation, I am not persuaded such a provision forecloses the local union from conducting further negotiations as to matters affecting the Program Center. Such a foreclosure is not explicit by the terms of the agreement, nor can it be inferred from the aforementioned articles therein. Contrariwise, the language employed envisages further "dealings" between the local union and the respective Center. In such a posture, I am constrained to conclude that Complainant has been acknowledged by the national union to act on its behalf as to matters affecting the local installation. Further, management has, in effect, acceded to its responsibility to recognize the local union in this regard. Thus, the Bureau's Instruction 711-1 (SSA-BRSI) declares that the individual Payment Center locals are representatives of AFGE in the respective centers, and, as such, the Bureau consults and negotiates with them on local matters. Attempts by Respondent to disavow its responsibility toward the local union, in the face of the foregoing, assumes a contradictory position. Moreover, such a position flies in the face of the Assistant Secretary's decision in a case involving the same parties herein, Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 984. It was concluded therein that the Respondent was obligated under the order to afford the Complainant (Local 1760) notice and an opportunity to meet and confer on procedures to be utilized in effectuating its decision to transfer claims cases. 5/ In my opinion this cited decision lays to rest the issue as to whether local 1760 represents the Respondent's employees and is entitled to act for the national AFGE in respect to matters affecting this installation. 6/

Finally, I do not subscribe to management's view that its obligation toward Complainant, in respect to ongoing policies and practices, is limited to consultation as distinguished from negotiation. The Council has recognized no such distinction on negotiable issues unless this obligation is mutually limited by the parties. While the word "consult" appears in the master agreement, there was no express demarcation between it and the term "negotiate." Moreover,

5/ The complaint was, however, dismissed based on a finding that Complainant failed to request bargaining on impact and implementation.

6/ See also Department of Health, Education and Welfare, Social Security Administration, BRSI, A/SLMR No. 1022.

reference is also made, under Article 2, Section (c), to the fact that meetings will be held in the Centers to confer on local conditions and practices. To find a waiver of the local union's right to seek bargaining over issues pertaining to the Program Center's employees, and limit Respondent's obligation to consultations, the parties must so provide in clear and unmistakable language. See Kennedy Space Center, A/SLMR No. 566. In the case at bar the words "consult" and "negotiate" appear in various provisions of the agreement. Mere usage of these terms does not, in my opinion, spell out a differentiation between them, particularly since the terms were used interchangeably in the earlier days of public sector bargaining. Accordingly, I conclude management may not properly confine its obligations to consultation with Complainant concerning matters affecting the Program Center herein. 7/

Respondent argues further that, assuming arguendo, it must negotiate or bargain with Complainant re local issues or changes in working conditions, the detailing of five employees herein did not create a substantial impact on personnel policies, practices, and working conditions, citing Department of Defense, Air National Guard, Texas Air National Guard, Camp Mabry, Austin, Texas, A/SLMR No. 738. I do not agree. The assignment of five employees to work in a different area on special reports for several months must necessarily result in material impact. Such an assignment prompted concern by Complainant as to the procedure to be followed in selecting the individuals, whether assignments would be made on a voluntary and rotational basis, to what extent the detail would affect the member selected from College Point since the hours thereat differed from those in effect during the detail, and whether overtime would be paid to the members. These issues are, in my opinion, important and the decision may adversely affect unit employees. 8/

7/ I am aware that Bureau attempted to distinguish these terms in its Instruction 711-1. But this declaration constituted its own interpretation of "consultation" and "negotiation". It was neither agreed to by Complainant nor reflective of the Council's interpretations of these words.

8/ Cf. Department of Health, Education and Welfare, Social Security Administration, et. al., supra, where the Assistant Secretary found that the decision to transfer claims cases had a material impact on employees so as to require Respondent to meet and confer thereon.

Moreover, unlike the circumstances present in A/SLMR No. 984 involving these parties, the record herein establishes that Complainant did request that management bargain over the impact and implementation of the detail. A specific request to do so was made by Complainant on February 11 at which time Bergman stated he would try to arrange a meeting in that regard. Moreover, I do not conclude that management's partial replies to the union's inquiries fulfill its obligation to meet and confer re the procedures to be followed and the impact of its decision. Apart from the fact that Bergman was unable to answer the union's questions re the detail, he never arranged a meeting between the parties. Moreover, Bergman advised Arnet on February 14 that management saw no need to discuss the detail which had already been implemented. Accordingly, I find and conclude that Respondent violated Sections 19(a)(1) and (6) of the Order by failing and refusing to meet and confer with Complainant over the procedures to be invoked in the implementation of the detail of five employees on February 14 to sort and code annual reports, as well as the impact upon those adversely affected.

Recommendation

Having found that Respondent has engaged in certain conduct which is violative of Sections 19(a)(1) and (6) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purposes of Executive Order 11491, as amended.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center shall:

1. Cease and desist from

- (a) Instituting a detail or assignment of employees to sort, code, or otherwise process annual reports, which employees are represented exclusively by the national office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), without notifying American Federation of Government Employees, AFL-CIO, Local 1760, as the authorized representative, and affording

it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such detail or assignment, and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Notify American Federation of Government Employees, AFL-CIO, Local 1760, as the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Payment Center Locals), the exclusive bargaining representative of Respondent's employees, of any intended detail or assignment of employees to sort, code, or otherwise process annual reports, and upon request meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such detail or assignment, and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

(b) Post at its facility at the Northeastern Program Center copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Director of Respondent and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulation, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply therewith.


WILLIAM NAIMARK
Administrative Law Judge

Dated: 8 JUN 1978
Washington, D.C.

WN:mjm

APPENDIX

- 2 -

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a detail or assignment of employees to sort, code, or otherwise process annual reports, which employees are represented exclusively by the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals) without notifying American Federation of Government Employees, AFL-CIO, Local 1760, as the authorized representative, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedure which management will observe in implementing such detail or assignment and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify American Federation of Government Employees, AFL-CIO, Local 1760, of any intended detail or assignment of employees to sort, code, or otherwise process annual reports, and upon request meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such detail or

assignment, and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

Agency or Activity

Dated: _____ By: _____
(Signature)

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

If employees have any other questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, U.S. Department of Labor, whose address is: Room 3515 - 1515 Broadway, New York, New York 10036.

August 21, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE AIR FORCE,
924th TACTICAL AIR GROUP RESERVE,
BERGSTROM AIR FORCE BASE, TEXAS
A/SLMR No. 1102

This case involved a representation petition filed by the National Federation of Federal Employees, Local 1926 (NFFE) seeking a unit of all nonsupervisory, nonprofessional Wage Grade and General Schedule employees employed by the 924th Tactical Air Group Reserve (924th TAG) located at the Bergstrom Air Force Base, Texas (Bergstrom). The Intervenor, the American Federation of Government Employees, Local 2539, AFL-CIO (AFGE) had been granted exclusive recognition in 1967 for a unit of all non-professional appropriated fund employees at Bergstrom. The Activity and the AFGE contended that the employees of the 924th TAG were within the unit represented by the AFGE, that the NFFE's petition was untimely filed and, finally, that the unit sought was not appropriate for the purpose of exclusive recognition.

The Assistant Secretary concluded that employees of the 924th TAG are within the exclusively recognized unit represented by the AFGE at Bergstrom. In this regard, he found that when the 924th TAG was transferred on March 31, 1976, from Ellington Air Force Base to Bergstrom, the employees of the 924th TAG accreted into the unit represented by the AFGE and, further, that they continue to remain a part of such unit.

Accordingly, as the petitioned for employees are within the exclusively recognized unit represented by the AFGE, and as the NFFE's petition was untimely filed with respect to the negotiated agreement between Bergstrom and the AFGE covering such unit, the Assistant Secretary ordered that the petition be dismissed.

A/SLMR No. 1102

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
924th TACTICAL AIR GROUP RESERVE,
BERGSTROM AIR FORCE BASE, TEXAS

Activity

and

Case No. 63-8021(RO)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1926

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2539, AFL-CIO

Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer A. Jack Lewis. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief filed by the Activity, 1/ the Assistant Secretary finds:

1. The labor organizations involved herein claim to represent certain employees of the 924th Tactical Air Group Reserve, hereinafter called 924th TAG.
2. The NFFE seeks an election in a unit of all nonsupervisory, nonprofessional Wage Grade and General Schedule employees employed by the 924th TAG. The Activity contends that the employees in the unit sought by the NFFE are a part of the AFGE's exclusively recognized unit at Bergstrom Air Force Base, hereinafter called Bergstrom, that there is an agreement bar to the petition filed by the NFFE on December 16, 1977, that the employees in the petitioned for unit do not possess a clear and identifiable community of interest separate and distinct from other employees at Bergstrom and, finally, that such a unit would not promote

1/ The Petitioner, National Federation of Federal Employees, Local 1926, hereinafter called NFFE, filed an untimely brief which has not been considered.

effective dealings and efficiency of agency operations. The Intervenor, American Federation of Government Employees, Local 2539, AFL-CIO, hereinafter called AFGE, agrees with the Activity's position in this matter.

On December 22, 1967, the AFGE was accorded exclusive recognition for a base-wide unit of all nonprofessional appropriated fund employees at Bergstrom. The most recent agreement between the parties was signed July 29, 1977, and is effective for a period of three years from the date of execution. 2/ The 924th TAG is an Air Force Reserve unit whose day-to-day operations involve reservist training and aircraft maintenance and which was originally located at Ellington Air Force Base, Texas. On March 31, 1976, the 924th TAG, along with the 10th Air Force Reserve, 3/ were transferred to Bergstrom which transfer resulted in the relocation of some 134 employees of the 924th TAG and 70 employees of the 10th Air Force Reserve from Ellington. There are presently some 143 appropriated fund Wage Grade and General Schedule employees in the 924th TAG.

The record shows that the Commander of the 67th Tactical Reconnaissance Wing is also the Base Commander at Bergstrom and that he is in charge of civilian personnel and labor-management relations functions for all organizations at Bergstrom, including the 924th TAG. 4/ In this capacity, the Base Commander has authority to settle grievances; select, reassign and separate employees; carry out a disciplinary program; classify civilian positions; determine training needs; maintain an effective health and safety program; insure the proper and efficient use of base facilities; and service the work and recreational needs of employees. In addition, he has the authority to negotiate with employee organizations and meet regularly with labor organizations enjoying exclusive recognition on matters relating to personnel policies and practices. The record further shows that all employees at Bergstrom, including those of the 924th TAG, share comparable salary, hours, skills, job series and classifications; are subject to the same personnel policies and practices; and are serviced by a Central Civilian Personnel Office which acts as a common appointing and servicing authority.

2/ The AFGE's unit encompasses some 533 employees in addition to the employees of the 924th TAG.

3/ Both units were represented at Ellington by another Local of the NFFE, Local 112, in a base-wide unit of nonprofessional Wage Grade and General Schedule employees.

4/ Other tenant organizations at Bergstrom are the aforementioned 10th Air Force Reserve; the Headquarters, Twelfth Air Force; DET 1,400 Management Engineering Squadron; 602 No. Tactical Air Control Wing; DET 10, 25th Weather Squadron; 423 Field Training Detachment; 1882 Communications Squadron; DET 12, Tactical Communications Area; DET 1001, Air Force Office of Special Investigations; DET 406, Air Force Audit Agency Office; Electronic Systems Division; and TAC NCO Academy and Air Force Commissary Services.

Although some of the 924th TAG employees are Air Force Reserve Technicians (ART), who are required to maintain active duty status in the Air Force Reserve in order to retain their civilian positions, 5/ the record reveals that ART employees are treated in the same manner as other employees with respect to personnel policies and practices. 6/ Moreover, all the employees in the petitioned for unit use the same procedures as other Bergstrom employees for grievances, promotions, reductions-in-force, transfers and classification appeals, and are free to use the same lunchrooms and cafeterias, wash-up rooms, parking and recreational facilities. Also, the employees of the 924th TAG work in buildings specifically assigned to the 924th TAG which are in close proximity to other Bergstrom offices and work locations.

The evidence establishes that the AFGE has represented, and continues to represent, the 924th TAG employees in grievances, Equal Employment Opportunity complaints, and in matters effecting the working conditions of such employees. In addition, certain employees of the 924th TAG are on AFGE dues check-off.

Based on these circumstances, I conclude that the employees of the 924th TAG are within the exclusively recognized unit represented by the AFGE at Bergstrom. 7/ In this regard, I find that when the 924th TAG was transferred on March 31, 1976, to Bergstrom, the employees of the 924th TAG accreted into the unit represented by the AFGE, and that they continue to remain a part of such unit. Thus, as noted above, the AFGE's exclusively recognized unit includes all nonappropriated fund employees at Bergstrom; the AFGE has represented employees of the 924th TAG since their transfer from Ellington Air Force Base; the Base Commander is in charge of all civilian personnel and labor-management relations functions, and has full authority to negotiate with employee organizations; and all Bergstrom employees are serviced by the same Central Civilian Personnel Office. Moreover, employees of the 924th TAG and other employees at Bergstrom work in close proximity to each other; utilize identical procedures for grievances, promotions, classification appeals, reductions-in-force and transfers; have similar skills and job series; are subject to the same personnel policies and practices; and share comparable salaries and hours of work. In these circumstances, I conclude that employees of the 924th TAG and other unit employees located at Bergstrom

5/ It is noted that the 10th Air Force Reserve, which is not included in the petitioned for unit, also includes a number of ART employees.

6/ The current negotiated agreement between the AFGE and the Activity has provisions for Air Force Reserve personnel, including ART personnel.

7/ Cf. United States Department of the Air Force, 434 S.O.W., Air Force Reserve, Grissom Air Force Base, Indiana, 2 A/SLMR 215, A/SLMR No. 149 (1972).

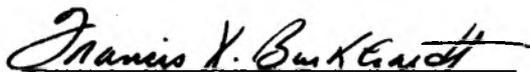
continue to share an identifiable community of interest, and that the existing unit represented by the AFGE, including employees of the 924th TAG, promotes effective dealings and efficiency of agency operations, and also reduces the potential for unit fragmentation. 8/

Accordingly, as the petitioned for employees are within the exclusively recognized unit represented by the AFGE, and as the NFFE's petition was untimely filed with respect to the AFGE's negotiated agreement covering such unit, I shall dismiss the petition in the subject case. 9/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 63-8021(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 21, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

August 21, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE ARMY,
YAKIMA FIRING CENTER,
FORT LEWIS, WASHINGTON
A/SLMR No. 1103

This proceeding arose upon the filing of three unfair labor practice complaints by the International Association of Fire Fighters, Local F-202, AFL-CIO (Complainant) against the Department of the Army, Yakima Firing Center, Fort Lewis, Washington (Respondent).

The complaint in Case No. 71-4471(CA) alleged violations of Section 19(a)(1) and (6) of the Order by the Respondent's refusal to meet and confer on the impact on adversely affected employees of its decision to assign six military augmentees to the Respondent's fire station, and by a statement by a military officer to a union official to the effect that the augmentee situation was a military matter, not the business of the union, and that "you have now been conferred with." The Administrative Law Judge recommended that the complaint be dismissed with respect to the military officer's statement and the exchange that preceded it. However, he found that the Respondent violated Section 19(a)(1) and (6) by refusing to negotiate with the Complainant concerning the impact of assigning additional personnel to the fire station.

The complaint in Case No. 71-4475(CA) alleged violations of Section 19(a)(1) and (6) by certain actions of the Respondent's Commanding Officer. The Administrative Law Judge concluded that the evidence failed to establish any violation.

The complaint in Case No. 71-4476(CA) alleged violations of Section 19(a)(1) and (6) of the Order based on statements alleged to have been made by Respondent's facilities engineer to a union official regarding the proper use of the chain of command, the Respondent's use of augmentees at the fire station, and an "anecdote" about labor-management relations. The Administrative Law Judge concluded that this complaint should be dismissed. In this regard, he found neither evidence of a restraining or coercive effect upon the union official, nor evidence of threats or promised benefits.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations. Accordingly, the Assistant Secretary ordered the Respondent to cease and desist from engaging in the conduct found violative of the Order and take certain affirmative actions.

8/ Cf. Department of the Army, Fort McPherson, Georgia, FLRC No. 76A-82.

9/ Inasmuch as the petition herein was untimely filed, I find it unnecessary to determine whether the unit sought, which is, in effect, a portion of an existing exclusively recognized unit, would otherwise be appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
YAKIMA FIRING CENTER,
FORT LEWIS, WASHINGTON

Respondent

and

Case Nos. 71-4471(CA)
71-4475(CA)
71-4476(CA)

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL F-202, AFL-CIO

Complainant

DECISION AND ORDER

On June 16, 1978, Administrative Law Judge Thomas Schneider issued his Recommended Decision and Order in the subject cases, finding that the Respondent had engaged in one of the unfair labor practices alleged in the complaint in Case No. 71-4471(CA), and finding further that it had not engaged in the unfair labor practices alleged in the complaints in Case Nos. 71-4475(CA) and 71-4476(CA). With regard to the complaint in Case No. 71-4471(CA), the Administrative Law Judge recommended that the Respondent cease and desist from the conduct that he found to be violative of Section 19(a)(1) and (6) of the Order. 1/ He recommended that the complaints in Case Nos. 71-4475(CA) and 71-4476(CA) be dismissed in their entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in these cases,

1/ In his proposed remedial order, the Administrative Law Judge did not recommend that the Respondent take any affirmative action other than posting a Notice to Employees.

and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations. 2/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Army, Yakima Firing Center, Fort Lewis, Washington, shall:

1. Cease and desist from:

(a) Refusing to meet and confer with the International Association of Fire Fighters, Local F-202, AFL-CIO, concerning the impact on adversely affected employees of assigning additional personnel to the fire station at the Yakima Firing Center.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Upon request by the International Association of Fire Fighters, Local F-202, AFL-CIO, meet and confer, to the extent consonant with law and regulations, concerning the impact on adversely affected employees of assigning additional personnel to the fire station at the Yakima Firing Center.

(b) Post at the fire station, Department of the Army, Yakima Firing Center, Fort Lewis, Washington, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer of the Firing Center and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees

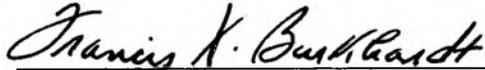
2/ It is well settled that the obligation to meet and confer on the impact of a decision by agency management (as here, the realignment of work forces) is mandatory under Section 11(a) of the Order. Thus, I do not adopt the Administrative Law Judge's Recommended Decision and Order insofar as it implies that bargaining on impact might be only a permissive subject of bargaining under Section 11(b) of the Order. Federal Railroad Administration, 4/SLMR 497, A/SLMR No. 418 (1974), Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, 3 A/SLMR 626, A/SLMR No. 329 (1973), and United States Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, 3 A/SLMR 376, A/SLMR No. 289 (1973). Cf. also Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431, FLRC No. 71A-56 (1973), and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 227, FLRC No. 71A-31 (1972).

are customarily posted. The Commanding Officer of the Firing Center shall take reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaints in Case Nos. 71-4475(CA) and 71-4476(CA) be, and they hereby are, dismissed.

Dated, Washington, D. C.
August 21, 1978



Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer with the International Association of Fire Fighters, Local F-202, AFL-CIO, concerning the impact on adversely affected employees of assigning additional personnel to the fire station at the Yakima Firing Center.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended:

WE WILL, upon request, meet and confer with the International Association of Fire Fighters, Local F-202, AFL-CIO, to the extent consonant with law and regulations, concerning the impact on adversely affected employees of assigning additional personnel to the fire station at the Yakima Firing Center.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 600
San Francisco, California 94105



REPLY TO SAN FRANCISCO
AREA CODE 415 556-0555

In the Matter of)
)
DEPARTMENT OF THE ARMY)
YAKIMA FIRING CENTER)
FORT LEWIS, WASHINGTON)
)
Respondent)
)
and)
)
INTERNATIONAL ASSOCIATION)
OF FIRE FIGHTERS, LOCAL F-202)
AFL-CIO)
Complainant)

*
Case Nos. 71-4471 (CA)
71-4475 (CA)
71-4476 (CA)

RICHARD D. McCURDY
Attorney at Law
Fort Lewis, Washington

MICHAEL O. COSTANI
Labor Relations Specialist
Fort Lewis, Washington
For the Respondent

LAWRENCE WEIGEL
Vice President, 16th District
International Association of Fire
Fighters AFL-CIO, Local F-202
For the Complainant

Before: THOMAS SCHNEIDER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding consists of three consolidated cases under Executive Order 11491, as amended (the Order).

* The official transcript erroneously designated the numbers of the cases heard. The numbers given here are correct.

In each case the International Association of Firefighters, Local F-202, AFL-CIO (Union) alleges that the Department of the Army, Yakima Firing Center, Fort Lewis, Washington (the Activity or Respondent) violated various subsections of section 19 of the Order. The Regional Administrator, San Francisco Region, Labor-Management Services Administration, set the matter for hearing with reference to alleged violations of section 19(a)(1) and (6) of the Order. The hearing was held before me on April 11, 1978, in Yakima, Washington. At all material times the Union was the recognized exclusive representative of employees at the fire station at the Yakima Firing Center, although no agreement had been signed.

Case 71-4471 involves an alleged failure by Respondent to consult with the Union prior to assigning six additional military brush fire fighters, called "augmentees," to the fire station for a six-month period commencing in May 1977.

Case 71-4475 involves a conversation that Lt. Col. Dieterich, the Commander of the Activity, had with two fire fighters on April 28, 1977, respecting a complaint of unsafe conditions at the firehouse.

Case 71-4476 involves a discussion Mr. Cecil E. Wise, Facilities Engineer at the Activity, had with Mr. James B. Young, a Union official, on May 6, 1977, respecting various subjects.

Findings of Fact and Conclusions

Case No. 71-4471

During the 1976 brush fire season, i.e., a year before the incidents giving rise to the instant complaints, the activity augmented the normal strength of the fire station with military personnel who were not trained fire fighters, but who received some training in fighting brush fires. These men slept and ate in the firehouse with the regular fire fighters, which caused severe overcrowding - a condition which the fire chief described as "almost unbearable at times." (Tr. 124).

In order to avoid such overcrowding in 1977, the Activity arranged for the augmentees to eat and sleep in facilities other than in the fire station. Thus, the impact of the augmentees upon the facilities at the fire station was far less in 1977 than the previous year. In all, there were a total of six augmentees assigned for duty at the fire station in 1977. The regular complement

of personnel at the fire station consists of eleven fire fighters including the chief, plus six other military fire fighters for a total of seventeen. (Tr. 42). The six augmentees thus represented a 35 percent increase in staffing. The augmentees shared the regular fire fighters' coffee mess, although some witnesses suggested that the augmentees shared in buying the coffee. They shared the day room and t.v. facilities, and the latrine. Although they were not supposed to use the refrigerator, they did use it.

It is obvious that the decision whether or not to assign augmentees to the fire station is a matter with respect to the mission of the agency which need not be conferred about. Order, section 11(b); 12(b). The impact of realigning work forces may nevertheless be negotiated. Order, section 11(b). The confusion between these two concepts - assignment of personnel and impact of such assignment - seems to lie at the heart of the controversy here. Thus the Commander of the Activity, Lt. Col. Dietderich, testified as follows:

"I don't think I'm required to ask the union, by Executive Order, to ask the union if I can bring in augmentees to fight range fires. If that's the case, then I must have to ask the union if I can use the soldiers in the field out there. Correct?" (Tr. 74)

The Colonel was obviously correct regarding his decision to bring in augmentees. He was mistaken about his duty to meet and confer regarding impact. Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland and National Federation of Federal Employees, Local 1624, A/SLMR No. 486 (1975); Pennsylvania Army National Guard and Association of Civilian Technicians, Inc., A/SLMR No. 475 (1975); see, Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center Norfolk, Virginia, FLRC No. 71A-56 (1973).

At the conclusion of a short exchange between one Captain Aranow and Mr. Young (a Union official) on May 4, 1977, Captain Aronow said, "You have now been conferred with." It is clear that this statement and the exchange that preceded it was not intended to fulfill any obligation the Activity may have had to meet and confer. Rather, the Activity contends that it had no duty to meet and confer because the six augmentees had no impact on the remaining fire fighters. Although the impact was far less than in 1976, it was not negligible. Not only were

the day facilities being shared by the augmentees, but the job of fighting brush fires was being shared by personnel less highly trained than the regular fire fighters. This obviously had an impact on working conditions. I further note that the Respondent had ample time - about six months - in which to give the Union notice and an opportunity to consult about impact. I therefore conclude that the Activity failed to fulfill its obligation under section 19(a)(1) and (6) of the Order.

Of course, it is possible for emergencies to arise, which would require immediate augmentation. In such cases consultation about impact would have to wait. For this reason I recommend that consultation about impact only be required if additional personnel are to be assigned to the fire station for periods exceeding thirty days.

Case 71-4475

On April 28, 1977, Lt. Col. Dietderich, Commanding Officer of the Activity went to the fire station in response to an order he received from higher headquarters to investigate an allegedly unsafe condition at the fire house. The condition was wax on the floor, which, when covered with dust allegedly became slippery. The Colonel was concerned about this allegation, not only because it involved safety, but also because the matter was called to his attention by his superiors rather than by his subordinates in the chain of command. When he arrived at the fire station only two people were there, Mr. Charbonneau and Mr. Seelbinder. Neither of them had complained to the Commanding General of the unsafe condition. That complaint had come from the Union, by its then president, Bruce Kincaid.

Lt. Col. Dietderich, as far as the evidence shows, made no remarks concerning the Union to Charbonneau or Seelbinder. He asked to see the allegedly unsafe condition, and had it corrected forthwith. He may have mentioned the chain of command, but it is clear he did not interfere with, restrain or coerce either of the men in the exercise of any of their rights. Mr. Charbonneau's testimony unambiguously showed that this incident was a perfectly proper on-the-spot investigation by the Commanding Officer. I conclude that it involved no violations of the Order.

Case No. 71-4476

On May 6, 1977, Cecil E. Wise, facilities engineer,

whose duties included supervision of the fire station, had a conversation with James B. Young, who was both a regular fire fighter and an officer of the Union. The conversation took place in Wise's office and was a sequel both to the letter written by the Union to the Commanding General regarding wax on the floor, and the appearance of the augmentees at the fire station two days before. The acting Fire Chief, Sergeant Rush, had told Mr. Wise that Young had been irate when he saw the augmentees at the station without the Union having been consulted. And Wise was aware that the Union had by-passed him in the chain of command when it complained to the Commanding General directly. Mr. Wise, who testified at the hearing, prided himself on a past career, including many years in private industry, in which labor-management relations were good. I construe the evidence to show that Mr. Wise's efforts in this conversation were aimed at soothing Mr. Young and improving labor-management relations at the Activity. In that context he told an anecdote about a senior union member telling a younger member that the company, not the union, paid his salary. Although this anecdote was not particularly amusing to Mr. Young, it could hardly have had a restraining or coercive effect upon him. There was no evidence of threats or promised benefits. Accordingly, I conclude that Mr. Wise's comments did not violate the Order.

Recommended Order

It is recommended that the complaints in cases 71-4475 and 71-4476 be dismissed in their entirety.

It is further recommended that in case 71-4471 the Activity be directed by the Assistant Secretary to cease and desist from:

(a) refusing to consult, confer, or negotiate with the International Association of Fire Fighters, Local F-202, AFL-CIO concerning the impact of assigning additional personnel to the fire station at the Yakima Firing Center for any period in excess of thirty days;

(b) in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended; and to post a notice of its intent in the form attached as "Exhibit A" in conspicuous places at the station including all bulletin boards where notices to employees are customarily posted. Respondent should be directed to take reasonable steps to insure that such notices remain posted for 60 days and are not altered, defaced, or covered.

Dated on the 16th day of June 1978, in San Francisco, California.


THOMAS SCHNEIDER
Administrative Law Judge

Enclosure

TS:tl

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to consult, confer, or negotiate with the International Association of Fire Fighters, Local F-202, AFL-CIO concerning the impact of assigning additional personnel to the fire station at the Yakima Firing Center for any period in excess of thirty days.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights assured by the Executive Order 11491, as amended;

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

August 23, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION, ORDER AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U. S. DEPARTMENT OF THE NAVY,
NAVAL AIR ENGINEERING CENTER,
LAKEHURST, NEW JERSEY
A/SLMR No. 1104

This case involved an RA petition filed by the Naval Air Engineering Center, Lakehurst, New Jersey, (Activity) subsequent to a reorganization which disestablished two of the three separate commands at Lakehurst, New Jersey, and merged these two commands into the Activity. Specifically, the Activity contended that six of the eight exclusively recognized units at the Activity, the Naval Air Station (NAS), and the Naval Air Test Facility (NATF) are now inappropriate as a result of the reorganization, and that a unit of all General Schedule and Wage Grade employees, excluding professional employees and firefighters, in addition to the standard exclusions, is now appropriate.

The Assistant Secretary found that the unit contended to be appropriate by the Activity was inappropriate. In this regard, he found, with respect to four of the six units disputed by the Activity, that the reorganization had resulted in a material alteration in their scope and character, which resulted in their disappearance as recognizable appropriate units. With regard to the other two units, he found that their scope and character had not been materially affected by the reorganization, and that they remained intact and appropriate for the purpose of exclusive recognition under the Order. Accordingly, the Assistant Secretary found that an Activitywide unit, excluding those employees in the units remaining appropriate, as well as the undisputed units, was appropriate for the purpose of exclusive recognition.

In this regard, he found that such employees, in effect, constituted a residual unit of all unrepresented employees of the Activity, enjoyed a clear and identifiable community of interest, and that such unit would promote effective dealings and efficiency of agency operations, and would prevent the further fragmentation of the Activity's employees. Accordingly, he directed an election in the unit found appropriate, and dismissed the petition insofar as it related to the two bargaining units which he found continued, subsequent to the reorganization, to be appropriate.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF THE NAVY,
NAVAL AIR ENGINEERING CENTER,
LAKEHURST, NEW JERSEY

Activity-Petitioner

and

Case No. 32-5035(RA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 23

Intervenor

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 284

Intervenor

and

PHILADELPHIA METAL TRADES
Council, AFL-CIO

Intervenor

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, LOCAL 2581

Intervenor

and

NATIONAL ASSOCIATION OF PLANNERS,
ESTIMATORS, PROGRESSMEN AND
PRODUCTION CONTROLLERS, LOCAL #4

Intervenor

and

NATIONAL ASSOCIATION OF GOVERNMENT
INSPECTORS AND QUALITY ASSURANCE
PERSONNEL, UNIT #2

Intervenor

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Allan W. Stadtmauer. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs submitted by the Philadelphia Metal Trades Council, AFL-CIO, hereinafter called MTC, and the National Federation of Federal Employees, Locals 23 and 284, hereinafter referred to as NFFE Local 23 and NFFE Local 284, respectively, the Assistant Secretary finds:

The Naval Air Engineering Center, Lakehurst, New Jersey, hereinafter called the Activity, filed the subject petition seeking a determination by the Assistant Secretary with respect to the effect of a recent reorganization on the continued appropriateness of six of the eight exclusively recognized units at the Activity, the Naval Air Station (NAS), and the Naval Air Test Facility (NATF). As a result of the reorganization, the NAS and NATF were disestablished, and their missions, resources, and personnel were transferred to the Activity. Specifically, the Activity contends that certain of the exclusively recognized units are inappropriate due to the reorganization which consolidated the functions, resources and personnel of the NAS and the NATF into the Activity, which now has the combined mission of the former commands. ^{1/} It argues that, under present circumstances, the only unit appropriate for the purpose of exclusive recognition is a unit of all employees of the Activity, excluding all employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, management officials, supervisors, and professional employees and firefighters who are included in existing exclusively recognized units.

The Intervenor, NFFE Local 284 and NFFE Local 23; the MTC; the National Association of Planners, Estimators, Programmers, and Production Controllers, Local #4 (NAPEPPC); and the National Association of Government Inspectors and Quality Assurance Personnel, Unit 2 (NAGIQAP), contend that the reorganization of the Activity was essentially a paper reorganization, and that the units for which each labor organization was accorded exclusive recognition continue to be identifiable, viable and

^{1/} The Activity does not challenge the continued appropriateness of a unit represented by NFFE Local 23 of all professional General Schedule (GS) employees recognized by the Activity in 1971. It also does not challenge the continued appropriateness of a unit represented by the International Association of Firefighters, Local 114 (IAFF) of all eligible civilian employees in the Fire Protection Division, consisting of Structural and Crash Branches, recognized

(Continued)

appropriate. In addition, the NAGIQAP asserts that the petition, as it relates to its exclusively recognized unit, is untimely on the basis of an asserted agreement bar. The MTC contends that the subject petition is untimely as to its exclusively recognized unit on the basis of an asserted certification bar. NFFE Locals 23 and 284 take the position that the further processing of the instant petition with regard to their certified exclusively represented units is precluded by the existence of a "blocking" unfair labor practice complaint. Prior to the hearing in this matter, the International Association of Machinists and Aerospace Workers, AFL-CIO, Local 2581 (IAM), took the position that its unit survived the reorganization and remained appropriate. However, it subsequently indicated that it now concurs with the Activity's position and requests that it be allowed to participate in whatever election the Assistant Secretary directs in this matter.

BACKGROUND

The mission of the Activity is to conduct, provide, operate and maintain test sites, facilities and support services for programs of research, engineering, development, development test and evaluation system integration, limited production procurement and fleet engineering support in aircraft launching, recovery and landing aid systems, and ground support equipment for aircraft and airborne weapons systems. Prior to 1974, there were essentially two major naval commands at Lakehurst, New Jersey, the NAS and the NATF. The NAS was a support activity without a technical mission. The NATF tested equipment designed by the Activity, then located in Philadelphia, Pennsylvania, and other commands. In 1974, the Activity, was transferred to Lakehurst as part of a Shore Establishment Realignment Program (SER). Because of its technical mission, the Activity became the host command at Lakehurst. The NAS and the NATF continued to function as separate commands, but the NAS was made a subordinate command of the Activity. No question regarding the appropriateness of the exclusively recognized units at the Activity, the NAS or the NATF was raised at the time of the 1974 transfer.

At the time of the 1977 reorganization, the civilian labor force of the Activity was organized among five separate bargaining units. NFFE Local 23 was the certified exclusive representative of two units: an Activitywide unit of professional employees and an Activitywide unit of nonprofessional GS employees. Both units were certified in August 1971, and both were covered by a multi-unit negotiated agreement which expired on July 18, 1977. 2/ The MTC was granted exclusive recognition in April 1964, for an Activitywide unit consisting of approximately 167 Wage Grade (WG) employees. The most recent negotiated agreement for this

1/ by the NAS in 1965. This latter unit and its employees were transferred to the Activity as a result of the reorganization and consists of 42 employees. Since neither the Activity nor any of the intervenors questioned the appropriateness of these units, neither unit will be considered in this decision.

2/ As noted above, the appropriateness of the professional unit represented by NFFE Local 23 is not at issue herein.

unit expired on February 1977, and no negotiated agreement presently is in effect. The NAPEPPC was granted exclusive recognition in October 1965, for a unit consisting of all the Activity's nonsupervisory planners, estimators, progressmen, and production controllers. This unit is currently covered by a negotiated agreement with an expiration date of May 8, 1979. Finally, the NAGIQAP was granted exclusive recognition in December 1969, for a unit composed of all WG inspectors and nonprofessional GS quality assurance personnel of the Quality Assurance Office. Prior to the reorganization, this latter unit consisted of approximately 30 GS employees who were covered by a negotiated agreement with an expiration date of July 26, 1978.

The NAS had two exclusively represented bargaining units. The first unit consisted of firefighters represented by the IAFF, which was granted exclusive recognition in June 1965. 3/ The second unit consists of all remaining eligible nonprofessional employees, approximately 160 GS and 239 WG employees, for which the IAM was certified as the exclusive representative in November 1975. This unit was covered by a negotiated agreement, which is due to expire on December 9, 1978.

All eligible nonprofessional employees of the NATF, consisting of 136 GS employees and 103 WG employees, were represented by NFFE Local 284, which had been granted exclusive recognition in June 1967. NFFE local 284's negotiated agreement covering such unit expired in May 1978.

In late February 1977, the Department of the Navy directed the consolidation of the three naval commands located at Lakehurst. The consolidation was to occur through the disestablishment of the NATF and the NAS, and the expansion of the Activity so that it would assume the personnel, functions and missions of the NAS and the NATF. The consolidation was to be completed in three phases. Phase I involved the disestablishment of the NATF and the NAS and the corresponding expansion of the Activity. During Phase I, employees of the NATF and the NAS were assigned to one of three interim departments within the reorganized Activity, designated as the Test Group, the Engineering Group and the Support Group. Phase II, effective June 5, 1977, involved the integration of the three departments of Phase I into a unified organizational structure. Phase III was pending at the time of the hearing in this matter.

The extent of the reorganization of the Activity is demonstrated by the following comparison between the pre-Phase I organizational structure and the post-Phase II organizational structure:

Prior to the reorganization, the Activity's Commanding Officer had two deputies, an Executive Officer, a Naval Officer, and a civilian Chief Engineer, (General Engineer GS-801-16). There was a single line of

3/ As noted above, the appropriateness of this unit is not at issue herein.

authority from the Commander through the deputies to the Activity's six staff offices and six departments. The staff offices consisted of an Administrative Office, a Civilian Personnel Office, a Staff Civil Engineer, a Supply Office, a Plans and Programs Office and a Quality Assurance Office. The Equal Employment Opportunity Office reported directly to the Commander. The Activity's departments consisted of the Departments of: Comptroller, Ground Support Equipment, Specifications and Standards, Fleet Technical Service, and Engineering.

As a result of the Phase II reorganization, the lines of authority and administrative structure were significantly altered so that the two deputies to the Commander now have separate lines of authority over their respective staffs and departments. The Executive Officer exercises supervision over the Legal Office, Public Affairs Office, Chaplain's Office, Aviation Safety Officer, General Safety Officer, Tenant Support Office, Support Assistant, Small Business Assistant, Equal Opportunity Office, Comptroller, Administration, Civilian Personnel, Computer Systems, Public Works, Security, Supply, Navy Exchange, and Air. The other deputy, now called the Technical Director, has line supervision over the Plans and Programs Office, Test and Evaluation Coordination, Quality Assurance Office, Ship Installations Engineering, Ground Support Equipment, Engineering Specifications and Standards, Test, Fleet Technical Services and Development Shops and Site Support Departments.

In addition to administrative changes in the Activity's structure, Activity, NAS and NATF personnel were reassigned to the newly designated departments. Since the NAS and the NATF were totally disestablished, the majority of administrative and physical transfers involved their personnel. A majority of the nonprofessional GS employees transferred from the NATF were assigned to the Test Department and the Public Works Department, with the remaining employees scattered throughout five other components. Approximately 136 WG employees were transferred from the NATF to the following components: Quality Assurance, Public Works, Development and Site Support, and Test. Approximately 279 nonprofessional GS employees were transferred from the NAS to the following Departments: Administration, Air, Computer Systems, Civilian Personnel, Security, Supply, Public Works, Comptroller, and a small number of employees to various other divisions. Approximately 239 WG employees transferred from the NAS were assigned to Administration, Supply and Public Works.

In addition to adding personnel and components to the activity, the reorganization also precipitated a greater degree of interplay, interdependence and interaction among the divisions of the Activity since the majority of the divisions were intended to become more specialized and, as a result, tended to rely on services and general support from other divisions. Personnel were temporarily detailed from one department to another as their special skills were needed. In addition, some lines of supervision were altered at the department level and at the employee level. For example, in the Development Site and Support Department (DSSD), the number of general foremen was altered, production superintendents were interchanged, and the employee-supervisor

ratio was changed slightly. Efforts were made activitywide to eliminate the overlapping of responsibility and duplication of work. A minority of employees involved in administrative transfers from the NAS and the NAFTA also were physically relocated, resulting, in some cases, in new working hours, use of time cards, different shifts and lunch periods and more changes in day to day job sites. Some blue collar position descriptions were changed, and the Public Works Department is now responsible for basewide facility maintenance, including support of test operations. Further, the areas of competition for promotions, reductions-in-force (RIF) and career ladders are now based on a single command, rather than the multi-command basis prior to the reorganization.

THE EFFECT OF THE REORGANIZATION

Pursuant to the Activity's assertion in its RA petition that six of its units are no longer appropriate as a result of the 1977 reorganization, I have examined the reorganization's effect upon each of the six units. With respect to certain of the individual units, I find that the reorganization resulted in a material alteration in their scope and character which resulted, in effect, in their disappearance as recognizable appropriate units. As to certain other individual units, I find that the scope and character of such units were not materially affected by the reorganization, although there were some changes in the units due to additional personnel and changes in organizational mission.

Upon examination of the record, I make the following findings with respect to the continued appropriateness of each of the six exclusively recognized units:

1. The NAPEPPC Unit

This unit, composed of all nonsupervisory planners, estimators, progressmen, and production controllers employed by the Activity, contains both WG and GS employees. As a result of the reorganization, approximately 15 employees in these job classifications were transferred from the Public Works Department of the NAS to the Activity. Employees so classified now work primarily in only two divisions of the Activity, the Plans and Programs Office and the Public Works Department.

The record reveals that the nonsupervisory planners, estimators, progressmen and production controllers of the Activity, including those added to its jurisdiction as a result of the reorganization, remain in essentially the same physical location and perform the same job functions as prior to the reorganization, and that there has been no significant change in their working conditions. It further appears that the immediate supervision of these employees remain substantially unchanged, and that they continue to share common skills, have comparable working conditions and training and there is little or no interchange between these employees and other WG and GS employees at the Activity.

2. The NAGIQAP Unit

This unit was composed of all WG and GS employees of the Quality Assurance Office of the Naval Air Engineering Center. Prior to the reorganization, the unit consisted of 30 GS employees. As a result of the reorganization, four WG inspectors from the disestablished NATF were transferred to the Quality Assurance Office. It was stipulated at the hearing that all NAEC Quality Assurance Office personnel now possess similar skills and perform similar duties, and that the additional mission of test site quality assurance has had little impact on the duties and working conditions of employees of the Quality Assurance Office.

The record reveals that the WG and GS employees of the Quality Assurance Office, including those transferred to the office as a result of the reorganization, remain in essentially the same physical locations, perform the same job functions as prior to the reorganization, and that there has been no significant addition to, or changes in, their working conditions and immediate supervision.

Based on the foregoing circumstances I find that the two above noted units are each a functionally distinct grouping of employees who continue, subsequent to the reorganization, to enjoy separate and distinct communities of interest. The record reveals that both units have experienced a history of effective labor-management relations since their establishment, and that they remain basically unchanged by the reorganization and, as such, viable and appropriate for the purpose of exclusive recognition. Moreover, in my view, these units can reasonably be expected to promote effective dealings and efficiency of agency operations. In this regard, it was noted particularly that in a similar situation the Activity has taken the position that a functionally distinct grouping of firefighting employees remains appropriate, and that the existence of such a unit would not have an adverse impact on effective dealings or efficiency of agency operations. Under all of these circumstances, I shall dismiss the instant petition as it relates to these units. 4/

3. The IAM Unit

This unit was composed of all WG and GS employees of the Naval Air Station, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a clerical capacity, firefighters, supervisors, guards and temporary employees.

4/ In view of my determination that the NAPEPPC unit remains appropriate, I find it unnecessary to pass upon the NAPEPPC's motion to dismiss the RA petition, as it applied to this unit, based on the existence of an agreement bar.

4. The NFFE Local 284 Unit

This unit was composed of all WG and GS employees employed by the Naval Air Test Facility, excluding all managerial, professional and supervisory personnel.

5. The NFFE Local 23 Unit

This unit was composed of all of the eligible GS employees of the Activity, excluding professionals, those employees represented by the National Association of Planners, Estimators, Progressmen, Production Controllers, Local 4 and the National Association of Government Inspectors and Quality Assurance Personnel, Unit 2, and management officials, supervisors, employees engaged in Federal personnel work other than those in a purely clerical capacity, and guards.

6. The MTC Unit

This unit was composed of all WG employees of the Activity, excluding all GS employees, professional employees, supervisory employees, and management officials.

At the hearing, NFFE Locals 23 and 284 and the MTC renewed pre-hearings motions which were referred by the Hearing Officer to the Assistant Secretary. In the first motion, NFFE Locals 23 and 284 moved to dismiss the subject petition as it relates to their units on grounds that further processing of the petition was improper until final disposition of an unfair labor practice complaint in Case No. 22-07332(CA). In the second motion, the MTC moved to dismiss the petition as it relates to its unit on the basis of an asserted certification bar.

As to the first motion, I take official notice that Case No. 22-07332(CA) involved a complaint filed by the National Federation of Federal Employees against the Department of the Navy, Office of Civilian Personnel, alleging violations of Sections 19(a)(1) and (6) of the Order based upon an alleged improper refusal to "consult" pursuant to national consultation rights enjoyed by the National Federation of Federal Employees. 5/ Because this complaint involves different parties and different levels of recognition than are involved herein, I find that it does not block further processing of the instant petition. Accordingly, the motion to dismiss filed by NFFE Locals 23 and 284 is hereby denied.

With regard to the second motion, the MTC asserts that the Activity's RA petition is untimely under Section 202.3(b) of the Assistant

5/ The gravamen of the complaint in Case No. 22-07332(CA) involved an alleged failure of the Department of the Navy to consult regarding the then proposed reorganization involved herein. On March 22, 1978, I issued my Decision and Order in this case, finding that the Department of the Navy violated Section 19(a)(1) and (6) as alleged in the complaint. See A/SLMR No. 1012. This Decision and Order is presently pending an appeal before the Federal Labor Relations Council.

Secretary's Regulations. 6/ The MTC was certified as the exclusive representative for its unit on April 22, 1977, as a result of a challenging petition filed by a rival labor organization. While it concedes that an agreement bar will not bar an RA petition when a reorganization has substantially affected the appropriateness of a unit, it argues that this result is based on the wording of Section 202.3(c) of the Assistant Secretary's Regulations. 7/ Thus, the MTC argues, since Section 202.3(c) specifically provides that a petition may be filed at any time when "unusual circumstances exist which substantially affect the unit or the majority representation," and since no such wording exists in Section 202.3(b) of the Regulations which involves certification bars, the Assistant Secretary is required to dismiss the instant petition as the "unusual circumstances" provision does not apply to Section 202.3(b). The MTC asserts further that it was certified on April 22, 1977, after Phase I of the reorganization was underway, and it would be inequitable to allow the appropriateness of its unit to be challenged by the instant petition when the Activity failed to challenge the appropriateness of the unit in the earlier case.

It has previously been held that an RA petition filed in good faith by an activity or agency, based on substantial changes in the character and scope of a unit, is considered to raise the "unusual circumstances" contemplated by Section 202.3(c)(3) of the Assistant Secretary's Regulations and, therefore, is not subject to the timeliness requirements set forth in Section 202.3 of the Regulations. 8/ In this regard, I reject the MTC's contention which asserts, in effect, that since there is no similar proviso in Section 202.3(b) regarding "unusual circumstances", the existence of "unusual circumstances" does not operate as an exception to the timeliness requirement established in Section 202.3(b) of the Regulations. Such an illogical result should not be read into the Regulations of the Assistant Secretary. Thus, in my view, the policy consideration of promoting stability by providing

6/ Section 202.3(b) of the Regulations provides: "When there is a certified exclusive representative of the employees, a petition will not be considered timely if filed within twelve (12) months after the certification as the exclusive representative of employees in an appropriate unit, unless a signed and dated agreement covering the claimed unit has been entered into in which case paragraph (c) of this section shall be applicable."

7/ Section 202.3(c) of the Regulations provides that "When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed as follows: . . . (3) Any time when unusual circumstances exist which substantially affect the unit or the majority representation."

8/ See Denver Airway Facilities HUB Sector FAA, Rocky Mountain Region, DOT Aurora, Colorado, 5 A/SLMR 466, A/SLMR No. 535 (1975).

exclusive representatives periods free from challenges to their majority status is the same for both certification bars and agreement bars. Consequently, in my judgment, a certification bar, like an agreement bar, may bar an RA petition only if that petition is based on a good faith doubt as to the continuing majority status of the incumbent exclusive representative. Since the instant RA petition alleges that the MTC unit is no longer appropriate due to substantial changes in the character and scope of the unit, I find that the above noted policy consideration is not applicable.

Nor do I find merit in the MTC's argument as to the inequity of allowing the Activity to file the instant petition when it failed to question the appropriateness of the unit in the earlier representation case. Thus, the record clearly reveals that the MTC has enjoyed a long and successful history of bargaining with the Activity, and that at the time of the processing of the earlier petition the MTC had knowledge of the pending reorganization. Further, the record reveals that the reason that the Activity did not question the appropriateness of the unit at that time was the absence of finality of the details of the reorganization plan. The instant RA petition was filed by the Activity when the details of the reorganization plan had crystallized in sufficient final form to allow the Assistant Secretary a reasonable basis upon which to base his determination of the continued appropriateness of the unit involved. Accordingly, the motion to dismiss filed by the MTC is hereby denied.

With regard to the impact of the reorganization on these four exclusively recognized units, as noted above, the evidence establishes that the NAS and NATF were disestablished, and that the unit employees involved were physically and/or administratively transferred to the various divisions within the Activity where they were commingled with other employees of the Activity. As a consequence, employees of each of the three former commands now work along side each other, sharing common supervision, generally similar job classifications and duties, and enjoy a high degree of integration of operations with other employees in their own and in other divisions. The record also reveals that the reorganization of the Activity resulted in significant changes in, and additions to, the mission and organizational structure of the Activity. Thus, the Activity's mission was altered and enlarged so as to encompass the missions of the former NATF and NAS, the organizational structure of the Activity was significantly altered, refined and enlarged, and employees of the Activity and the former NATF and NAS were thoroughly integrated throughout the various organizational components of the Activity.

Under these circumstances, I find that the June 6, 1977, reorganization, in effect, created a new organizational entity, and effected a substantial change in both the scope and character of each of the

DIRECTION OF ELECTION

exclusively recognized units represented by the IAM, the MTC, and NFFE Locals 23 and 284 which were not functional units within the meaning of Section 10(b) of the Order. Accordingly, I find that the reorganization rendered these exclusively recognized units inappropriate for the purpose of exclusive recognition under the Order.

As set forth above, I have found that certain of the units involved herein are no longer appropriate as a result of the 1977 reorganization, and I have found that certain other units remain appropriate for the purpose of exclusive representation. In these circumstances, I reject the contention of the Activity that only an overall activitywide unit of nonprofessional GS and WG employees, excluding professional and fire-fighter employees, would be appropriate for the purpose of exclusive recognition, inasmuch as certain of the currently recognized units have remained appropriate subsequent to the reorganization. However, I find, based on the factors outlined above, that an activitywide unit, excluding employees in the four exclusively recognized units which remained appropriate subsequent to the reorganization, is appropriate for the purpose of exclusive recognition under the Order. 9/ Thus, as noted above, such employees share a common mission, common overall supervision, engage in a highly organized and integrated work function, and enjoy common personnel and labor relations policies and practices. Under these circumstances, I find that such employees enjoy a clear and identifiable community of interest. Moreover, I find that such unit, embracing all employees of the Activity not otherwise represented, constituting, in effect, a residual unit of the Activity's unrepresented employees, would promote effective dealings and efficiency of agency operations, and would prevent the further fragmentation of the Activity's employees.

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended: 10/

All Wage Grade and General Schedule employees of the Naval Air Engineering Center, Lakehurst, New Jersey, excluding professional employees, firefighters, inspectors and quality assurance personnel of the Quality Assurance Office, planners, estimators, progressmen, and production controllers, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Order.

9/ Cf. Idaho Panhandle National Forests, United States Department of Agriculture, 4 A/SLMR 351, A/SLMR No. 394 (1974).

10/ In the absence of any record evidence as to whether or not NFFE Local 284, NFFE Local 23, or the MTC desire to appear on the ballot in this matter, they will be placed on the ballot because they have properly intervened herein.

- 11 -

An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but no later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the International Association of Machinists and Aerospace Workers, AFL-CIO, Local 2581; the National Federation of Federal Employees, Local 284; the Philadelphia Metal Trades Council, AFL-CIO; or the National Federation of Federal Employees, Local 23; or by no labor organization.

Because the above Direction of Election is in a unit different than contended to be appropriate by the Activity, the IAM, NFFE Locals 284 and 23, and the MTC, I shall permit any of these labor organizations to withdraw if they do not desire to proceed to an election in the unit found appropriate in the subject case upon notice to the appropriate Area Administrator within 10 days of the date below. If any of these labor organizations desire to proceed to an election because the unit found appropriate is different than that contended to be appropriate by the Activity, I direct that the Activity, as soon as possible, shall post copies of a Notice of Unit Determination, which shall be furnished by the appropriate Area Administrator, in places where notices are normally posted affecting employees in the unit found appropriate. Such notice shall conform in all respects to the requirements of Section 202.4(b) and (c) of the Assistant Secretary's Regulations. Further, any labor organization which seeks to intervene in this matter must do so in accordance with the requirements of Section 202.5 of the Assistant Secretary's Regulations. Any timely intervention will be granted solely for the purpose of appearing on the ballot among the employees in the unit found appropriate.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 32-5035(RA), insofar as it relates to the bargaining units exclusively represented by the National Association of Planners, Estimators, Progressmen and Production Controllers, Local No. 4, and the National Association of Government Inspectors and Quality Assurance Personnel, Unit No. 2, be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 23, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

- 12 -

August 23, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION, ORDER AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION,
REGION 3
A/SLMR No. 1105

Involved herein were two petitions filed by the General Services Administration, Region 3 (Activity-Petitioner). At issue in both cases' is placement of a unit of Sign Shop employees currently represented by the Washington Federal Printing Workers Union, Local 713, International Printing and Graphics Communications Union, AFL-CIO (Printers Union). By its petition for clarification of unit (CU), the Activity sought to clarify an existing bargaining unit represented by the American Federation of Government Employees, AFL-CIO, Local 2151 (AFGE) to include the Sign Shop employees. By its RA petition, the Activity-Petitioner sought a determination whether, subsequent to a reorganization, the Sign Shop unit remained appropriate for the purpose of exclusive recognition under the Order. In addition, the Activity-Petitioner asserted a good faith doubt that the Printers Union continued to represent a majority of employees in the Sign Shop unit.

In the CU case, the Assistant Secretary found that there was insufficient basis to support the Activity-Petitioner's contention that the Sign Shop employees accreted to the unit employees represented by AFGE Local 2151. Rather, the Assistant Secretary found that employees in the Sign Shop unit continued to maintain a community of interest separate and distinct from that of other employees. He noted in this regard that in the 12 years since this functional craft unit was deemed appropriate for the purpose of exclusive recognition, including the time since a reorganization occurred during 1972-73, its overall function and structure underwent no appreciable change, and its employees continued to perform the same work under essentially the same supervision without any significant degree of interchange, transfer or commingling with employees represented by AFGE Local 2151. Further, he noted that the Sign Shop had been in operation in its present location under the same conditions since the reorganization, and that there was no evidence that effective dealings or efficiency of agency operations had been adversely affected. Finally, the Assistant Secretary noted particularly the continued desire of the incumbent Printers Union to represent unit employees. He, therefore, ordered that the CU petition be dismissed.

With respect to the RA petition, the Assistant Secretary noted that he had already found in the CU case that the unit represented by the Printers Union remained appropriate for the purpose of exclusive recognition under the Order. He concluded, however, that the evidence was sufficient to support a good faith doubt by the Activity-Petitioner as to the majority status of the Printers Union. He noted, in this regard, that the Printers Union had neither negotiated an agreement nor requested negotiations at any

time since it became the exclusive representative of employees in the Sign Shop in 1966. Also, during that time, no grievances were filed or processed. In addition, the parties stipulated that although the Activity-Petitioner made 11 separate attempts since August 1976, to solicit comments from the Printers Union on proposed changes in operating and personnel policies, the Union responded only in two unrelated instances. Finally, the Assistant Secretary noted that despite an attempt by the Printers Union in January 1978, to add to its membership, only one of nine eligible unit employees had authorized dues deduction. Under these circumstances, the Assistant Secretary ordered that an election be conducted in the appropriate unit.

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UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 3

Activity-Petitioner

and

Case Nos. 22-08080(RA) and
22-08772(CU)

WASHINGTON FEDERAL PRINTING WORKERS
UNION, LOCAL 713, INTERNATIONAL PRINTING
AND GRAPHICS COMMUNICATIONS UNION, AFL-CIO

Labor Organization 1/

DECISION, ORDER AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Ralph R. Smith. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in these cases, the Assistant Secretary finds:

In Case No. 22-08772(CU), the General Services Administration (GSA), Region 3, hereinafter referred to as the Activity or the Activity-Petitioner, filed a petition for clarification of unit (CU) seeking to clarify an existing

1/ The name of the labor organization appears essentially as amended at the hearing. The American Federation of Government Employees, AFL-CIO, Local 2151 (AFGE) was included originally in these proceedings as a party in interest and was served with copies of all correspondence and notices relevant hereto. However, it did not seek official intervenor status in the proceedings and did not enter an appearance at the consolidated hearing. Accordingly, the AFGE is no longer viewed to be a party in interest in this matter.

bargaining unit represented exclusively by AFGE Local 2151, 2/ by including in said unit certain employees currently represented by the Washington Federal Printing Workers Union, Local 713, International Printing and Graphics Communications Union, AFL-CIO, hereinafter referred to as the Printers Union.

In Case No. 22-08080(RA), the Activity-Petitioner filed an RA petition seeking a determination whether as a result of a 1972-73 reorganization the bargaining unit represented exclusively by the Printers Union remained appropriate for the purpose of exclusive recognition under the Order. In addition, the Activity-Petitioner asserted a good faith doubt that the Printers Union continued to represent a majority of employees in the exclusively recognized unit.

At issue in the subject cases is a unit of "all nonsupervisory employees of the Sign Shop, Central Repair and Services Section, Special Services Branch, Public Buildings Service, Metropolitan Washington area," GSA, Region 3. The Sign Shop is one of many trade and craft shops within the GSA, and generally is responsible for providing the GSA with engraved, embossed and painted signs on both a regional and a nationwide basis. It also performs various other graphic arts projects, such as the engraving of the Great Seal of the United States. The Printers Union has held exclusive recognition for the Sign Shop unit since 1966.

Early in 1972, the Activity-Petitioner embarked on a long-term reorganization plan, apparently designed to consolidate various operations conducted by branches of its Public Buildings Service (PBS). By the time the reorganization was completed in late 1973, the Special Services Branch of the PBS was eliminated entirely, with its operations transferred and redelegated to other branches of the PBS.

As a part of the Special Services Branch, the Sign Shop was directly affected by the reorganization, undergoing both physical and administrative changes. In March 1972, it was transferred from the Washington Navy Yard, Washington, D. C., to its present location in the Combined Shops Facility, Bladensburg, Maryland. Thereafter, in October 1973, a related administrative transfer placed the Sign Shop under the Contract Services Branch of the PBS' Building Operations Division.

As a result of the relocation, the Sign Shop currently shares the Combined Shops Facility with three other trade and craft shops (Fabric and Upholstery Shop, Uniform Shop, and Bulk Storage Facility Shop) whose employees are represented by AFGE Local 2151. Although there was one instance where certain employees from the other shops were detailed to the Sign Shop to perform basic, non-technical tasks, there is no other evidence

2/ AFGE Local 2151 is the exclusive representative of a unit of all trades and crafts and other Wage Board employees in the Public Buildings Service, GSA, Region 3, Washington, D. C., Metropolitan area, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined by the Order, employees designated WS-08 and above, and employees already in exclusively recognized units.

of interchange between Sign Shop employees and those in other shops. Further, no Sign Shop employee has ever been either temporarily detailed or permanently transferred to any other of the Combined Shops.

As to the effect of the administrative transfer, the record reveals that prior to 1973, the Sign Shop Foreman reported directly to the Chief of the Central Repair and Services Section, who then was responsible to the Chief of the Special Services Branch. Now he reports to the Chief of the Combined Shops, who, in turn, reports to the Chief of the Contract Services Branch. The authority of the Foreman both to approve employee leave and to recommend employee awards was unaffected by the reorganization. Although the general personnel policies and staffing patterns of the Sign Shop are directed by the same Personnel Office which handles similar matters for the other Combined Shops, this is no departure from pre-reorganization procedure inasmuch as the Activity-Petitioner has a single office which handles all of its personnel matters. Finally, the mission of the Sign Shop has not changed since the 1972-73 reorganization.

With respect to the instant CU petition, I find insufficient basis to support the Activity-Petitioner's contention that the Sign Shop employees have accreted to the unit of employees represented by AFGE Local 2151. In Department of the Army, Fort McPherson, Georgia, FLRC No. 76A-82 (1977), the Federal Labor Relations Council (Council) held that appropriate unit determinations, including those arising in the context of a claimed accretion of one unit to another resulting from a reorganization, require an affirmative determination that the unit ultimately found appropriate "clearly, convincingly and equally" satisfy each of the criteria contained in Section 10(b) of the Order. In addition, and of special significance in the circumstances herein, the Council noted that a past bargaining history involving a labor organization which continues to claim to represent the unit employees is a relevant consideration in determining whether the previously existing unit remains appropriate under the Order. Fort McPherson, cited above, at footnote 11.

With regard to the Section 10(b) criteria, I find that employees in the Sign Shop unit continue to maintain a community of interest separate and distinct from that of other PBS employees. In this regard, I note particularly that in the 12 years since this functional craft unit was deemed appropriate for the purpose of exclusive recognition, including the time since the 1972-73 reorganization, its overall function and structure have undergone no appreciable change, and its employees continue to perform the same work under essentially the same supervision without any significant degree of interchange, transfer or commingling with employees represented by AFGE Local 2151. In addition, I note that the Sign Shop has been in operation at Bladensburg under the same conditions since 1973, and that there is no evidence that effective dealings or efficiency of agency operations have been adversely affected. Finally, of importance is the continued desire of the incumbent Printers Union to represent the unit employees. Under all these circumstances, I shall order that the instant CU petition be dismissed.

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The RA petition in Case No. 22-08080(RA) raises two issues. As to the first, concerning the continued appropriateness of the exclusively recognized unit represented by the Printers Union, I have found above that such unit remains appropriate for the purpose of exclusive recognition under the Order. Second, the Activity-Petitioner asserts a good faith doubt concerning the continued majority status of the Printers Union. In this regard, the record reveals that although the Printers Union has held exclusive recognition for the Sign Shop unit since 1966, it has neither negotiated an agreement with the Activity-Petitioner nor requested negotiations at any time during this period. Further, in the 12 years that the Printers Union has held exclusive recognition, no grievances have been filed or processed. In addition, the parties stipulated that although the Activity-Petitioner has made 11 separate attempts since August 1976, to solicit comments from the Printers Union on proposed changes in operating and personnel policies, the Union has responded only in two unrelated instances. Finally, the evidence establishes that despite an attempt by the Printers Union in January 1978, to add to its membership, only one of nine eligible unit employees has authorized dues deduction.

When viewed in their totality, I find that the above-noted circumstances are sufficient to support a good faith doubt by the Activity-Petitioner as to the majority status of the Printers Union and that it will effectuate the purposes and policies of the Order to afford the unit employees the opportunity to express their desires with respect to continued exclusive representation by that labor organization.

Accordingly, I shall direct an election in the following unit which I find to be appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All employees of the Sign Shop, Combined Shops, Contract Services Branch, Building Operations Division, Public Buildings Service, GSA, Region 3, excluding Sign Painter Foreman, WB-4104-17, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and other supervisors as defined in the Order. 3/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-08772(CU) be, and it hereby is, dismissed.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the unit found appropriate, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall

3/ The unit description has been modified to reflect the unit's current organizational status. It has also been modified to reflect the standard Executive Order exclusions.

-4-

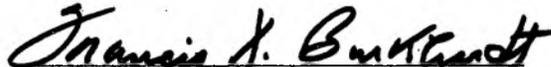
August 29, 1978

supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition by the Washington Federal Printing Workers Union, Local 713, International Printing and Graphics Communications Union, AFL-CIO. 4/

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
SOUTHWEST REGION,
DALLAS, TEXAS
A/SLMR No. 1106

Dated, Washington, D. C.
August 23, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU), and NTEU Chapter 91 alleging, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order when it failed to negotiate on the impact and implementation of a change in the method used to select work samples of Appeals Officers for performance review.

The Administrative Law Judge concluded that the Respondent had no obligation under the Order to bargain over the impact and implementation of the revised system of selecting cases for review because he found that this change had no discernible effect upon the Appeals Officers' working conditions. He therefore recommended that the complaint be dismissed in this regard. However, the Administrative Law Judge found that a supervisor in the Respondent's New Orleans Branch Office went beyond merely implementing the new system for selecting cases for review and misinterpreted the plan to mean that new time standards were established, thereby changing the terms and conditions of employment for employees in the New Orleans Branch Office without negotiating on impact and implementation in violation of Section 19(a)(1) and (6) of the Order.

Contrary to the Administrative Law Judge, the Assistant Secretary found that the new basis for selecting cases for performance evaluation effected a change in employee terms and conditions of employment. Thus, prior to April 1, 1976, the Appeals Officers working for the Respondent could generally expect that a cross-section of their work product would form the basis for their performance evaluation. Subsequent to April 1, 1976, a skewed sample of their work, either limited to or weighted toward those cases which exceeded certain average lengths of time for completion of cases, or "trigger points," would form the basis for their evaluation. In the Assistant Secretary's view, this change to an unbalanced sample of work selected for review, in contrast with the prior system involving Branch Chiefs' discretionary selections, constituted a change in the base from which performance evaluations were to be made and, therefore, was a change in employee terms and conditions of employment giving rise to the obligation of the Respondent to meet and confer, upon request, with the exclusive representative concerning the impact and implementation of the change. Therefore, he concluded that the Respondent's failure to fulfill its bargaining obligation in this regard constituted a violation of Section 19(a)(1) and (6) of the Order. In view of this disposition, it was considered unnecessary to make a finding in connection with

4/ Noting the above finding that the unit involved herein did not accrete to the unit exclusively represented at the Activity by AFGE Local 2151, and the fact that AFGE Local 2151 did not otherwise have standing to intervene herein, if a majority of ballots are cast against representation, the unit then will be unrepresented.

the implementation of the system in the Respondent's New Orleans Branch Office.

Accordingly, the Assistant Secretary ordered the Respondent to cease and desist from engaging in the conduct found violative of the Order and to take certain affirmative actions.

A/SLMR No. 1106

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
SOUTHWEST REGION,
DALLAS, TEXAS

Respondent

and

Case No. 63-6916(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 91

Complainant

DECISION AND ORDER

On March 17, 1978, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge also found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended that the complaint be dismissed in that regard. Thereafter, both the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order, and each party filed an answering brief with respect to the other's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions, briefs, and answering briefs filed by the parties, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, to the extent consistent herewith.

The complaint alleges, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order when it failed to negotiate on the impact and implementation of a change in the method used to select work samples of Appeals Officers for performance review.

The Administrative Law Judge concluded that the Respondent had no obligation under the Order to bargain over the impact and implementation of the revised system of selecting cases for review because he found that this change had no discernible effect upon the Appeals Officers' working conditions. He therefore recommended that the complaint be dismissed in this regard. However, the Administrative Law Judge found that a supervisor in the Respondent's New Orleans Branch Office went beyond merely implementing the new system for selecting cases for review and misinterpreted the plan to mean that new time standards were established, thereby changing the terms and conditions of employment for employees in the New Orleans Branch Office without negotiating on impact and implementation in violation of Section 19(a)(1) and (6) of the Order.

Prior to April 1, 1976, the Branch Chief in each of the Respondent's five Appellate Branch Offices was required to conduct an in depth review of a representative sample of the work of each Appeals Officer he supervised. 1/ The review included, among other factors, consideration of the quality of the decision in each case, the promptness of the conference held with the taxpayer, the promptness of the final determination, the case management, and the write-up of the case. The selection of cases to be reviewed was at the discretion of each Branch Chief. On April 1, 1976, the Respondent implemented a new basis for selection of the work sample to be reviewed for performance evaluation. Under this new system, the Branch Chief would review, at a minimum, performance on all cases which exceeded "trigger points" based on national and regional average lengths of time for completion of various classes of cases. The new system of selecting cases for review removed the Branch Chiefs' discretion in selecting cases for review, although they might still review cases in addition to those required by the "trigger point" based sample. 2/

Contrary to the Administrative Law Judge, I find that the new basis for selecting cases for performance evaluation effected a change in employee terms and conditions of employment. 3/ Thus, prior to April 1, 1976, the Appeals Officers working for the Respondent could generally expect that a cross-section of their work product would form the basis for their performance evaluation. Subsequent to April 1, 1976, a skewed sample of their work, either limited to or weighted toward those cases which exceeded the "trigger points," would form the basis for their evaluation. In my view, this change to an unbalanced sample of work selected for review in contrast with the prior system involving Branch Chiefs' discretionary selections, constituted a change in the base from

1/ There is also an Assistant Branch Chief in the Dallas Branch Office who supervises Appeals Officers.

2/ As noted by the Administrative Law Judge, the new system of sampling was not used by the Respondent Activity after November 1976.

3/ A failure to bargain about the impact and implementation of the change in another kind of sampling technique has previously been found to violate Section 19(a)(1) and (6) of the Order. Department of the Treasury, Internal Revenue Service, Fresno Service Center, A/SLMR No. 983 (1978).

which performance evaluations were to be made and, therefore, was a change in employee terms and conditions of employment giving rise to the obligation of the Respondent to meet and confer, upon request, with the exclusive representative concerning the impact and implementation of such change. 4/ The Administrative Law Judge found, and I agree, that the Complainant's demand to negotiate was sufficient to clearly apprise the Respondent that it desired to negotiate on any element of the change which was negotiable. Therefore, I conclude that the Respondent's subsequent failure to fulfill its bargaining obligation in this regard constituted a violation of Section 19(a)(1) and (6) of the Order. 5/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Southwest Region, Dallas, Texas, shall:

1. Cease and desist from:

(a) Instituting changes in the system by which Branch Chiefs sample work accomplished by Appeals Officers for the purpose of evaluating their performance without affording the National Treasury Employees Union, Chapter 91, the exclusive representative of the affected employees, a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be used in implementing the change and on the impact of such change on adversely affected employees.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request by the National Treasury Employees Union, Chapter 91, the exclusive representative of its employees, meet and confer, to the extent consonant with law and regulations, on the procedures to be used in implementing a change in the system by which Branch Chiefs sample the work accomplished by Appeals Officers for the purpose of evaluating their performance and on the impact of such change on adversely affected employees.

4/ The impact of the change in the sample herein was demonstrated as more supervisory memoranda concerning the timeliness of case handling were placed in employee personnel files after the change than before.

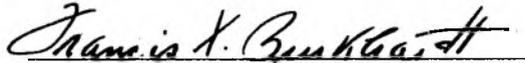
5/ In view of the disposition herein, it was considered unnecessary to make a finding regarding a separate violation in connection with the implementation of the system in the Respondent's New Orleans Branch Office.

(b) Upon request, reevaluate, using the present sampling system, any employee whose current annual evaluation is based, in whole or in part, on individual cases selected for review during the period from April 1, 1976, through November 19, 1976, if the cases were selected for review based on the sampling system implemented on April 1, 1976.

(c) Post at all Department of the Treasury, Internal Revenue Service, Southwest Region, Dallas, Texas, facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Commissioner and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
August 29, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute changes in the system by which Branch Chiefs sample work accomplished by Appeals Officers for the purpose of evaluating their performance without affording the National Treasury Employees Union, Chapter 91, the exclusive representative of the affected employees, a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be used in implementing the change and on the impact of such change on adversely affected employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request by the National Treasury Employees Union, Chapter 91, the exclusive representative of our employees, meet and confer, to the extent consonant with law and regulations, on the procedures to be used in implementing a change in the system by which Branch Chiefs sample work accomplished by Appeals Officers for the purpose of evaluating their performance and on the impact of such change on adversely affected employees.

WE WILL, upon request, reevaluate, using the present sampling system, any employee whose current annual evaluation is based, in whole or in part, on individual cases selected for review during the period from April 1, 1976, through November 19, 1976, if the cases were selected for review based on the sampling system implemented on April 1, 1976.

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

.....
In the Matter of

DEPARTMENT OF THE TREASURY, INTERNAL
REVENUE SERVICE, SOUTHWEST REGION,
DALLAS, TEXAS

Respondent

and

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU, CHAPTER 91

Complainant
.....

Case No. 63-6916 (CA)

HENRY H. ROBINSON, ESQUIRE
Assistant Regional Counsel
National Treasury Employees Union
300 East Huntland Drive, Suite 1204
Austin, Texas 78752

For the Respondent

DAVID N. REDA, ESQUIRE
Staff Assistant to the Regional Counsel
Internal Revenue Service, Southwest Region
Room 12D27, Federal Office Building
1100 Commerce Street
Dallas, Texas 75242

For the Complainant

Before: SALVATORE J. Arrigo
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding arises under the provisions of Executive Order 11491, as amended (hereinafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter referred to as the Assistant Secretary), a Notice of Hearing on complaint issued on June 1, 1977 with reference

to alleged violations of 19(a)(1) and (6) of the Order. The complaint, filed on August 2, 1976 by the National Treasury Employees Union and NTEU Chapter 91 (hereinafter referred to as the Union or Complainant) asserted that the Internal Revenue Service, Southwest Region (hereinafter referred to as the Activity or Respondent) violated the Order by refusing to negotiate with the Union with regard to an alleged change in the manner of supervisory review, assessment and evaluation of unit employees' work.

At the hearing held on July 7, 1977 the parties were represented by counsel and afforded full opportunity to adduce evidence and call, examine and cross-examine witnesses and argue orally. Both parties filed briefs.

Upon the entire record in this matter, 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 hereto the Union has been the exclusive collective bargaining representative of various of the Activity's employees including all Appeals Officers located within the Activity's Southwest Region. Appeals Officers are located in five appellate branch offices in Dallas, Texas, Denver, Colorado, Houston, Texas, New Orleans, Louisiana, and Oklahoma City, Oklahoma. Appeals Officers are supervised by and responsible to Branch Chiefs who are in turn responsible to the Activity's Assistant Regional Commissioner, Appellate.

Appeals Officers review cases involving disputed tax assessments and make recommendations as to tax determinations and how the controversy might be resolved without litigation. Traditionally, a Branch Chief evaluated an Appeals Officer's work by selecting certain cases, at his own discretion, and reviewing that case on the basis of the Appeals Officer's overall work performance. In the New Orleans Branch Office, as in other offices generally, an Appeals Officer's case handling was evaluated in terms of such factors as the type of statement prepared to support the recommendation, quality of decision and the utilization of time in completing the assignment. The various elements considered were assigned weights of 1 to 5 to reflect the Appeals Officer's performance on the case.

In March 1976 the Activity established a new "trigger point" system designating which cases were to be reviewed by Branch Chiefs. The new system was not intended to change the type of review a case was to receive. Further, there is no evidence that any change in the type of evaluation a case received after it was "triggered" for review was any different than pre-change review in appellate branch offices in the Activity's Southwest Region other than the New Orleans Office.

At a meeting of New Orleans Appeals Officers conducted by the Branch Chief on March 16, 1976 the Appeals Officers were informed that the system by which their cases were selected for review by the Branch Chief was to be changed effective April 1. According to the Branch Chief, the new evaluation system was so designed that it would automatically "trigger" for in-depth review certain cases where the time expended by the Appeals Officer to decide a case exceeded or was less than 25% of a predetermined amount of work time allowed for a case of a particular dollar value. If the Branch Chief decided that an excessive amount of time was utilized by the Appeals Officer, then a derogatory memorandum would be placed in his personnel "drop" file unless the Appeals Officer presented a good reason for what was determined to be excessive utilization of time. 1/ The Branch Chief indicated that only an exceptional case which exceeded the time-value criteria would not cause a derogatory memorandum to be placed in an individual's file. 2/ Further, the Appeals Officers in New Orleans were informed that the Branch Chief would no longer utilize the numerical rating system then employed by the Branch Chief when evaluating case performance.

NTEU Chapter 91 President, J.M. Pilie, an Appeals Officer in the New Orleans office, was present when the Branch Chief informed the group of the change on March 16, 1976. Sometime between March 16 and April 1 Pilie asked the Branch Chief what the work time and dollar values were that established the "trigger points". The Branch Chief at first replied he didn't know. When asked again by Pilie at a subsequent time the Branch Chief refused to supply this information indicating that the Assistant Regional Commissioner forbade the dissemination of this information.

1/ Previously derogatory comments were placed in Appeals Officers' files by the Branch Chief, but they were few in number.

2/ Timeliness in case handling is a factor considered when an employee is appraised for promotion. (See Respondent's Exhibit No. 3).

On March 23, 1976, Pilie wrote the following letter to Assistant Regional Commissioner Douglas M. Moore:

"It has come to the attention of NTEU, Chapter 91, that you propose to institute a system which will trigger cases which Appellate Branch Chiefs will be obliged to review. The procedure is apparently based on the dollar amount of the proposed deficiency or overassessment and the amount of time spent on the case by the Appellate Conferee.

"According to my understanding, if the amount of time spent is over or under the national (or regional) average by 25% or more, it will require review by the Branch Chief. If the time spent is in excess of the average by 25% or more, and the Branch Chief cannot justify the excessive time by reviewing the case, he will question the conferee concerning the excessive time.

"If the Chief is not satisfied with the answers to his questions he will write a narrative report which will be placed in the Conferee's "drop file" and this will be part of the criteria used in evaluating the conferee's performance.

"NTEU Chapter 91 hereby notifies you that such a system violates Article 9, Section 4, of the Multi-Regional Agreement and demands that it not be implemented.

"If you intend to institute a system which incorporates elements which do not violate the Agreement, NTEU Chapter 91 hereby demands that negotiations be undertaken prior to implementation of such a system. I await your reply regarding an appropriate time for discussions to begin. 3/

3/ Article 9, Section 4 of the parties collective bargaining agreement provides:

"A. The statistics concerning field enforcement officers' performance maintained by the Employer for the purpose of forecasting and monitoring aspects of work planning control programs will not be used as quotas, allocations or as specific amounts of work that must be completed.

[Cont'd]

In a letter dated March 29, 1976 Assistant Regional Commissioner Moore responded to President Pilie, stating:

"In reply to your letter of March 23, 1976, the plan concerning case review by Appellate supervisors will not violate Article 9, Section 4, of the Multi-Regional Agreement. On the contrary, it is within the spirit and intent of the contract provisions to reserve to management the right to raise questions with any individual about the amount of time being spent on individual cases or the results being achieved.

"The procedure is designed to identify units meriting commendation for case handling as well as to identify problems in case management.

"I am of the opinion also that the elements of the plan are not negotiable. Section 11(b) of Executive Order 11491, as amended, leaves to management the right to establish criteria by which to select work to be reviewed.

"In the conviction that you have been adequately briefed on this matter, the new criteria for selecting units to be reviewed will become operative on April 1, 1976."

The change became effective at all Branch Offices in the Southwest Region on April 1, 1976. In the New Orleans office, the change resulted in a substantial increase in the number of derogatory memoranda reflecting excessive time used in case dispositions which were placed into Appellate Officers "drop" files. In other offices in the Region, while the new system resulted in more cases being reviewed in-depth by Branch Chiefs, the vast majority of the reviews did not result in any increase in either commendatory comments or comments reflecting excessive case handling time.

3/ Cont'd.

"B. The tax enforcement results of individual appellate conferees and appellate auditors will not be accumulated and maintained as a regular statistic in such a way as to identify the product of any individual enforcement officer. Provided, however, that the Employer may raise any question with an individual enforcement officer about the number of cases he has turned in during a specific period, the amount of time he has been spending on individual cases, or the kind of results he has been getting. [Cont'd]

Thereafter, by letter dated April 28, 1976 the Union filed an unfair labor practice charge with the Activity alleging violations of Sections 19(a)(1) and (6) of the Order contending that "(s)ome of the elements of the changes violated the Multi-District Agreement between the parties while other elements were not covered by the ... Agreement". The Union's letter recited Pilie's demand to negotiate the changes to the extent they were not covered by the agreement and alleged the Activity "ignored the demand to negotiate by unilaterally implementing all elements of the changes on April 1, 1976."

In addition, by letter dated April 30, 1976 President Pilie filed a grievance 4/ with the Activity's Regional Commissioner alleging violations of Article 9, Sections 4 (A)(B) and (C) of the agreement, stating:

"Chapter 91, Federal Treasury Employees Union, hereby files a grievance due to violations of the provisions of the Multi-Regional Agreement, as more fully set out below.

"Section 4(A) of Article 9 of the Multi-Regional Agreement provides that statistics maintained by the Employer for the purpose of forecasting and monitoring aspects of work planning control programs will not be used as quotas, allocations or as specific amounts of work that must be completed.

"The Appellate Branch Chiefs in the Southwest Region have been ordered by the ARC-Appellate to use such statistics as quotas and allocations in

3/ Cont'd.

"C. Enforcement production records will not be used to establish individual quantity performance standards. None of the foregoing will be used to compare one field enforcement officer with another."

4/ The agreement provides for a four step grievance procedure, culminating in arbitration: step 1 - filed with first level supervision; step 2 - filed with the office or Branch Chief; step 3 - filed with the Assistant Regional Commissioner; and step 4 - filed with the Regional Commissioner.

order that management may measure individual conferees' performances. The Branch Chiefs have been instructed that if they find that a conferee is determined to be performing at 25% above or below these statistical quotas he is to be commended or reprimanded unless it is determined that there is justification for more or less time having been spent on the unit of cases involved. If it is determined that there was no proper justification, a narrative report must be written by the Branch Chief and placed in the Appellate conferee's "drop file" which file will be used later for the evaluation of the conferee's performance. In addition, the quotas are used as specific amounts of work that must be completed within the statistical time limit based on the dollar amount of the deficiency or overassessment, with the 25% tolerance. These quotas and requirements are in violation of Article 9, Section 4(A), of the Multi-Regional Agreement.

"Section 4(B) of Article of the Multi-Regional Agreement provides that the tax enforcement results of individual Appellate conferees will not be accumulated and maintained as a regular statistic in such a way as to identify the product of any individual.

"The tax enforcement results of individual Appellate conferees are being accumulated in the Branch Offices and are being maintained in a manner to identify the product of the conferee. This is in violation of Section 4 (B) of Article 9 of the Multi-Regional Agreement. The proviso in this Section does not encompass the employer's using time and dollar statistics to establish quotas with which to evaluate the performances of Appellate conferees.

"Article 9, Section 4(C), provides that enforcement production records will not be used to establish quantity performance standards and that these records will not be used to compare one field enforcement officer with another.

"The amount of time expended by an individual Appellate conferee on cases worked by him or her are being compared with compiled production statistics (the origin of which is known only to the ARC-Appellate). These statistics purportedly indicate the average amount of time spent by other conferees on cases involving deficiencies or overassessments of comparable amounts. This is in direct violation of Section 4(C) of Article 9 of the Multi-Regional Agreement.

"Based on the foregoing, NTEU Chapter 91 requests the following remedial actions:

1. A statement from the Regional Commissioner endorsing the principles outlined in Article 9, Section 1(A) which provide that all evaluations of performance will be made in a fair and objective manner only by the employee's immediate supervisor who is immediately responsible for the employee's work.
2. The Regional Commissioner will order the immediate discontinuance of the violations referred to above and of the procedures which have been in effect since April 1, 1976 which are producing these recurring violations.

"It is requested that in accordance with the provisions of Article 32, Section 10(B) of the Multi-Regional Agreement, it be mutually agreed that steps 2 and 3 referred to in Article 32, Section 7, be waived."

On May 18, 1976 the Activity responded to the grievance at the third step. Assistant Regional Commissioner Moore replied as follows:

"Your letter of April 30 has been referred to me by the Regional Commissioner.

"You contend I have ordered the Branch Chiefs to use statistics to set quotas and allocations to measure individual performance. You further state that specific amounts of work must be completed within the statistical time unit based on a dollar amount of deficiency or overassessment within a 25% tolerance. This simply is not the situation.

"What I have done is set guidelines for required case review. The Appellate supervisors have been asked to review any case which has more or less time on it than those guidelines. The reviewer will then have three alternatives at his/her discretion - 1) a commendation for superior time utilization; 2) a notation on Form 3564 that the time is justified; or 3) an in-depth review to determine the reason or reasons for the amount of time expended on the unit. This may or may not result in a recordation of performance per Article 9, Section 1.(B).(2). Such a decision will be made on a case-by-case basis by the supervisor.

"There have never been nor will any quotas be set for individual employees in Appellate.

"Regional Commissioner Memorandum 12-42 specifically deals with Policy Statement P-1-20. I believe the review procedure conforms with these guidelines as well as with Article 9, Section 4, of Multi-Regional Agreement. No production rate - that is, an average time per case - has been nor will be computed for an individual. No time and dollar statistics are maintained on individual production.

"No quantity performance standards have been set. Certainly, no individual is being compared with another nor evaluated on such a basis. Time utilization will continue to be evaluated on the basis of the particular case and the problems therein.

"I hope that the explanation I have made of its origin and purpose will assuage your fears regarding the effects on an individual's performance evaluation. The Appellate supervisors will be making an analysis of conferee's work on a 'business as usual' basis - that is, whatever individual problems arise will be worked out with the individual - not against some arbitrary standard.

"The foregoing comments are provided further to explain that neither production goals nor statistical evaluation methods for individuals are being used.

"Previously - on March 29 - I wrote you a letter explaining in some detail the review procedures you are now grieving. In that letter, I told you the procedure would take effect on April 1.

"Since the grievance is untimely, the merits of your contention are not being further considered and remedial relief you requested is denied."

On May 27, 1976, President Pilie filed with the Regional Commissioner a step four grievance on the matter. The Regional Commissioner, on June 28, 1976, concluded the grievance was untimely and concurred in Moore's decision to deny any remedial relief. By letter dated June 21, 1976 the Union invoked arbitration and the parties selected an arbitrator to hear the matter.

While it was in effect, the new system designating which cases were to be reviewed was modified twice in an attempt to decrease the number of cases requiring review. The system was finally abandoned on November 14, 1976. At this time case review reverted to the pre April 1, 1976 procedure whereby Branch Chiefs used their discretion in deciding which cases would receive an in-depth review.

On June 13, 1977 the Union withdrew its grievance, with prejudice, stating, inter alia, that they "...assume the Internal Revenue Service would have refused to arbitrate the cases and instead would have filed an arbitrability petition."

Positions of the Parties

The Union contends that the Activity's refusal to negotiate with regard to the implementation of the new system of "triggering" case review and the impact of that change on affected employees violated Sections 19(a)(1) and (6) of the Order.

The Activity contends: the new system of case review did not affect policies, practices and working conditions of unit employees and asserts Complainant failed to sustain its burden of proof in this regard; no adequate request to negotiate on the matter was made by the Union; in any event the unfair labor practice complaint should be considered moot since the new system terminated on November 19, 1976; the case really involves a matter of good faith interpretation of Article 9, Section 4 of the agreement and no patent breach of the agreement has occurred; and an unfair labor practice finding is barred by virtue of Section 19(d) of the Order since the Complainant sought a disposition of the

issue by invoking the grievance procedures of the agreement. 5/

Discussion and Conclusions

Section 11(a) of the Order provides, in relevant part:

"An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions."

The vast majority of managerial decisions, by their very nature, in some manner relate to personnel policies and practices affecting working conditions, (hereinafter referred to simply as working conditions). However, other Sections of the Order specifically exclude numerous areas of typical managerial concern from the general bargaining obligation imposed by Section 11(a), even though these subjects clearly affect the working conditions of bargaining unit employees. Thus, Section 11(b) provides in part:

"(b) In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change. "

5/ Section 19(d) provides, in relevant part:

"Issues which can properly be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures."

Section 12(b) states:

"(b) management officials of the agency retain the right, in accordance with applicable laws and regulations -

- (1) to direct employees of the agency;
- (2) to hire, promote, transfer, assign, and retain employees in positions with the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
- (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
- (4) to maintain the efficiency of the Government operations entrusted to them;
- (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
- (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency...."

Decision of the Federal Labor Relations Council reveal that even in these matters of express management prerogative, an agency must provide the exclusive representative of its employees with an opportunity to negotiate on "...procedures, to the extent consonant with law and regulations, which management will observe in reaching the decision or taking the action involved, provided that such procedures do not have the effect of negating the authority reserved" and on the impact of the agency's decision on those employees adversely affected. 6/

Decisions of the Assistant Secretary indicate that even though an agency is privileged to make unilateral decisions on the matters set forth in Sections 11(b) and 12(b), nevertheless, prior to changing a policy or working condition encompassed by these Sections an agency must provide the exclusive representative an opportunity to negotiate the procedures observed in reaching the decision, implementing the action and the impact on adversely affected employees. 7/

6/ See Veterans Administration Research Hospital Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), Report No. 31; and Tidewater Virginia Federal Employees Metal Trades Council, FLRC No. 71A-56 (June 29, 1973), Report No. 41.

7/ See United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, 3 A/SLMR 376, A/SLMR No. 289; and Federal Aviation Administration, National Aviation Facilities Experimental Center Atlantic City, New Jersey, 3 A/SLMR 626, A/SLMR No. 32.

In the case herein the Union does not claim that the Activity is obligated to negotiate with the Union regarding the decision to revise the system of selecting cases for supervisory review. Rather, the Union acknowledges that it is seeking to negotiate with the Activity only as to matters concerning procedures and impact relative to the change. 8/

I conclude the Activity was under no obligation under the Order to bargain with the Union on matters of implementation or adverse impact.

Essentially, the Activity effectuated a general revision in the methodology employed by its supervisors in fulfilling their assigned tasks of case review. Supervisors were no longer to use their own discretion in deciding which cases were to be reviewed. Instead, "trigger points", which mandated review, were established. As applied to all Branch Offices, the Activity did not contemplate changing the nature of the in-depth review a case received, only which cases were to be selected for that review. While some unit employees and the Union may have misconstrued the establishment of the "trigger point" system to be the establishment of goals and time targets which were not an element in the previous system of work evaluation, the evidence reveals that no such general intention was manifest. Nor does the evidence establish that, except with regard to the New Orleans Branch Office, infra, the Activity utilized "trigger points" as goals or time targets for case handling evaluation purposes.

Both before and after the change, unit employees' duties and obligations remained the same. Standards of case handling performance, including timeliness of case handling, remained unaffected. Supervisors, notwithstanding the advent of the new "trigger points", continued to assess the timeliness of case handling using their own independent judgment. Unit employees both before and after the change were given the opportunity to challenge a supervisor's derogatory appraisal of case handling by inserting an explanatory memorandum in the drop file, if they so desired. If perhaps the new procedure disclosed case handling deficiencies which then led to revised work performance standards,

8/ The transcript is replete with statements of counsel for both Complainant and Respondent reflecting the posture of the case in this regard.

those new standards would, of course, be in a different posture for consideration. However, the possibility of such an eventuality is too speculative to have the effect of characterizing the revision of case review selection techniques as an employee working condition.

Thus, I find and conclude that what actually changed was a term and condition of employment for supervisors, a change which had no discernable affect upon the Appeals Officers' working conditions. Accordingly, I conclude that Respondent's refusal to negotiate with Complainant as to the implementation and impact of the revised system of selecting cases for review as it generally applied to all of the Activity's Branch Offices did not violate Sections 19(a) (1) and (6) of the Order. 9/

As indicated above, virtually any managerial action could be viewed in such a manner, perhaps strained, to have an affect, however slight, upon working conditions of unit employees. A literal reading of the Order might well then compel a conclusion that any such managerial action carries with it the concomitant obligation to, upon demand, bargain with the exclusive representative on the matter, at least with regard to the implementation and adverse impact of the action. Nevertheless, I conclude that the obligation to bargain with the Union on the matter herein did not arise since the change had insufficient impact, if any, on the work unit employees performed, their manner of performance or evaluations. 10/

9/ See Department of the Navy, Norfolk Naval Shipyard, A/SLMR No. 805 which involved a claim that the activity therein was obligated to negotiate with the exclusive representative concerning the establishment, implementation and impact of a policy of using radar to enforce speed limits at the activity's facilities. The Assistant Secretary found that the decision to use radar to enforce speed limits did not affect or change employees, terms and conditions of employment. Accordingly, the complaint was dismissed in that the activity was not required to negotiate concerning the "new method of enforcing existing policy."

10/ See generally Department of Defense, Air National Guard, Texas Air National Guard, Camp Mabry, Austin, Texas 6 A/SLMR 591, A/SLMR No. 738, where the Assistant Secretary held that a past practice of allowing the consumption of alcoholic beverages at parties at a government facility was not a working condition contemplated by Section 11(a) of the Order. More significantly, the Assistant Secretary stated: [Cont'd on next page]

Further, it appears that in the Federal Labor Relations Council's view, the mere fact that an management action affects or has an impact on unit employees is not the controlling criteria when non unit supervisory positions are being considered. Thus, in Texas ANG Council of Locals, AFGE, FLRC 74A-71 (March 3, 1976), Report No. 100, the Council considered the negotiability of a union's contract proposal to make the unit's negotiated promotion procedures applicable to the filling of threshold supervisory positions outside the bargaining unit. The union contended that its proposal applied only to unit employees who were candidates for threshold supervisory positions and, accordingly, its proposal was negotiable since it had the right to negotiate promotion procedures for unit employees. The Council found the proposal not negotiable and held, inter alia, that since the proposal related to supervisory positions "...which are concerned with management responsibilities and the performance of management functions...(the proposal)...clearly does not relate to the personnel policies and practices affecting the bargaining unit which are encompassed within the bargaining obligations under Section 11(a)." 11/

Certainly the procedures used to promote bargaining unit employees to threshold supervisory positions has a greater affect and impact upon working condition of employees than the procedures used to alter how a supervisor selects

10/ [Cont'd]

"Section 11(a) describes the limited areas which are subject to the bargaining obligation on the part of agencies and exclusive representatives. In my view, it is not intended to embrace every issue which is of issue to agencies and exclusive representatives and which indirectly may affect employees. Rather, Section 11(a) encompasses those matters which materially affect and have a substantial impact on, personnel policies, practices, and general working conditions." [Emphasis supplied.]

11/ In its decision the Council also noted that it was not holding that all proposals in any way related to filling of supervisory vacancies would be outside the obligation to bargain under Section 11(a), giving as an example, "proposals dealing with notification of unit employees eligible for consideration under agency regulations."

cases for performance review, as herein. 12/ Accordingly, if such promotion procedures are not negotiable, the procedures used in changing the technology of case selection for review must also be a matter about which an activity may refuse to negotiate without violating the Order.

However, at the New Orleans Branch Office the Appeals Officers' supervisor went beyond merely changing the existing system for selecting cases for review. Rather, as the evidence discloses, the Branch Officer interpreted the establishment of "trigger points" for review to mean that the "trigger points" in fact represented the periods of time for case handling which would be permissible. In his view, when Appeals Officers in that Branch exceeded those times, it presumptively indicated that an excessive amount of time was spent on that case. This interpretation changed the standards of acceptable case handling performance of Appeals Officers. Indeed, the New Orleans Branch Officer's misinterpretation of the Agency's directive resulted in a substantial number of derogatory memoranda dealing with inordinate case handling time being placed in Appeals Officers' "drop" files.

Accordingly, I conclude that the New Orleans Branch Officer changed the terms and conditions of employment for Appeals Officers without providing the Union with an opportunity to negotiate as to the implementation and impact of the change on adversely affected employees and thereby violated Sections 19(a)(1) and (6) of the Order. 13/

I reject the contention that the abandonment in November 1976 of the new case review selection system and return to the prior discretionary system has rendered the matter moot

12/ For treatment of filling supervisory positions under the National Labor Relations Act, see generally KONO-TV-Mission Telecasting Corporation, 163 NLRB 1005. See also Wincharger Corporation, Subsidiary of Zenith Radio Corporation, 172 NLRB 83 which held that an employer was not obligated to give notice to or negotiate with a union about its decision to increase the number of supervisors the employer concluded was necessary to provide more effective supervision of its employees.

13/ Cf. National Labor Relations Board, 3 A/SLMR 88, A/SLMR No. 246; and Federal Aviation Administration, National Aviations Facilities Control Center, Atlantic City, New Jersey, 4 A/SLMR 647, A/SLMR No. 438, Case No. 32-3071(CA).

and the unfair labor practice allegation should therefore be dismissed. The "trigger point" system was in effect almost seven months and resulted in derogatory memoranda being placed in unit employees "drop" files at the New Orleans Branch Office. Performance evaluations are, in part, based upon such data and a suitable remedy is necessary to dissipate the effects of the unfair labor practice conduct. Accordingly, in these circumstances I do not conclude the complaint is moot as Respondent suggests.

I also reject Respondent's contention that Complainant failed to demand negotiations on the impact and implementation regarding the system that was put into effect on April 1, 1976. 14/ The Union's letter of March 23, supra, in effect demands negotiations on any change in the review procedure which did not violate the parties agreement. 15/ The Union, of course, was somewhat handicapped since information on the new system was provided them from the New Orleans Branch Officer whose interpretation and application of the change was different from that which the Activity intended. Indeed, the New Orleans Branch Officer refused to supply details of the system. 16/ The Activity's March 29, response to the March 23, letter denied any contract violation and claimed the elements of the plan were simply "not negotiable" and informed the Union that the new system would be effective April 1.

While a union's demand to negotiate on impact and implementation must be communicated in specific terms, 17/ in these circumstances, I find and conclude that the Union's demand to negotiate was sufficient to clearly apprise the Activity that the Union wanted to negotiate on any element of the change which was negotiable. Given the paucity of information and nature of the Branch Officer's interpretation

14/ Due to my prior findings and conclusions, it is only necessary to consider this argument as it may apply to the situation at the New Orleans Branch Office.

15/ The Union obviously recognized that violations of the agreement would be resolved through the parties negotiated grievance procedure, infra.

16/ Complainant urges that Respondent violated the order by refusing its request to provide information on the new system. However, neither the charge nor complaint allege such a violation nor do the circumstances herein indicate that such an allegation was encompassed in the complaint. Accordingly, no finding can be made on this matter.

17/ See Internal Revenue Service, National Office, A/SLMR No. 846.

of the changes, a demand of this nature should be expected. In my view, the initial demand broadly included a request to negotiate on matters of implementation and impact of the change. The Activity's refusal, in turn, broadly indicated that since the new procedure would be operative three days from the date of the letter, further communication on the matter would be futile. 18/

Turning now to Respondent's positions that the matter actually concerns a question of contract interpretation and the unfair labor practice complaint is barred by virtue of Section 19(d), I find no merit to either contention. From the initial step in this proceeding, the Union sought to keep separate its challenge to the Activity's action. Thus, as best the Union understood it, the new system involved the possible accumulation and use of statistics which was seen as a matter concerning the possible violation of Article 9, Section 4 of the agreement. However, the implementation of a new system of review was seen as a unilateral change in conditions of employment. As the record clearly reflects, the Union in these unfair labor practice proceedings is not challenging the change itself but the Activity's refusal to bargain on the implementation and impact of the change, notwithstanding whether or not the change in the system of case review used statistics contrary to Section 9, Article 4 of the agreement. Indeed, under existing case law, the Union could not challenge the suspected breach of Article 9 in an unfair labor practice proceeding unless a patent breach was found to have occurred. 19/ Further, there is neither contention nor evidence that the Union could have raised as a breach of contract the matter of the unilateral implementation and refusal to bargain on the adverse impact in changing the standards for assessing the utilization of time in case handling in the New Orleans Branch Office.

In sum, the subject matters of the grievance and the unfair labor practice complaint were separate and distinct and treated as such. Accordingly, in considering the Respondent's conduct regarding the change in the standards of acceptable case handling for Appeals Officers in the New Orleans Branch Office, I reject Respondent's contention that the matters

18/ See generally United States Department of Agriculture, Forest Service, Pacific Southwest and Range Experiment Station, Berkeley, California, 5 A/SLMR 658, No. 573.

19/ Social Security Administration, Great Lakes Program Center, Chicago, Illinois, A/SLMR No. 804; Watervliet Arsenal, U.S. Army Armament Command, A/SLMR No. 726.

giving rise to the unfair labor practice complaint constituted issues of contract interpretation and application of Section 19(d).

Recommendations

Having found that Respondent has engaged in conduct violative of Sections 19(a)(1) and (6) of the Order through its failure and refusal to negotiate with Complainant with regard to the implementation and impact on employees adversely affected with regard to the changing of standards for evaluating timely case handling performance of Appeals Officers at the New Orleans Branch Office, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Order.

As to all other allegations, I recommend the complaint be dismissed.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Southwest Region, Dallas, Texas, shall:

1. Cease and desist from:

(a) Changing standards for evaluating timely case handling performance of Appeals Officers at its New Orleans Branch Office without affording the National Treasury Employees Union Chapter 91, the exclusive representative, a reasonable opportunity to meet and confer, to the extent consonant with law and regulations on the procedures to be used in implementing the change and on the impact such change will have on employees adversely affected by the change.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the policies of Executive Order 11491, as amended:

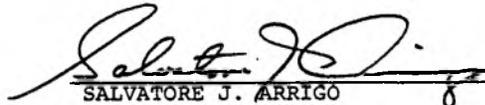
(a) Notify National Treasury Employees Union, Chapter 91, or any other exclusive representative of the employees, of any future decision to change standards for case handling procedure of Appeals Officers prior to its effectuation, and upon request, make available to such representative any information relevant to the change and

afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

(b) Expunge from any personnel files of New Orleans Branch Office Appeals Officers any adverse evaluation of Appeals Officers' timely case handling performance where such evaluation was not based upon standards in effect prior to April 1, 1976, and expunge any adverse appraisal made based upon such adverse evaluation.

(c) Post at the New Orleans facility of the Department of the Treasury, Internal Revenue Service, Southwest Region, copies of the enclosed notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Commissioner, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.


SALVATORE J. ARRIGO
Administrative Law Judge

Dated: 17 MAR 1976
Washington, D.C.

SJA:mjm

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT fail to notify National Treasury Employees Union, Chapter 91, or any other exclusive representative of our employees, of a decision to change standards for case handling performance prior to its effectuation, and, upon request, make available to such representative any information relevant to the change and afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify National Treasury Employees Union, Chapter 91, or any other exclusive representative of our employees, of any future decision to change standards for case handling performance prior to its effectuation, and, upon request, make available to such representative any information relevant to the change and afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

WE WILL expunge from any personnel file of New Orleans Branch Office Appeals Officers any adverse evaluation of Appeals Officers' timely case handling performance where such evaluation was not based upon standards in effect prior to April 1, 1976, and expunge any adverse appraisal made based upon such adverse evaluation.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
CINCINNATI DISTRICT OFFICE
A/SLMR No. 1107

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union, Chapter 27 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by instituting and implementing a change in the level of review of advisory arbitration recommendations from the Regional Commissioner to the District Director without affording the Complainant proper notification of the change and an opportunity to negotiate. The Respondent took the position that it had not violated the Order as the change in the level of review had no impact on the working conditions of employees, and that the complaint was brought against the wrong party, the Cincinnati District Office.

The Administrative Law Judge found that both the Internal Revenue Service and its Cincinnati District Office were named as parties in the complaint and that the Complainant was not given notice of the decision to change the level of review by the Internal Revenue Service or its Cincinnati District Office. He concluded, and the Assistant Secretary concurred, that the Cincinnati District Office violated Section 19(a)(1) and (6) of the Order by not timely notifying the Complainant of the decision to make the change in review level and by not meeting with it to negotiate on the impact and implementation of the change before it became effective. In this regard, he found that the change in the level of review had an impact and effect on employees represented by the Complainant. In reaching his decision the Administrative Law Judge noted that the specific issue presented by the Complainant at the hearing was whether Sections 19(a)(1) and (6) of the Order were violated by the Respondent's failure to bargain with respect to the impact and implementation of the decision to change the level of review, rather than whether the Respondent's change in the level of review was violative of the Order. Therefore, neither the Administrative Law Judge nor the Assistant Secretary passed upon the question whether such a unilateral decision and change would itself constitute a violation of Section 19(a)(1) and (6) of the Order.

Although the Administrative Law Judge found that the District Office committed the unfair labor practice herein, his recommended remedial order was directed, in part, against the Internal Revenue Service, as he concluded the only meaningful remedy available in the instant case would be against the parent organization which was ultimately responsible for the bargaining of its subordinate activity and which should be held accountable for the actions of its agents and subsidiaries.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations and issued an appropriate remedial order for the violation found herein.

A/SLMR No. 1107

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
CINCINNATI DISTRICT OFFICE

Respondent

and

Case No. 53-09485(CA)

NATIONAL TREASURY EMPLOYEES
UNION, NTEU CHAPTER 27

Complainant

DECISION AND ORDER

On April 10, 1978, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief, 1/ I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 2/

1/ The Respondent excepted to certain credibility findings made by the Administrative Law Judge. In Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, 2 A/SLMR 377, A/SLMR No. 180 (1972), the Assistant Secretary held that as a matter of policy he would not overrule an Administrative Law Judge's resolution with respect to credibility unless the preponderance of all the relevant evidence established that such resolution clearly was incorrect. Based on a review of the record herein, I find no basis for reversing the Administrative Law Judge's credibility findings.

2/ In his Recommended Decision and Order, the Administrative Law Judge noted that, as agreed to by the parties, the issue presented

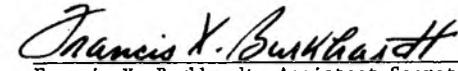
(Continued)

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, and its Cincinnati District Office, Cincinnati, Ohio, shall:

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary of Labor, in writing, within 30 days from the date of this order as to what steps have been taken to comply therewith.

Dated, Washington, D.C.
August 30, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1. Cease and desist from:

(a) Instituting any change in the method of processing advisory arbitration opinions with respect to employees represented exclusively by the National Treasury Employees Union, Chapter 27, without first notifying the National Treasury Employees Union, Chapter 27, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the impact and implementation of such change.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purpose and policies of Executive Order 11491, as amended:

(a) Rescind the decision to change the level of review of arbitrators' advisory opinions with respect to adverse actions and have the arbitrator's advisory opinion in the matter of Mr. Darrell Douglas, Sr., reviewed by the appropriate Regional Commissioner.

(b) Notify the National Treasury Employees Union, Chapter 27, of any intended change in the processing of arbitrators' awards, and, upon request, meet and confer, to the extent consonant with law and regulations, on the impact and implementation of such change.

(c) Post at its facility at the Internal Revenue Service, Cincinnati District Office, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commissioner of the Internal Revenue Service and by the District Director, Cincinnati District Office and shall be posted and maintained by the District Director for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

2/ herein was whether the District Director of the Cincinnati District Office had authority to bargain with NTEU Chapter 27 concerning the implementation and impact of the decision by the Internal Revenue Service to change the level of review of an arbitrator's advisory opinion, and that the parties did not submit for consideration the issue whether the unilateral decision to change the level of review was violative of the Order. Accordingly, his Recommended Decision and Order, and my decision herein, do not pass on whether such unilateral conduct would be violative of the Order.

-3-

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

WE WILL NOT institute any change in the method of processing advisory arbitration opinions with respect to employees represented exclusively by the National Treasury Employees Union, Chapter 27, without first notifying the National Treasury Employees Union, Chapter 27, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the impact and implementation of such change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind the change made in the level of review of arbitrators' advisory opinions in adverse actions and will have the arbitrator's advisory opinion in the matter of Mr. Darrell Douglas, Sr., reviewed by the appropriate Regional Commissioner.

WE WILL notify the National Treasury Employees Union, Chapter 27, of any intended change in the processing of arbitrators' awards and upon request, meet and confer, to the extent consonant with law and regulations, on the impact and implementation of such change.

Dated: _____ By: _____
Commissioner, Internal Revenue
Service

Dated: _____ By: _____
District Director, Cincinnati
District Office

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Federal Office Building, 230 S. Dearborn Street, Chicago, Illinois 60604.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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 In the Matter of :
 :
 DEPARTMENT OF THE TREASURY :
 INTERNAL REVENUE SERVICE :
 DISTRICT OFFICE CINCINNATI :
 :
 Respondent : Case No. 53-09485(CA)
 :
 and :
 :
 NATIONAL TREASURY EMPLOYEES :
 UNION, NTEU, CHAPTER 27 :
 :
 Complainant :

THOMAS ANGELO, Esquire
 Suite 1101
 1730 K Street, N.W.
 Washington, D.C.
 For Complainant

KENNETH DALE, Esquire
 Regional Counsel
 IRS Central Region
 P.O. Box 2059
 Cincinnati, Ohio
 For Respondent

Before: SAMUEL A. CHAITOVITZ
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on December 8, 1977 by the Regional Administrator for Labor-Management Service Administration, Chicago Region, a hearing was held before the undersigned in Washington, D.C.

This proceeding was initiated under Executive Order 11491, as amended, (herein called the Order), by the filing

of a complaint by National Treasury Employees Union, NTEU Chapter No. 27 (herein called Complainant or NTEU) against Internal Revenue Service, Cincinnati District Office of the Treasury Department (herein called IRS Cincinnati District Office or Respondent). The complaint, which was filed on December 6, 1976, alleged that Respondent violated Sections 19(a)(1) and (6) of the Order by instituting and implementing a change in an advisory arbitration procedure without first giving the Complainant notice of the intended change and an opportunity to bargain about the change.

All parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. 1/ Thereafter the parties filed briefs which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the stipulation, testimony and evidence adduced at the hearing, I make the following Recommended Findings of Fact, Conclusions of Law and Order:

Findings of Fact

1. At all times material herein NTEU Chapter 27 was the exclusive collective bargaining representative of a unit composed of all professional and non-professional employees of the Cincinnati District of the Internal Revenue Service.

2. Prior to September 9, 1974 the Civil Service Regulations provided for appeals methods for employees suffering adverse actions. One such method was direct appeal to the Civil Service Commission. The second method was to appeal through the internal agency procedures.

3. The Internal Revenue Service regulations which existed prior to September 9, 1974 provided that a District Director's adverse action could be appealed to a hearing examiner who would issue an advisory opinion which would be reviewed by the Regional Commissioner. The regulations provided further that if the Regional Commissioner adopted the advisory decision or modified it in favor of the employee,

1/ An Affidavit of Charles Fergenbaum and an attachment to it have been jointly submitted by the parties. The Affidavit and attachment are hereby made a part of the record herein and are hereby marked as Joint Exhibit No. 3.

the decision was a final one within the agency. If the advisory opinion was rejected by the Regional Commissioner it would be referred to the Director of Personnel for the Internal Revenue Service.

4. In Multidistrict Agreements 1 and 2, the parties negotiated an arrangement whereby an impartial arbitrator mutually selected was substituted in the above described procedures for the hearing examiner. The arbitrator's award was also advisory and was treated in the same manner as had decisions rendered by hearing examiner; that it was reviewed by the Regional Commissioner.

5. Executive Order 11787 became effective on September 9, 1974. It abolished agency procedures for processing appeals from adverse actions. In implementing Executive Order 11787, the Civil Service Commission held that collective bargaining agreements containing advisory arbitration procedures would not be affected, except that such provisions could not be contained or continued in contracts negotiated after September 9, 1974. The Civil Service Commission also held that the 15 day time limit for appealing adverse actions to the Civil Service Commission would not be stayed for employees to appeal adverse actions to the Civil Service Commission after arbitration.

6. Multidistrict Agreement 2 was negotiated in August of 1974 and was within the meaning of the ruling of the Civil Service Commission as a contract negotiated before September 9, 1974.

7. On October 7, 1974 a meeting was held between NTEU and IRS representatives. NTEU was represented by its President Vincent Connery and its General Counsel Robert Tobias. IRS was represented by Chief of the Labor Relations Brandon Hastings and Chief of the IRS' Conduct and Appeals Section of the Labor Relations Branch, Personnel Division Lucille H. Smoot, as well as other IRS representatives. At the meeting the parties discussed how the IRS was going to implement the change in "oral reply" procedures of disciplinary actions. 2/ The NTEU was advised that under the new

2/ Presumably the change was instituted to conform to new regulations issued by the Civil Service Commission that required that the person who initiated the adverse action be at a lower management level than the person who ultimately decided upon the action.

procedures the division chief would initiate the adverse action and the District Director would make the final decision. 3/ Mr. Tobias objected to these new "oral reply" procedures contending that they violated the spirit of the Civil Service Commission's regulations. At this meeting the parties did not discuss and the NTEU representatives were not advised of any new or proposed changes in the procedures for dealing with arbitrator's advisory opinions and they were not advised that an arbitrator's advisory opinion would now be reviewed by the District Director rather than the Regional Commissioner.

In arriving at the foregoing findings of fact with respect to the discussions that took place at the October 7, 1974 meeting, I credit the testimony of Robert Tobias rather than that of Lucille H. Smoot. I do this solely on the grounds that although both witnesses had gaps in their recollections, Mr. Tobias recollection of the conversations and occurrences that took place at the meeting seem to be clearer and more precise than Ms. Smoot's, whose recollections seemed somewhat less clear, less precise and more confused.

8. On February 7, 1975 District Director Dwight James took adverse action against Darrell Douglas, Sr., a member of the subject collective bargaining unit. NTEU invoked the advisory arbitration procedures.

9. The arbitrator's advisory opinion recommended that Mr. Douglas be reinstated. The advisory opinion was reviewed by Director James who rejected it and sustained the removal. The Regional Commissioner did not review or otherwise pass on the arbitrator's award.

Conclusions of Law

Respondent contends that the complaint in the subject case should be dismissed because it was brought against the wrong party. Respondent urges that the complaint was erroneously brought against the Cincinnati District Office of the IRS 4/ whereas the decision to change the level of

3/ Under the old procedures the District Director issued the letter of proposed adverse action, there was then an opportunity for an oral (or written) reply, and then the District Director would make the final decision as to whether the adverse action would be imposed.

4/ The Activity for which NTEU Local No. 27 was the collective bargaining representative.

review of an arbitrator's advisory opinion was made by the IRS national office. 5/ The foregoing analysis seems to ignore the fact that the Complainant, at the hearing, specifically stated that it was not contending that the Order was violated by the unilateral decision to change the level of review of an arbitrator's advisory opinion. Rather, NTEU is contending there was a failure to bargain, as required by the Order, with respect to the implementation and impact of the decision to change the level of review. Further there was no showing at the hearing that the Director of the District Office was without authority to bargain with NTEU Local No. 27 about the implementation and impact of the decision to change the level of review of an arbitrator's advisory opinion. Accordingly therefore, it is concluded that the complaint should not be dismissed because it named the wrong Respondent. 6/ Both parties agree that the unilateral decision by the IRS to change the level of review of an arbitrator's advisory opinion was not a violation of Section 19(a)(1) and (6) of the Order and this issue was not submitted to the undersigned for his consideration. Accordingly the undersigned does not reach this issue. However, nothing in the decision should be construed as a conclusion by the undersigned as to whether or not such a unilateral decision and change would constitute a violation of Section 19(a)(1) and (6) of the Order.

Respondent urges further that the complaint should be dismissed because there was no impact and there were no changes in working conditions as a result of the decision to change the level of review. Therefore Respondent had no obligation to give timely notice of the change or to bargain concerning the change's impact and implementation. This contention must be rejected however. Grievance and arbitration procedures have classically been considered working conditions and appropriate subjects for collective bargaining. This was clearly recognized in Section 13 of the Order which

5/ There was no recognition of NTEU as collective bargaining representatives at this level although there was a history of multi-unit bargaining and agreements.

6/ The Complaint named the "Internal Revenue Service Cincinnati District Office" as the "Activity and/or Agency." It is further concluded that the complaint named both the IRS and its Cincinnati District Office. Respondent contends that by omitting the "and" in the complaint the NTEU was confining itself to naming only the District Office. This contention is rejected as it seems to place too much weight on form and too little on the substance of the case.

provides that collective bargaining agreements shall contain grievance and arbitration procedures. Accordingly it must follow that any unilateral change in existing grievance and arbitration procedures would necessarily have an impact on the working conditions of employees. The subject change necessarily changed how and by whom arbitrators' advisory opinions in adverse actions would be reviewed. Such a change affects the very basis of a kind of arbitration procedure and therefore affects a very fundamental working condition.

In light of the foregoing it is concluded that the change in the level of review of an arbitrator's advisory opinion had an impact and effect on employees represented by NTEU Local 27. Because the decision to change the level of review did have an impact and effect on employees represented by NTEU Local No. 27; the IRS Cincinnati District Office was obliged to give NTEU Local No. 27 notice of the decision to make the change and, upon request, to meet and bargain with NTEU Local No. 27 concerning the implementation and impact of the impending change.

Based on the foregoing findings of fact it is concluded that neither NTEU Local No. 27, nor any of its representatives at any level were notified by representatives of the IRS National Office or Cincinnati District Office of the decision to change the level of review of an arbitrator's advisory opinion prior to NTEU's learning of it when the arbitrator's advisory opinion in the Douglas matter was reviewed by the District Director. This can hardly be considered timely and appropriate notice of a change so as to permit the complainant an opportunity to bargain about the impact and implementation of the change before it becomes effective.

Accordingly it is concluded that IRS Cincinnati District Office violated Sections 19(a)(1) and (6) of the Order by its failure to give NTEU Local No. 27 timely notice of the impending change.

Finally it is concluded that a status quo ante remedy is appropriate to cure the subject unfair labor practice. Apparently, due to the passage of time and the operation of Executive Order 11787, the parties no longer have advisory arbitration of adverse actions. A future undertaking to bargain about the impact and implementation of the change would therefore be meaningless.

In Department of the Navy, Pentagon, A/SLMR No. 924, the Assistant Secretary, although finding a violation of the Order based on a failure to bargain about the implementation

a "contracting out" decision refrained from ordering status quo ante relief. In so deciding the Assistant Secretary balanced the competing interests of the parties and concluded that "the potential disruption of Respondent's operations that would be created by such an order outweighs the need for a status quo ante remedy in this matter." Department of Navy, Pentagon, supra, at page 5.

In the subject case the record fails to indicate any "potential disruption of the Respondent's operation" if a status quo ante remedy were applied in the subject case.

Accordingly, the only meaningful remedy in the subject case is to require, the IRS, with respect to the Douglas grievance, to rescind its changed policy and to require the Regional Commissioner to review the arbitrator's advisory opinion.

An argument could be made that since the District Office committed the unfair labor practice, the remedial order must run against that organization and not its parent. However this argument must be rejected where a subsidiary organization commits the unfair labor practice and the only meaningful remedy available would be against the parent organization. After all, under the Order it is the "Agency" that has the ultimate responsibility for bargaining with the collective bargaining representative and the District Office and its officials are agents of the parent IRS and the IRS must be held accountable and responsible for the actions of its agents and subsidiaries. To hold otherwise would be to "draw artificial distinctions between organizational levels of such agency management..." and would clearly violate the spirit and aims of the Order as interpreted by the Federal Labor Relations Council in Naval Air Rework Facility, Pensacola, Florida, et al A/SLMR No. 608, FLRC No. 76A-37 (May 4, 1977).

Recommendation

Having found that Internal Revenue Service, Cincinnati District Office has engaged in conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order herein-after set forth which is designed to effectuate the policies of the Order.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulation, the

Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service and its Cincinnati District Office, Cincinnati, Ohio, shall:

1. Cease and desist from:

(a) Instituting any change in the method of processing advisory arbitration opinions with respect to employees represented exclusively by National Treasury Employees Union, Chapter 27, without first notifying National Treasury Employees Union, Chapter 27 and affording such representation the opportunity to meet and confer concerning the impact and implementation of such change.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Rescind the decision to change the level of review of arbitrator's advisory opinions with respect to adverse actions and to have the arbitrator's advisory opinion in the matter of Mr. Darrell Douglas, Sr., reviewed by the appropriate Regional Commissioner.

(b) Notify the National Treasury Employees Union, Chapter 27 of any intended change in the processing of arbitrator's awards, and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the impact and implementation of such a change.

(c) Post at its facility at the Internal Revenue Service, Cincinnati District Office, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary of Labor, in writing, within 30 days

from the date of this Order as to what steps have been taken to comply therewith.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: April 10, 1978
Washington, D.C.

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change the procedures for handling advisory arbitration opinions without notifying the exclusive bargaining representative, the National Treasury Employees Union, Chapter 27, and affording such representative the opportunity to meet and confer to the extent consonant with the law and regulations on the implementation and impact of such change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce over employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind the change made in the level of review of arbitrators' advisory opinions in adverse actions and will have the arbitrator's advisory opinion in the matter of Mr. Darrell Douglas, Sr., reviewed by the appropriate Regional Commissioner.

WE WILL notify the National Treasury Employees Union, Chapter 27, of any intended change in the processing of arbitrator's awards and upon request, meet and confer in good faith on the impact and implementation of such changes.

Agency or Activity

Dated: _____ By: _____
(Signature)

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.

SAC:yw

August 30, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF SECOND SUPPLEMENTAL DECISION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF STATE,
PASSPORT OFFICE,
CHICAGO PASSPORT AGENCY,
CHICAGO, ILLINOIS
A/SLMR No. 1108

On August 11, 1976, the Assistant Secretary issued his Decision and Direction of Election in the above-captioned case finding that the petitioned for unit was appropriate for the purpose of exclusive recognition under the Order. Thereafter, on March 4, 1977, the Federal Labor Relations Council (Council), before determining whether to accept or deny the Activity's petition for review in the instant case, remanded the subject case to the Assistant Secretary for clarification in light of the principles enunciated by the Council in its consolidated DCASR decision.

On November 7, 1977, the Assistant Secretary issued a Supplemental Decision and Remand finding that the record did not provide an adequate basis upon which to make affirmative determinations regarding effective dealings and efficiency of agency operations as required by the Council. Accordingly, he remanded the case to the appropriate Regional Administrator for the purpose of reopening the record to secure additional evidence, including evidence regarding seven specific factors relating to effective dealings and efficiency of agency operations.

Under all of the circumstances of this case, including the rationale and finding contained in A/SLMR No. 697 with regard to the employees in the claimed unit sharing a clear and identifiable community of interest, the Assistant Secretary reaffirmed the previous finding that the petitioned for unit was appropriate for the purpose of exclusive recognition under the Order. In reaching this determination, the Assistant Secretary weighed what he considered to be valid considerations as to whether the proposed unit would promote effective dealings. In his view, the fact that personnel and labor relations policies are established at the Headquarters level is outweighed by the personnel authority given to, or effectively recommended by, the Agent-In-Charge (AIC) at the petitioned for Activity level unit. In this regard, it was noted that the AIC had been delegated substantial authority in matters concerning local working conditions and that in certain other matters, where specific personnel authority had not been delegated down to the

Activity level, his personnel action recommendations concerning such matters had been adopted, with few exceptions, by Headquarters. Thus, the Assistant Secretary found that bargaining at the Activity level over matters of particular concern to employees at that level, including other personnel matters effectively recommended by the AIC, will promote effective dealings. In addition, the Assistant Secretary, noting that the concentration of negotiation expertise at the Headquarters level and the current lack of such expertise at the Activity level was not expected to change regardless of the type of unit found appropriate, found that when the need arises such expertise would be provided by the Headquarters to the Activity level and that such an arrangement may result in less overtime and cost to the Agency since the certification of activitywide units will alleviate the possible need to negotiate both a master and supplemental local agreements.

With regard to efficiency of agency operations, the evidence established that travel costs for the Agency's negotiating team could be less for the petitioned for unit than for a nationwide unit, no unusual labor relations training costs would be incurred, and additional labor relations staff would not be required. Moreover, the Agency has currently two other exclusively represented bargaining units and did not allege that such recognitions have failed to promote the efficiency of its operations.

Finally, the Assistant Secretary noted that the Activity and similarly situated offices are the only organizational level in the Passport Office below the National Office level and can be compared to regional offices in other agencies. In this regard, he stated that although the finding of a nationwide unit in all cases would result in reduced fragmentation, such a determination, based on reduced fragmentation alone, was, in his view, inappropriate and would not effectuate the purposes of the Order, where, as here, a bargaining unit of employees in an organizational entity immediately below the national level fully meets each of the three criteria of Section 10(b) and would be deemed appropriate.

Accordingly, the Assistant Secretary reaffirmed the decision in A/SLMR No. 697.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF STATE,
PASSPORT OFFICE,
CHICAGO PASSPORT AGENCY,
CHICAGO, ILLINOIS

Activity

and

Case No. 50-13100(RO)
A/SLMR No. 697
FLRC No. 76A-147
A/SLMR No. 929

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3671

Petitioner

SECOND SUPPLEMENTAL DECISION

On August 11, 1976, the Assistant Secretary issued his Decision and Direction of Election in the above-captioned case in 6 A/SLMR 448, A/SLMR No. 697 (1976), finding that the petitioned for unit was appropriate for the purpose of exclusive recognition under the Order. 1/ Thereafter, on March 4, 1977, the Federal Labor Relations Council (Council), before determining whether to accept or deny the Activity's petition for review in the instant case, remanded the subject case to the Assistant Secretary for clarification in light of the principles enunciated by the Council in its consolidated Defense Supply Agency, Defense Contract Administration Services Region (DCASR) decision. 2/

1/ Pursuant to the Decision and Direction of Election in A/SLMR No. 697, a Certification of Representative was issued to the American Federation of Government Employees, AFL-CIO, Local 3671.

2/ Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, FLRC No. 75A-14; Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, FLRC No. 75A-128; and Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District, (DCASD) Seattle, Washington, FLRC No. 76A-4.

Thereafter, on November 7, 1977, the Assistant Secretary issued a Supplemental Decision and Remand in A/SLMR No. 929 (1977), finding that the record did not provide an adequate basis upon which to make affirmative determinations regarding effective dealings and efficiency of agency operations as required by the Council. Accordingly, he remanded the case to the appropriate Regional Administrator for the purpose of reopening the record to secure additional evidence, including evidence regarding seven specific factors relating to effective dealings and efficiency of agency operations. A hearing subsequently was held before Hearing Officer B. W. Hogancamp. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject case, including the facts developed at both hearings in this matter, and the briefs filed by the Activity and the American Federation of Government Employees, AFL-CIO, Local 3671, the Assistant Secretary finds:

The Department of State, hereinafter called Agency, has consistently asserted in the proceedings involved herein that the petitioned for unit is not appropriate for the purpose of exclusive recognition because it would not promote effective dealings and efficiency of agency operations. It contends that the only appropriate unit would include all eligible employees of the Agency. In the alternative, the Agency indicated that it would accept, as appropriate, a unit consisting of all eligible employees in the Passport Office of the Agency.

For the purpose of developing a complete record and one which would allow a careful and thorough analysis of evidentiary considerations regarding the effective dealings and efficiency of agency operations criteria, the Assistant Secretary, in his Supplemental Decision and Remand, indicated that evidence should be developed concerning, but not limited to, the below noted seven specific factors. The following evidence in this regard was received:

1. The past collective bargaining experience of the Activity and Agency.

There has been no history of bargaining within the Chicago Passport Agency, hereinafter called Activity; however, the record discloses that within the Agency there are two Civil Service employee bargaining units. One unit is located in the School of Language Studies of the Foreign Service Institute in the Washington, D.C., area, and consists of approximately 180 General Schedule (GS) excepted service language instructors. Two agreements have been negotiated for this unit since exclusive recognition was granted in 1971. The other unit is in the Publishing and Reproduction Branch of the Bureau of Administration, located in Washington, D.C., and consists of approximately 125 Wage Grade (WG) and GS employees. One agreement has been negotiated for this unit since exclusive recognition was granted in 1971.

2. The locus and scope of authority of the responsible Personnel Office administering personnel policies with regard to employees in the claimed unit.

The Agency's Bureau of Personnel establishes personnel policy for all employees of the Agency and has final administrative authority over personnel actions for Passport Office employees. At the Activity level, an Agent-In-Charge, hereinafter called AIC, implements personnel policies and makes recommendations on personnel actions which are forwarded to the Agency's Bureau of Personnel for approval. According to the Agency, if the unit sought were found to be appropriate for the purpose of exclusive recognition under the Order, no change in the delegation of authority in personnel matters is contemplated.

3. The limitations, if any, on the negotiation of matters of critical concern to employees in the claimed unit, and how these concerns differ from other employees of the Agency.

The record reveals that the Activity's AIC exercises discretionary authority in matters concerning such local working conditions as when employees have their work breaks and lunch periods, employees' starting and quitting times, scheduling employees' annual leave, and procedures for rotating the Duty Officer assignment. In other personnel matters, such as promotions, overtime, travel, awards, hiring at the GS-7 level and below, formal discipline, layoffs, training, and position descriptions, the Activity's AIC forwards his recommendation to the Bureau of Personnel for approval. Although final approval for personnel actions is with the Bureau of Personnel, the evidence establishes that since March 1976, of the approximately 50 personnel action recommendations forwarded by the Activity's AIC, all were adopted; and in the past nine years, 96 percent of such recommendations have been adopted.

4. The availability of personnel with expertise in labor relations matters at the level of the claimed unit in comparison to that of a more comprehensive unit.

Labor relations personnel, located in the Bureau of Personnel in Washington, D.C., are authorized to handle all labor relations matters for the Agency's Passport Office. The Agency indicates that no labor relations personnel would be assigned to the Activity if the unit sought were found to be appropriate. Further, the labor relations staff would not be increased if the petitioned for unit, or a nationwide unit, were found to be appropriate.

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5. The level at which labor relations policy is set in the Activity and Agency, and the effectuation of Agency training in the implementation of negotiated agreements and grievance procedures covering employees in bargaining units as compared with the claimed unit and/or a more comprehensive unit.

Labor relations policy for the entire Passport Office is established by the Agency's Deputy Under-Secretary for State for Management. According to the Agency, the AIC of an Activity level Passport Office would receive labor relations training in implementing and administering a negotiated agreement regardless of whether the claimed unit, or a nationwide unit, were found to be appropriate. In this connection, the record reveals that during the past year the Activity's AIC has taken two labor relations courses provided by the Civil Service Commission.

6. Benefits to be derived from a unit structure which bears a relationship to the operational and organizational structure of the Agency.

A nationwide unit would result in a uniform policy nationally, and the potential for inconsistencies among the Activity level offices regarding local issues would be less in a unit structure which followed the centralized operational and organizational structure of the Agency. However, an Activity level unit could handle local personnel problems more expeditiously and possibly alleviate the need for supplemental local agreements which the parties could deem necessary if the nationwide unit were found to be the only appropriate unit.

7. Impact of the claimed unit on Agency operations in terms of cost, productivity and use of resources, as compared to the impact of a more comprehensive unit.

Agency costs involved in negotiating in the claimed unit could be less than those involved in negotiating in a nationwide unit urged by the Agency. In this regard, Headquarters labor relations personnel would travel to Chicago to negotiate an agreement for the claimed unit, whereas for a nationwide unit, the AICs of the Activity level offices might have to travel to Washington, D.C., as part of the Agency's negotiating team. In the case of a nationwide unit, additional travel by Agency personnel to the field might be necessary in order to negotiate local supplemental agreements to the national negotiated agreement. With respect to the costs of labor relations training, the AICs would receive such training regardless of which type of unit is found to be appropriate, as the record reveals that the Agency encourages the AICs to take such training as part of their management development.

Under all of the circumstances of this case, including the rationale and findings contained in A/SLMR No. 697 with regard to the employees in the claimed unit sharing a clear and identifiable community

- 4 -

of interest, and having given equal weight to the three criteria set forth in Section 10(b) of the Order, I reaffirm the previous finding that the petitioned for unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended. In weighing what I consider to be valid considerations as to whether the proposed unit would promote effective dealings within the Agency, as indicated above, I have considered, among other things, the locus and scope of personnel authority, limitations on the negotiation of matters of critical concern to employees at the level of the petitioned for unit, the availability of negotiation expertise, experience of this Agency in other bargaining units, and the level at which labor relations policy is set in the Agency. In my view, the fact that personnel and labor relations policies are established at the Headquarters level is, in the particular circumstances of this case, outweighed by the personnel authority delegated to the AIC at the petitioned for Activity level unit as well as the evidence of the effectiveness of his recommendations in personnel matters. In this regard, it is noted that the AIC has been delegated substantial authority in matters concerning local working conditions, such as starting and quitting times, break and lunch periods, procedures for rotating Duty Officer assignments, and the scheduling of employee annual leave. Further, in certain other matters such as promotions, overtime, travel, awards, hiring at the GS-7 level and below, formal discipline, layoffs, training, and position descriptions, where specific personnel authority has not been delegated down to the Activity level, it appears clear from the record that, with few exceptions, all personnel action recommendations forwarded by the Activity's AIC concerning such matters are adopted by Headquarters. Thus, in weighing the locus of personnel and labor relations authority in the Agency against the scope of such authority exercised or effectively recommended at the AIC level, I find that, under the circumstances of this case, bargaining at the Activity level over the many matters of particular concern to employees at that level will promote effective dealings.

Of course, in reaching my determination herein, I am not unmindful of the concentration of negotiation expertise at the Headquarters level and the current lack of such expertise at the Activity level. The record reveals, however, that regardless of whether a nationwide or an activitywide bargaining unit is found appropriate, the distribution of labor negotiation expertise is not expected to change and, if necessary, on occasions when the need arises such expertise will be provided by the Headquarters to the Activity level. In addition, from record testimony, it appears that the procedure of providing labor negotiation expertise to the Activity level may, in fact, result in less overtime and cost to the Agency with the establishment of activitywide units since the certification of such units will alleviate the possible need to negotiate both a master and supplemental local agreements. Additionally, it appears as part of the ongoing Agency training program, regardless of the unit found appropriate, AICs are receiving, and will continue to receive, labor relations training.

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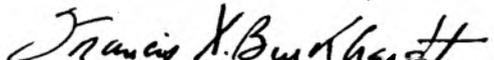
With respect to efficiency of agency operations, the evidence establishes that if the petitioned for unit is found appropriate, the travel costs for the Agency's negotiating team could be less than for a nationwide unit, no unusual labor relations training costs would be incurred, and additional labor relations staff would not be required. Moreover, the Agency has currently two other exclusively represented bargaining units and does not allege that such recognitions have failed to promote the efficiency of its operations. Accordingly, based on a balanced consideration of the stated factors, I find that the petitioned for unit meets the three criteria of Section 10(b) of the Order in that the employees in the petitioned for unit share a clear and identifiable community of interest and that said unit will promote effective dealings and efficiency of agency operations.

Left to be considered, however, is whether the petitioned for activitywide unit would be consistent with the policy of the Order of preventing and reducing fragmentation. The Activity herein is at an organizational level immediately below the National Office of the Passport Office, and the AIC in each of the 13 local offices, including the Activity, reports directly to the Director of the Passport Office, located in Washington, D.C. In point of reference, the Activity and similarly situated offices are the only organizational level in the Passport Office below the National Office level and can be compared to regional offices in other agencies. Although the finding of a nationwide unit in all cases will result in reduced fragmentation, in my view, such a determination, based on reduced fragmentation alone, is inappropriate and would not effectuate the purposes of the Order, where, as here, a bargaining unit of employees in an organizational entity immediately below the national level fully meets each of the three criteria of Section 10(b) and would be deemed appropriate.

Accordingly, under these circumstances, having given equal weight to the three criteria in Section 10(b) of the Order, I reaffirm the decision in A/SLMR No. 697 and find that the following unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All employees, including "temporary" and "seasonal" personnel, of the Department of State, Passport Office, Chicago Passport Agency, Chicago, Illinois, excluding management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, and supervisors as defined in the Order.

Dated, Washington, D. C.
August 30, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

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August 31, 1978

A/SLMR No. 1109

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, REGION VIII
REGIONAL OFFICE
A/SLMR No. 1109

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1802, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing the Complainant access to the materials utilized by a ranking panel in its evaluation of candidates for several merit promotion positions. The Complainant sought the information in connection with the processing of a grievance by an employee who had not been selected. The Respondent did furnish some material in response to the Complainant's initial request, but asserted that any further disclosure was barred by the Freedom of Information Act and the Privacy Act.

The Administrative Law Judge concluded that the Respondent was obligated to provide the information sought herein, which he found to be relevant and necessary to the performance of the Complainant's representational functions, and that its failure to provide such information was violative of Section 19(a)(1) and (6) of the Order. He further concluded that the documents initially supplied were of no value to the Complainant, and that the subsequent disclosure of additional information some eight months later did not constitute good faith compliance with the Executive Order.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations. In this regard, he noted particularly that the Federal Labor Relations Council (Council) has indicated that there are no statutory or regulatory prohibitions precluding disclosure of such material, in appropriate form, to an exclusive representative, and that a Federal Personnel Manual letter issued by the Civil Service Commission concerning such disclosure, among other things, instructed agencies to look to the Council's determination for guidance. The Assistant Secretary further noted that the Respondent's subsequent disclosure of additional information did not serve to cure the violation, particularly in view of the fact that the Respondent's failure to provide the information, in effect, precluded the Complainant from intelligently processing the grievance through the negotiated grievance/arbitration procedure. Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the violative conduct found herein, and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, REGION VIII
REGIONAL OFFICE

Respondent

and

Case No. 61-3763(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1802, AFL-CIO

Complainant

DECISION AND ORDER

On June 8, 1978, Administrative Law Judge Steven E. Halpern issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

The Administrative Law Judge found, and I agree, that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to provide information which was necessary and relevant to the Complainant in the performance of the latter's representational functions in connection with the processing of a grievance concerning the exclusion of an employee

from a promotion eligibility list. 1/ In reaching this conclusion, the Administrative Law Judge found that the materials which were initially furnished by the Respondent in response to the Complainant's request for the "promotion package" for the vacancy announcement were essentially of no value. He further found that the Complainant was entitled to additional information contained in the promotion package (which the Respondent refused to provide because of alleged statutory prohibitions) as such evaluation materials utilized in the course of the selection process are necessary and relevant for the processing of such a grievance as is at issue herein. I agree. 2/

In this connection, it is noted that in Department of Defense, State of New Jersey, 3 FLRC 284, FLRC No. 73A-59 (May 22, 1975), the Federal Labor Relations Council stated that:

"... applicable laws and regulations, including policies set forth in the Federal Personnel Manual, do not specifically preclude the Respondent from disclosing to the grievant (or his representative), in the context of a grievance proceeding, certain relevant and necessary information used by the evaluation panel in assessing the qualifications of the...candidates for appointment."

It is further noted that the Civil Service Commission has indicated in FPM Letter 711-126 3/, Section 4-Official Personnel Folder and Section 5-Performance Appraisals, that properly sanitized personnel forms and performance appraisals may be made available to an employee or his union representative, and advises agencies to look to FLRC No. 73A-59, cited above, for guidance on disclosure of other personnel records pertaining to the promotion process.

Under these circumstances, I find that the promotion package sought by the Complainant should have been supplied in appropriate form, and

1/ The Respondent did not except to the Administrative Law Judge's finding that Section 19(d) of the Order did not preclude consideration of this matter under the unfair labor practice procedures of the Order.

2/ See Department of the Navy, Long Beach Naval Shipyard, Long Beach, California, 6 A/SLMR 541, A/SLMR No. 728 (1976), and Department of the Treasury, Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin, A/SLMR No. 974 (1978)

3/ "Guidance for Agencies in Disclosing Information, Covered Under the Freedom of Information Act and the Privacy Act, to Labor Organizations Recognized Under Executive Order 11636 and 11491, as Amended" (December 30, 1976).

that the Respondent's failure to do so was violative of the Order.

Moreover, I do not view the Respondent's subsequent disclosure of additional information at the hearing in this matter, and its indication that other materials would be forthcoming, as curing the violation found herein. Thus, in agreement with the Administrative Law Judge, I find that compliance with an exclusive representative's request for necessary and relevant information must occur in such a manner that the exclusive representative's representational rights under the Executive Order are not prejudiced. In my view, the Respondent's belated offer to provide the requested information to the Complainant did not serve to cure its violative conduct eight months earlier, which, in effect, had precluded the Complainant from intelligently pursuing the instant grievance through the parties' negotiated grievance/arbitration procedure. 4/

Accordingly, by refusing to provide, in a timely manner, the necessary and relevant information sought by the Complainant herein, I find that the Respondent violated Section 19(a)(1) and (6) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education and Welfare, Region VIII Regional Office, shall:

1. Cease and desist from:

(a) Refusing to permit the American Federation of Government Employees, Local 1802, AFL-CIO, the employees' exclusive representative, access to such documents and materials as are necessary and relevant to such representative's processing of a grievance regarding the selection process for any vacancy for which a vacancy announcement is posted.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

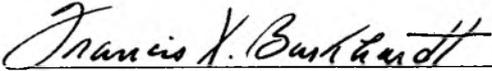
(a) Post at each of its facilities at which employees represented by the American Federation of Government Employees, Local 1802, AFL-CIO

4/ I make no finding as to whether the material supplied by the Respondent at the hearing, or offered thereafter, would have fulfilled its obligation if it had been timely supplied.

are employed, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Director, Department of Health, Education and Welfare, Region VIII and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Regional Director shall take steps to ensure that notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
August 31, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to permit the American Federation of Government Employees, Local 1802, AFL-CIO, the employees' exclusive representative, access to such documents and materials as are necessary and relevant to such representative's processing of a grievance regarding the selection process for any vacancy for which a vacancy announcement is posted.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Federal Office Building, Room 2200, 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 600
San Francisco, California 94105



REPLY TO SAN FRANCISCO
AREA CODE 415 556-0555

In the Matter of

DEPARTMENT OF HEW, REGION VIII
REGIONAL OFFICE

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES (AFGE)
LOCAL 1802, AFL-CIO

Complainant

CASE NO. 61-3763(CA)

Kenneth Bull
National Representative
American Federation of Government Employees
5001 South Washington
Englewood, Colorado

For the Complainant

Joseph Ronan, Jr.
Assistant Attorney
Grover Sherman
Labor Relations Officer
Department of Health, Education
and Welfare
Federal Office Building
1961 Stout Street
Denver, Colorado

For the Respondent

Before: STEVEN E. HALPERN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

STATEMENT OF THE CASE

This proceeding under Executive Order 11491, as amended, was initiated by Complaint filed October 5, 1977, with an amended Complaint having been filed January 6, 1978. Pursuant to Notice of Hearing issued on January 30, 1978, by the Regional Administrator, United

States Department of Labor, Labor-Management Services Administration, Kansas City Region, a hearing was held at Denver, Colorado, on March 1, 1978. Thereafter the parties filed supplemental materials and briefs; the record closed on April 27, 1978, upon receipt of the Respondent's brief.

Respondent is charged with having violated Section 19(a)(1) and (6). The factual basis on which the Complaint is premised is set forth therein as follows:

In order to process a grievance filed by a member of the bargaining unit, AFGE Local 1802 requested information regarding a promotion action. The information was necessary primarily to determine if a grievance actually existed. The name of the grievant is Willie McWashington. The Civil Service Commission issued FPM letter 711-126 Dec. 30, 1976, in which it authorized Agencies to process information to Exclusive Representatives as a routine user of information normally protected under the Privacy Act. Instead of processing the desired information under the routine user concept, management decided to process the information as a part of the Freedom of Information which does not provide the same information as would have been provided as a routine user. In fact, under the Freedom of Information act, the Union obtains very little information as it is designed only to protect the public's right to know. The routine user concept comes as a matter of right under E.O. 11491 as amended. The Union is estopped from pursuing the grievance to arbitration as it does not have sufficient information upon which to proceed.

The parties have been afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses, to make oral argument and to file briefs. Based upon the evidence of record, having observed the witnesses and assessed their credibility and having considered the arguments of the parties, I make the within findings, conclusions and recommendation.

FINDINGS OF FACT

1. Complainant Union, has, and at all times material hereto had, exclusive recognition as representative of the bargaining unit of which the grievant hereinbelow referred to was a member.

2. In response to a Vacancy Announcement issued by Respondent, Mr. Willie McWashington, then a member of the bargaining unit, filed application for the position of Contact Representative, GS-962-4/5/6.

3. Following Respondent's review and evaluation of the qualifications of the applicants a "Best Qualified" list was prepared on which appeared the names of those applicants determined to be eligible for the seven existing vacancies; five names, not including Mr. McWashington's, appeared on the list.

4. Non-inclusion on said list being a grievable matter a grievance was duly filed, in which action Complainant Union represented Mr. McWashington.

5. Having been unsuccessful through the last step of the established grievance procedure prior to arbitration the union, by letter of July 18, 1977, (Ex. M-4) made the following request of Respondent:

In order for the grievant to make a rational decision whether to accept your response or pursue the grievance to arbitration, we hereby request the promotion package for Announcement No. 77-1, Contact Representative, GS-962-4/5/6. Promotion packages are available to the Union as a routine user per FPM Ltr, 711-126, dated December 31, 1976.

6. Respondent did not furnish the promotion package but instead referred the matter to its department of Public Affairs and on August 4, 1977, the Director of that department responded to the Union's request as follows: (Ex. M-2)

Your memo to the Acting Regional Director (dated July 18, 1977) regarding a grievance filed by Willie McWashington was referred to this office because the request falls under the provisions of the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act, (5 U.S.C. 552a).

In your memo you requested "the promotion package for Announcement No. 77-1, Contact Representative, GS-952-4/5/6."

Records and documents bearing on your request are enclosed. We are withholding from you copies of complete SF-171s on individuals

under the authority of 5 U.S.C. 552(b)(6) which permits agencies to withhold from the public "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Under the same exemption, certain deletions have been made from the records and documents being provided you. These include deletions of Social Security numbers, home addresses and telephone numbers, and (in some cases) other identifying information.

You have the right to appeal this determination within 30 days of your receipt of this letter (5 U.S.C. 552(a) and 45 CFR, Part 5, Subpart G.). Any appeal must be in writing and should be addressed to:

Assistant Secretary for Management and Budget
Department of Health, Education, and Welfare
200 Independence Avenue, S.W.
Washington, D.C. 20201

Any such appeal should follow the procedures outlined in Subpart G of the enclosed regulations. You should mark the envelope "Freedom of Information Appeal." (emphasis supplied)

7. Being dissatisfied with the information furnished, 1/ Complainant, in accordance with the foregoing

1/ Pursuant to a ruling made at hearing Complainant subsequently supplied some (but not all) of the materials initially furnished to it by Respondent pursuant to its original request for the promotion package. Said materials, consisting of 10 pages, together with Complainant's cover letter are received in evidence as Exhibit U-8.

Respondent has neither commented on these items nor supplemented them; accordingly I assume that they are representative of all the materials originally furnished to Complainant and I find that they are essentially of no value in determining whether or not Mr. McWashington was fairly rated in relation to the other applicants or whether his application was properly rated in relation to the evaluation criteria.

instructions, by letter of August 16, 1977, to the Assistant Secretary for Management and Budget, took the following action: (Ex. M-3)

SUBJECT: Freedom of Information Act Appeal

During the process of representing a grievant, by memorandum dated July 18, 1977 I requested under FPM Ltr 711-126 dated 12/21/76 the promotion package for Announcement No. 77-1, Contact Representative, GS-962-4/5/6, (7 vacancies). The FPM Ltr designates the Union as a "routine user" and states that "neither the language of the Act, nor its legislative history, establish that Congress intended to preclude disclosure to recognized labor organization of relevant and necessary information under the Federal Labor-Management Relations Program."

The Labor Relations Officer, on his own initiative, requested the subject promotion package under the FOIA. Subsequently, I received the following documents:

- Candidate Referral Notice (names deleted)
- Ranking Sheet (names deleted)
- Weight & Factor Sheet for each applicant (names deleted)
- Appraisal for each applicant (names and ratings (on some) deleted)
- 1st page of SF-171 for a few applicants (identifiable factors deleted)
- SSA-4100 for a few applicants (identifiable factors deleted)

The agency omitted form SF-171 under 5 U.S.C. 552 (b)(6) which according to them "permits agencies to withhold from the public 'personnel... files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy'." (See copy of agency ltr attached and Federal Times article re Judge Gerhard Gesell's decision.) Also note that as the "loser's" representative I was denied the complete promotion package of the seven selectees.

The Union contends it is not the general public and that it was the intent of Congress to include promotion packages in the General Per-

sonnel Records System. To uphold this agency's interpretation of the FOIA would, in effect, deny to the Union an essential element to efforts of employees and their representatives to obtain justice in cases involving grievances and appeals.

Local 1802, AFGE, requests that the promotion package for Announcement No. 77-1, Contact Representative GS-962-4/5/6 be provided the Union to the fullest extent permitted by law.

8. Because of an apparent time limitation in proceeding to arbitration Complainant, on August 12, 1977, wrote the following to the Special Assistant to Respondent's Acting Regional Director: (Ex. U-2)

In view of the fact that there is no way I can determine whether there is valid grievance with the material that has been given to me in accordance with our request as a routine user under FPM Letter 711-126, I request an indefinite extension of time from receipt of the third-step decision within which to refer the subject grievance to arbitration.

The Union believes you have incorrectly applied the FOIA. We object very strenuously to your unilaterally invoking the FOIA, first, because it was not required since we are not in the category of the general public, and second, because it is not a part of FPM 711-126.

An FLRC decision which precedes FPM 711-126 states the Union has a right to see promotion packages under the Executive Order in order to process grievances. The Civil Service Commission has the right to determine who is a routine user. FPM 711-126 declares the Union to be a routine user under the Privacy Act. Since we are not in the category of the general public and the FOIA has nothing to do with FPM 711-126 rights under the Executive Order, your invocation of the FOIA denies us an essential element which is our right. We again ask for the promotion package as a routine user under FPM 711-126.

Because of the pending grievance, in order to protect the rights of the grievant, it is

imperative that the Union receive the promotion package or written basis for its denial within two weeks.

9. By letter of August 18, 1977, Complainant's request for an extension of time was denied and Respondent's position that it was properly processing the request for information was reiterated: (Ex. U-3).

We find that our actions are consistent with our responsibilities under FOIA and the Privacy Act, and that the information released was in accordance with FPM Letter 711-126. As you are aware, you may appeal our decision in this matter under the provisions of the FOIA.

I cannot agree to any extension of the time limit for proceeding to arbitration on Mr. Mc Washington's grievance. We considered the grievance carefully at each level and we provided you information concerning the promotion package (in accord with our perception of FOIA requirements) 2/ in good faith. While I understood that you would like more information, we can only release what we believe to be appropriate under FOIA. 3/ Our contract provides for arbitration when the parties fail to resolve matters of this nature. It should be noted that the final decision (my memo of July 29, 1977) responded to the questions raised by the grievance. Mr. Mc Washington was concerned that specific portions of his experience, education, and training were overlooked. My personal inquiry determined that all three elements had been considered. The whole point in this matter is that the grievant is dissatisfied with the result of the panel's work and my determination. I have answered the questions about what was considered by the panel (as regards the grievant). Any further questions must be resolved through a review of our work in examining the questions raised and the responses provided. If you find these procedures wanting, you must proceed as you see fit.

2/ Emphasis supplied.

3/ Emphasis supplied.

10. On August 23, 1977, the union filed a pre-complaint charge of an unfair labor practice based upon Respondent's failure to furnish the promotion package. In its October 19, 1977, reply thereto Respondent indicated that a HEW Headquarters decision on the Union's FOIA appeal "is expected very soon and we will abide by that decision." (Ex. U-4)

11. Not until March 1, 1978, at the hearing in this matter, was Complainant given any indication of the status of its FOIA "appeal". At that time counsel for Respondent advised that certain additional information would be released, and placed in the record as evidence thereof summaries of information apparently derived from the Standard Forms 171 of the five successful applicants. (Ex. M-4).

12. Not until March 14, 1978, was Complainant officially advised of the disposition of its August 16, 1977, FOIA "appeal" and of its right to appeal the agency's final action to the district court, (attachment 2 of Respondent's brief). It appears that Respondent now stands ready to furnish a substantial portion of the materials originally requested.

13. It further appears that the grievance filed on behalf of Mr. McWashington has long since been withdrawn because of his "departure" to accept employment with another Federal Agency.

CONCLUSIONS

The central issues herein arise out of Complainant Union's request for certain information to assist in its representation of a grievant and Respondent's failure to provide that information in view of privacy considerations.

The precepts controlling the resolution of the issues thus raised are evolved in a line of cases extending from major policy issue decisions of the Council in National Labor Relations Board and David A. Nixon, FLRC No. 73A-53 (October 31, 1974) and Department of Defense, State of New Jersey and National Army and Air Technicians Association, I.U.E., AFL-CIO, FLRC No. 73A-59 (May 22, 1975) through recent decisions of the Assistant Secretaries in Department of the Treasury, Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin, A/SLMR No. 974 (January 27, 1978) and Internal Revenue Service, Chicago District Office, A/SLMR No. 1004 (March 9, 1978).

In its current status the case law in the Federal sector requires activity management to provide an exclu-

sive representative with information it seeks which is necessary and relevant for the performance of its representational functions; and evaluation materials utilized by the activity in the course of a selection process have been deemed necessary and relevant to the effective processing of a grievance which questions the selection process. The right to privacy of any individual whose records may thus be disclosed is considered satisfied by concealment of his/her identity and the removal from the records of any sensitive or damaging personal material - a so called "sanitizing" process.

Because of its possible applicability here, in view of the small number of individuals whose records are involved, I note that the Assistant Secretary has further found privacy considerations to be satisfied even when the identity of the individual cannot be concealed, so long as any sensitive or damaging personal material is omitted. In A/SLMR No. 1004, supra, the Assistant Secretary held as follows:

On July 29, 1976, Vacancy Announcement 76-79 was posted for a position as an Audit Accounting Aide, GS-4, in the Respondent's Waukegan, Illinois, facility. There were three applicants. Two were found to be highly qualified, and one of these two candidates, Ms. Bonita Howe, was selected. The Complainant requested the evaluation material considered by the ranking panel in the course of this selection. The request was made in connection with the Complainant's duty to represent the employees in the unit. The Respondent declined to supply the materials, as noted above, on the ground that since there were only two individuals involved, sanitization would not protect the privacy of the selected candidate. Subsequently, a grievance was filed by the Complainant on behalf of Ms. Fredericks pursuant to the parties' negotiated grievance procedure, the grievance was carried to the fourth step, and arbitration was then invoked.

In Department of the Treasury, Internal Revenue Service, Milwaukee, Wisconsin, A/SLMR No. 974 (1178), I found that an employee's right to privacy of his records must be balanced against the conflicting

rights in each case. And where, as here, the conflicting rights are broad and involve the paramount public interest of an exclusive representative's right to adequately perform its representational functions, of having the Federal government operate within its merit promotion system equitably, and of encouraging the use of non-disruptive grievance procedures, I have determined that the mere identification of the subject of certain documents is not a violation of privacy so significant as to bar disclosure of the material and that the identified employee(s) would still have the right to have the documents sanitized so as to omit any sensitive or damaging personal material.

Under these circumstances, I conclude that the information sought herein, which I find to be necessary and relevant to the performance of the Complainant's representational function, should have been disclosed to the Complainant. Accordingly, by refusing to make available to the Complainant the evaluation material used in connection with the selection for promotion made pursuant to Vacancy Announcement 76-79, I find that the Respondent violated Section 19(a)(1) and (6) of the Order.

FREEDOM OF INFORMATION ACT AND PRIVACY ACT

Much attention has been devoted by the parties to Freedom of Information Act and Privacy Act considerations.

Complainant contends that as a Union it is a "routine user" and therefore is entitled to the requested information under the Privacy Act. Respondent concedes that Complainant Union is a "routine user" under the Privacy Act but asserts that the information requested was not reachable under that Act since it was not contained in a "system of records" as contemplated therein; and contends on the contrary that the Freedom of Information Act alone is controlling, under which the requested records may be disclosed only if such would not result in a "clearly unwarranted invasion of privacy."

Notwithstanding the several contentions of the parties it is evident from the aforementioned decision that

a resolution of the respective rights and obligations of the parties under said Acts is not determinative of the Unfair Labor Practice charged in this Executive Order proceeding. The decision of the Assistant Secretary in A/SLMR No. 1008, supra, was made upon a factual situation similar to the one in the instant case in the material particulars and must be viewed as having been decided under and subject to the various laws (regulations, et cetera) in existence at the time, bearing upon privacy considerations, which were likewise in existence at all material times in the instant case. Thus, in full contemplation of the implications of those various laws, the Assistant Secretary has in essence established that Complainant Union's right to information (relevant and necessary to its representation of a bargaining unit employee in a grievance proceeding) emanates from the Executive Order, and stands independent of rights arising under the Freedom of Information and Privacy Acts. Moreover, it is held that an activity which provides such information only pursuant to a FOIA request is in violation of the Executive Order. 5/

Insofar as other applicable regulations and laws, including the FOIA and Privacy Act, may have a prohibitory or restrictive effect, the activity in considering such must do so in a manner and within a time frame consistent with the Union's Executive Order status. Obviously in the case before me Respondent did not thus comport itself in that as a result of the procedures it employed in processing the request for information Complainant Union was foreclosed from effectively representing the grievant. The eight-month interval between Complainant's request for the records and the ultimate formal notification to the Union that (apparently) meaningful records would be furnished, patently is not reasonable; and, the ultimate determination to turn over the records to the Union, solely because the Freedom of Information Act required them to be furnished, is in denigration of Respondent's Executive Order rights.

FOIA COMPLIANCE

In addition to the materials originally supplied to Complainant under the provisions of the FOIA, Respondent now stands ready to produce additional materials it now concedes are disclosable under that Act.

5/ Department of the Treasury, Internal Revenue Service, Greenbars District Office, A/SLMR No. 1007.

Having reviewed a representative sampling of the data initially furnished I have found it to be of little if any use. Since I have been shown neither the entire promotion package requested by Complainant nor copies of all of the materials which Respondent now concedes must be supplied, I am unable to determine whether or not the latter constitute all of the materials to which Complainant is entitled under the Executive Order; nor is such determination required in this adjudication since the present disclosure of records, to whatever degree, some eight months after the request, is not timely and does not constitute good faith compliance with the Executive Order. This becomes most clear when viewed in the context that Complainant was time-barred from proceeding to arbitration from the third grievance step (for which purpose it required the requested records) and that Respondent refused to grant an extension of time pending final agency determination of Complainant's FOIA entitlement to records. Moreover, and of overriding significance, is that no disclosure whatsoever has been made or offered except under FOIA provisions; all Executive Order rights have been ignored. Certainly Complainant's request to be furnished with the information as a "routine user" constituted an assertion of its right to the information as a union generally, not only within the context of the Privacy Act but under the Executive Order as well, and no argument to the contrary has been made.

SECTION 19(d) bar-(grievance)

Respondent contends that Complainant is barred from pursuing this Unfair Labor Practice by section 19(d) of the Executive Order which in pertinent part provides that "Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures."

Respondent's failure to disclose the requested documents clearly was not the subject of the filed grievance. Complainant's request for the records made incidental to and in the course of a grievance proceeding does not bar it from raising the access issue in an unfair labor practice context. 6/

6/ Department of the Navy Long Beach Naval Shipyard, Long Beach, California, and American Federation of Technical Engineers, Local 174, A/SLMR No. 728. Internal Revenue Service and IRS, Atlanta District Office, A/SLMR No. 975.

Furthermore, Complainant having requested the records to assist in its determination of whether or not to proceed from grievance step 3 to arbitration, the grievance procedure, for all practical purposes, then ceased. Respondent having determined that it would deal with the request only under the Freedom of Information Act all further consideration of the request was made solely under the FOIA machinery. Respondent having caused the removal of the issue of Complainant's entitlement to the records from the grievance procedure to another forum cannot now be heard to assert this 19(d) defense.

SECTION 19(d) bar-(appeals procedure)

Respondent further contends that there was available, and that Complainant actually used, a FOIA appeals procedure 7/ in its attempt to secure the requested records, as a result of which it is barred from pursuing this Unfair Labor Practice action by that portion of section 19(d) which provides that "Issues which can properly be raised under an appeals procedure may not be raised under this section." For several reasons the defense fails.

First, it does not appear that the issue here presented, whether or not a violation of the Executive Order has taken place by Respondent's failure to produce the requested records, could properly have been raised under the FOIA appeals procedure. In any event Respondent, having asserted the defense, has not carried its burden of showing that such issue could properly have been raised. Stated from a slightly different perspective, Respondent having determined that the Union's only right to the requested records arose under the FOIA, (an act designed to give the public at large greater access to government records), denied the Union access to the requested records on the FOIA ground that their release would constitute an "unwarranted invasion of privacy" of

7/ Respondent does not appear to argue that Complainant is equally barred by an existing Privacy Act appeals procedure; such contention in any event would fail. Respondent at all times was adamant in its position that only the FOIA applied to the request; and, it expressly led Complainant to believe that the only avenue for appeal was under the FOIA. Under these circumstances I would estop Respondent from asserting any Privacy Act appeals procedure to constitute a 19(d) bar.

the individuals whose records were involved. Under Respondent's FOIA procedures that determination was appealable and the appeal was pursued. In no true sense did Complainant have the opportunity, in that "appeal", to litigate the issues of its right to have, and Respondent's obligation to supply, the data pursuant to the Executive Order.

Secondly, it is held as aforesaid that the furnishing of information to which a Union is entitled under the Executive Order, only pursuant to a FOIA request, is violative of the Executive Order. In my view, the interposition of an "appeal" which ultimately results in production of the requested data only pursuant to FOIA provisions, cannot alter that premise.

Question of Mootness

I find no merit in Respondent's contention that the grievant's subsequent acceptance of other Federal employment with the concomitant withdrawal of the grievance, moots the Unfair Labor Practice. I conclude on the contrary that such subsequent events do not vitiate its accountability for failure to give recognition to Complainant's status and the ULP action survives such subsequent events.

Under the circumstances, however, no useful purpose will be served by compelling Respondent presently to furnish the requested records and I shall not recommend to the Assistant Secretary that such affirmative action be required.

CONCLUSIONARY SUMMARY

In short, the treatment accorded the Union in regard to its request for information amounted to non-recognition of its representative status under the Executive Order. It is no defense to this Unfair Labor Practice action that there were laws of an ancillary nature which Respondent may have been bound to consider in connection with the Union's request, such consideration having been made by Respondent in a manner inconsistent with its Executive Order obligations and in derogation of Complainant's Executive Order rights.

Under these circumstances, I conclude that the information sought herein, being relevant and necessary to the performance of Complainant's representational function should have been disclosed to it. Respondent,

having failed to make said information available to Complainant, stands in violation of Section 19(a)(1) and (6) of the Order.

The Remedy

Having found that the Respondent has engaged in certain conduct prohibited by section 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Executive Order.

RECOMMENDED ORDER

Pursuant to section 6(b) of Executive Order 11491, and section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby Orders that the Department of HEW, Region VIII Regional Office, shall:

1. Cease and desist from:

(a) Refusing to permit the American Federation of Government Employees (AFGE) Local 1802, AFL-CIO, access to such documents and materials as are necessary and relevant to the American Federation of Government Employees Union's processing of a grievance regarding the selection process for any vacancy for which a Vacancy Announcement is posted.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

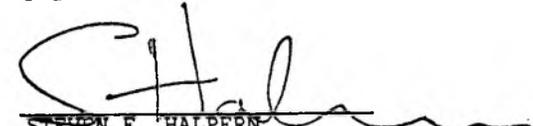
2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, permit the American Federation of Government Employees (AFGE) Local 1802, AFL-CIO, access to such documents and materials as are necessary and relevant to the American Federation of Government Employees Union's processing of a grievance regarding the selection process for any vacancy for which a Vacancy Announcement is posted.

(b) Post at each of its facilities at which employees represented by the American Federation of

Government Employees (AFGE) Local 1802, AFL-CIO are employed copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Director, DHEW, Region VIII and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Regional Director shall take steps to ensure that notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.


STEVEN E. HALPERN
Administrative Law Judge

Date: June 8, 1978
San Francisco, California

Enclosure: Appendix

SEH:tl

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to permit the American Federation of Government Employees (AFGE) Local 1802, AFL-CIO access to such documents and materials as are necessary and relevant to the American Federation of Government Employees Union's processing of a grievance regarding the selection process for any vacancy for which a Vacancy Announcement is posted.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, permit the American Federation of Government Employees (AFGE) Local 1802, AFL-CIO access to such documents and materials as are necessary and relevant to the American Federation of Government Employees Union's processing of a grievance regarding the selection process for any vacancy for which a Vacancy Announcement is posted.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 any employees have any questions concerning this Notice or compliance with any of its provisions, they may communi-

cate directly with the Regional Administrator of the Labor-Management Services Administration, United States Department of Labor, whose address is: Federal Office Building, Room 2200, 911 Walnut Street, Kansas City, Missouri 64106.

August 31, 1978

A/SLMR No. 1110

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ARMY AND AIR FORCE EXCHANGE
SERVICE, DEPARTMENTS OF THE
ARMY AND AIR FORCE
A/SLMR No. 1110

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1622, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by discharging Ms. Alice Dunn because of her activities on behalf of the AFGE.

The Administrative Law Judge found that the Respondent had not violated Section 19(a)(1) and (2) of the Order. In this regard, he found that the Respondent discharged Ms. Dunn because it believed she had engaged in improper conduct in connection with her work in the Respondent's jewelry department and not because of her union activities. Furthermore, he found that the record failed to establish any union animus on the part of the Respondent or that Ms. Dunn was treated any differently than employees who had not been active on behalf of the Union. Under these circumstances, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE
SERVICE, DEPARTMENTS OF THE
ARMY AND AIR FORCE

Respondent

and

Case No. 22-08477(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1622, AFL-CIO

Complainant

DECISION AND ORDER

On August 1, 1978, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-08477(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
August 31, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
 In the Matter of :
 :
 ARMY/ AND AIR FORCE EXCHANGE :
 SERVICE, DEPARTMENTS OF THE :
 ARMY AND AIR FORCE :
 :
 Respondent :
 :
 and :
 :
 AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES, LOCAL 1622 :
 :
 Complainant :

Case No. 22-8477(CA)

WILLIAM NAZDIN
 National Representative
 American Federation of Government
 Employees
 Star Route 3
 Box 135
 LaPlata, Maryland 20646
 For the Complainant

JAMES W. DeMIK, Esquire
 Associate General Counsel
 Army and Air Force Exchange Service
 3911 Walton Walker Boulevard
 Dallas, Texas 75222
 For the Respondent

Before: SAMUEL A. CHAITOVITZ
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on August 17, 1977 under Executive Order 11491, as amended (hereinafter called the Order) by American Federation of Government Employees,

Local 1622 (hereinafter called the Union or Local 1622 AFGE) against the Army and Air Force Exchange, Fort George G. Meade, Maryland (hereinafter called the Exchange, Activity or Respondent) a Notice of Hearing on Complaint was issued by the United States Department of Labor Regional Administrator for Labor Management Services for the Philadelphia, Pennsylvania, Region on February 2, 1978.

Basically the complaint alleged that the Activity violated Sections 19(a)(1) and (2) of the Order by discharging Ms. Alice Dunn because of her activities on behalf of the Union.

A hearing was held before the undersigned in Fort George G. Meade, Maryland. Both parties were represented and were afforded a full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Both parties were afforded an opportunity to argue orally and both parties briefs, which have been duly considered.

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

Findings of Fact

1. The Activity is a non-appropriated fund instrumentality of the United States Government and is basically a retail establishment. It is located on Fort George G. Meade and is part of the Washington Area Exchange.
2. On December 27, 1972 the Union was certified as the collective bargaining representative for a unit of certain employees of the Activity.
3. Alice Dunn was employed by the Activity on or about October 2, 1976 as a regular full time sales clerk and was, at all times material herein, a member of the collective bargaining unit represented by the Union.
4. Ms. Dunn was originally employed as a sales clerk in the ladies department but, by the end of 1976, was working as a sales clerk in the jewelry department.
5. As a sales clerk in the jewelry department Ms. Dunn's duties consisted, among other things, of selling, stocking, displaying and cleaning jewelry items ranging from inexpensive costume jewelry to real gold and diamond merchandise.

6. In February 1977 management changes were made at the Activity. Mr. Edward Robinson became the Exchange manager and as such he was responsible for entire operation of the Fort Meade Exchange, and Mr. Talley replaced Mrs. Witt as main store manager. Soon after taking over Mr. Robinson met with Mr. Joseph Smith, a security specialist from the Washington Area Office, concerning security problems.

7. In early April 1977 dishonesty was uncovered at a small cafeteria, Fiddler's Green. Nine individuals were involved, were turned over to the proper authorities, and, after making restitution, were permitted to resign.

8. At about the same time Mr. Smith indicated that there might be some security problem at the jewelry department.

9. During April 1977, the Activity was also undergoing a reevaluation and was apparently inquiring whether certain employees would voluntarily switch from lower graded full-time positions to high graded part-time positions. 1/ Ms. Dunn felt this was unwise and spoke to her fellow employees during breaks and lunch, in the exchange cafeteria and other non-work areas, trying to discourage them from voluntarily taking the part-time positions.

10. On or about April 19 representatives of the Union met with Activity representatives, including Exchange manager Robinson and store manager Talley and discussed the reorganization. During this conversation Union President Thomas J. Shoff advised the Activity representatives that he would be appointing a shop steward in the main store and that it would probably be Ms. Dunn.

11. At the Union meeting on or about April 21, 1977 Ms. Dunn formally became the Union steward. 2/ During this latter part of April, in addition to talking to other employees, she showed them a handwritten notice she had prepared which illustrated the alleged disadvantages to full-time employees if they voluntarily switched to part-time positions. Ms. Dunn posted the notice on a bulletin board at work.

1/ A restaffing study takes place every year.

2/ The prior shop steward had apparently been promoted in October 1976 and since then the position had remained vacant.

12. Mr. Kinslow, a management official, on at least one occasion observed Ms. Dunn engaging in the conduct described above in paragraphs 9 and 11.

13. Barbara Robinson was, at all times material, herein an Exchange detective. As part of her duties she had to perform a monthly inventory on "control critical items," including the jewelry department. Commencing in January 1977, while performing these inventories, she felt certain irregularities occurred with respect to the jewelry department which aroused her suspicion. These apparent irregularities recurred in February, March and April 1977.

14. Ms. Robinson also observed for an extended period of time what she felt were irregularities in Ms. Dunn's conduct. She noticed that Ms. Dunn placed certain merchandise aside on an "end cap," where it wasn't usually displayed, presumably so that Ms. Dunn could purchase all or some of such merchandise later. Ms. Robinson never observed Ms. Dunn buying the merchandise.

15. On April 29, 1977 Ms. Robinson states she observed Ms. Dunn place display sunglasses in her pocket and then, after being observed, later placed them on the display rack. Ms. Dunn states she had placed a number of pair of sunglasses in her pockets in order to carry them to display racks.

16. Later in early May Ms. Robinson again observed some conduct by Ms. Dunn which Ms. Robinson felt unusual, involving some sunglasses, and Ms. Robinson marked them. Later the glasses were gone and Ms. Dunn's purchase receipts indicated she bought a pair of sunglasses for \$2.95. Ms. Robinson felt the glasses in question were much more expensive.

17. In light of these suspicions Activity management decided to bring in another detective from another exchange to conduct an undercover investigation. They brought in a Ms. Jean Kinsey from the Andrews Air Force Base exchange. Ms. Kinsey reported and started working on or about May 3rd or 4th 1977.

18. By letter dated May 5, 1977, which was also delivered that date, the Union formally advised the Activity of Ms. Dunn's appointment as Chief Steward for the Exchange.

19. On the morning of May 9, 1977 Detective Kinsey thought she observed Ms. Dunn place a pair of higher priced pearl earrings in a jewelry box that had contained a pair of

lower priced onyx earrings ^{3/} and then set the pearl earrings aside for her husband to purchase.

20. Mr. Dunn, on May 9, 1977 purchased the mispriced pearl earrings and detective Kinsey caused Mr. and Ms. Dunn to be apprehended.

21. Mr. and Ms. Dunn were taken to the store offices and the military police were called. Ms. Dunn's locker was searched and the expensive pair of sunglasses described in paragraph 16 above was found in her purse.

22. Ms. Dunn was given an opportunity, if she admitted to her misconduct, to resign. She refused.

23. As a result of the foregoing the Activity issued a letter of Advanced Notice of Separation on May 16, 1977 and a final letter of separation was issued on June 6, 1977.

Conclusions of Law

The basic issue raised by this case is whether Ms. Dunn was fired from her position with the Activity, in violation of Sections 19(a)(1) and (2), of the Order because of her appointment as the Union's shop steward and because of her other activities on behalf of the Union.

The record establishes that during April 1977 Ms. Dunn actively campaigned among the employees urging them to refuse to voluntarily switch to higher graded but part-time positions and that the representatives of the Activity observed and was aware of this activity. Further, the Activity learned informally in April 1977 and formally on May 5, 1977 that Ms. Dunn had been appointed the Union's Chief Steward. Thus the record establishes that Ms. Dunn had engaged in various activity on behalf of the Union and that the Respondent was aware of this. Further, the fact that Ms. Dunn was discharged relatively soon after undertaking this activity on behalf of the Union, is suspicious and indicates that the discharge might somehow be related to her activity on behalf of the Union.

On the other hand it is noted that as a result of a change in management in February 1977 the Activity started to investigate security problems which had, at the time of

^{3/} The original price for the pearl earrings was \$7.00 and the price for the onyx earrings was \$5.75.

Ms. Dunn's discharge, already led to the resignation of a number of employees because they had engaged in improperly taking property. Further the jewelry department had been the object of concern by detective Robinson since February 1977 and she had observed conduct involving Ms. Dunn which made detective Robinson suspect Ms. Dunn had been engaged in dishonest conduct. As a result detective Kinsey was brought in and Ms. Dunn was apprehended because her husband purchased earrings after Ms. Dunn had apparently mispriced them.

In all these circumstances, it is concluded that the Activity discharged Ms. Dunn because it believed she had engaged in dishonest conduct and not because of Ms. Dunn's Union activity.

In reaching this conclusion I need not reach the issue of whether Ms. Dunn actually did engage in the misconduct alleged; rather it is concluded that the Activity had sufficient evidence available to it to reasonably conclude that Ms. Dunn had engaged in such misconduct and this was, in fact, the reason Ms. Dunn was terminated. ^{4/}

In so concluding it was noted that Ms. Dunn's misconduct involved a very small sum of money. However there was no showing that anyone else who engaged in similar misconduct was treated more leniently. On the contrary the record established that anyone whom the Activity had concluded had taken exchange property improperly was separated by discharge or resignation. Ms. Dunn was offered the opportunity of resigning.

Further in reaching the conclusion that the Activity discharged Ms. Dunn because of her alleged misconduct it was taken into consideration that the record fails to establish any conduct by the Activity to indicate Union animus on the Activity's part nor does it establish that Ms. Dunn was treated any differently than employees who had not been active on behalf of the Union. cf. Department of the Air Force, Offutt Air Force Base, A/SLMR No. 784; FLRC No. 77-A-22, (July 29, 1977), FLRC Report No. 132; and Veterans

^{4/} Accordingly, although evidence of a polygraph test was admitted into evidence at the hearing to establish that Ms. Dunn had not intentionally engaged in any misconduct, I need not reach the question of Ms. Dunn's actual guilt and therefore need not base any finding on the polygraph test.

August 31, 1978

Administration, North Chicago Veterans Hospital, North Chicago Illinois, A/SLMR No. 1024, FLRC No. 78-A-59, (July 12, 1978).

It is concluded that the Union failed to establish that Ms. Dunn was discharged because of her Union activity. The reason given by the Activity for Ms. Dunn's discharge was not a pretext; rather the record establishes that Ms. Dunn was in fact discharged because the Activity, based on the available evidence, reasonably concluded Ms. Dunn had engaged in dishonest acts.

Accordingly it is concluded that the Activity did not engage in conduct which violated Sections 19(a)(1) and (2) of the Order. cf. Department of the Air Force, Offutt Air Force Base, supra. and V.A., North Chicago Veterans Hospital, North Chicago, Illinois, supra.

Recommendation

Upon the basis of the foregoing findings and conclusions, I hereby recommend that the complaint against the Respondent be dismissed in its entirety.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: August 1, 1978
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, BOSTON DISTRICT OFFICE
A/SLMR No. 1111

This consolidated proceeding involved two unfair labor practice complaints filed by an individual, John J. Martin, Vice-President of Local 3555, American Federation of Government Employees, AFL-CIO (Complainant). The first complaint alleged that the Respondent violated Sections 19(a)(1) and (2) of the Order by imposing extraordinary reporting requirements and close scrutinization on the Complainant on March 9, 1977, and by admonishing him on March 10, March 22, and March 24, 1977, for not following the extraordinary reporting requirements. The second complaint alleged that the Respondent violated Sections 19(a)(1), (2) and (4) of the Order on July 25, 1977, by imposing on the Complainant an official disciplinary penalty of a hearing prior to a proposed notice of reprimand in retaliation for the Complainant carrying out his duties as Vice-President of AFGE Local 3555, and for having filed an unfair labor practice complaint.

The Administrative Law Judge concluded that the Respondent had not, in either case, violated the Order. In this regard, he found that the Complainant had not established by a preponderance of evidence that either extraordinary reporting requirements and close scrutinization were imposed upon the Complainant or that an official disciplinary penalty of a hearing had been imposed on the Complainant in retaliation for the Complainant having engaged in protected activity. Accordingly, he recommended that the complaints be dismissed in their entirety.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered the complaints be dismissed.

SAC:yw

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, BOSTON DISTRICT OFFICE

Respondent

and

Case Nos. 31-11034(CA) and
31-11431(CA)

JOHN J. MARTIN,
BOSTON DISTRICT OFFICE VICE-PRESIDENT,
LOCAL 3555, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On July 20, 1978, Administrative Law Judge Garvin Lee Oliver issued his Recommended Decision and Order in the above-entitled consolidated proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaints and recommending that the complaints be dismissed in their entirety. Thereafter, the Respondent filed timely exceptions to the Administrative Law Judge's Recommended Decision and Order. 1/

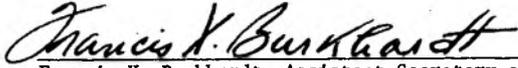
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject cases, including the Respondent's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 2/

1/ The Complainant submitted untimely exceptions which have not been considered.

2/ On page 3 of his Recommended Decision and Order, the Administrative Law Judge inadvertently referred to Local 3555 of the American Federation of Government Employees, AFL-CIO, as the exclusive representative of the Respondent's employees, rather than the parent organization, the American Federation of Government Employees, AFL-CIO, which is the national exclusive representative. This inadvertent error is hereby corrected.

IT IS HEREBY ORDERED that the complaints in Case Nos. 31-11034(CA) and 31-11431(CA) be, and they hereby are, dismissed.

Dated, Washington, D.C.
August 31, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
 In the Matter of :
 :
 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION :
 Boston District Office :
 Respondent :
 :
 and :
 :
 JOHN J. MARTIN :
 Boston District Office Vice-President :
 Local 3555, American Federation of :
 Government Employees :
 Complainant :

Case No. 31-11034(CA)
31-11431(CA)

JOSEPH RANDOLPH
Assistant Chief, Labor Management Relations Branch
Equal Employment Opportunity Commission
Washington, D.C. 20506
For the Respondent

MICHAEL D. GREENBURG, ESQUIRE
Greenburg & Lawson
2343 Massachusetts Avenue
Cambridge, Massachusetts 02140
For the Complainant

BEFORE: GARVIN LEE OLIVER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding arose pursuant to Executive Order 11491, as amended. It was initiated by unfair labor practice complaints filed on July 18, 1977 (31-11034(CA)) and November 8, 1977 (31-11431(CA)) by John J. Martin, Vice-President, Local 3555, American Federation of Government Employees (hereinafter called the Complainant) against the Equal Employment Opportunity Commission, Boston District Office (hereinafter called the Respondent). (Asst. Sec. Ex., 1(B), 1(F)). The Regional Administrator consolidated the cases for hearing. (Asst. Sec. Ex. (1(H))).

The complaint in Case No. 31-11034 alleged, in substance, that Respondent violated Section 19(a)(1) and (2) of the Executive Order by imposing extraordinary reporting requirements and close scrutinization on Complainant on March 9, 1977 and by admonishing him on March 10, March 22, and March 24, 1977 for not following the extraordinary reporting requirements.

The complaint in Case No. 31-11431 alleged, in substance, that Respondent violated Section 19(a)(1), (2) and (4) of the Executive Order on July 25, 1977 by imposing on Complainant an official disciplinary penalty of a hearing prior to a proposed notice of reprimand in retaliation for Complainant carrying out the duties of Vice-President of Local 3555 and for having filed an unfair labor practice complaint.

The Respondent denied all charges.

Procedural Matters

Respondent contends that the Regional Administrator obtained a Statement from Complainant, but not from Respondent, and had "an appropriate" independent investigation been conducted pursuant to 29 C.F.R § 203.6, Case No. 31-11034(CA) would have been dismissed and would not have reached the hearing stage.

29 C.F.R. § 203.9 provides that a determination by the Regional Administrator to issue a notice of hearing shall not be subject to review by the Assistant Secretary. The scope of the independent investigation is also within the discretion of the Regional Administrator. Respondent could have brought to the Regional Administrator's attention any matter relevant to the complaint, or provided reasons why the independent investigation should be expanded if it was unable to obtain such information on its own behalf. 29 C.F.R. §§203.5, 203.6.

Respondent also contends that the incidents involved in Case no. 31-11034(CA) were part of a March 16, 1977 unfair labor practice charge which was settled on May 13, 1977, and should, therefore, be dismissed.

The record reflects that a March 16, 1977 unfair labor practice charge was withdrawn as part of a bilateral agreement reached between the Respondent and AFGE Local 3555 on May 13, 1977. (Asst. Sec. Ex. 1c(1) and (2)). See also Equal Employment Opportunity Commission, Boston District Office, Case No. 31-10989(CA), dismissal of complaint affirmed by Assistant Sec. on May 23, 1978.

However, the complaint in Case No. 31-11034 is based on a charge dated June 7, 1977. I find the evidence that

the same incidents "were discussed at the meeting on May 13, 1977" (Tr. Vol. II, p. 30) insufficient to conclude that the matters raised in the June 7, 1977 charge are the same as those raised in the March 16, 1977 charge, and also insufficient to conclude that the matters raised in the June 7, 1977 charge and complaint in Case No. 31-11034(CA) are barred from consideration by the May 13, 1977 bilateral agreement.

Respondent contends that the incidents involved in Case No. 31-11034(CA) are also the subject of a separate unfair labor practice complaint in Case No. 31-10989(CA) and should, therefore, be dismissed. While a complainant may not simultaneously litigate the same issue, arising out of the same set of facts, in two different unfair labor practice proceedings before the same forum, Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 859, a comparison of the alleged basis for the complaint in Case No. 31-10989(CA) with that in the instant complaint in Case No. 31-11034(CA) reveals that the alleged facts constituting the unfair labor practice are different (Asst. Sec. Ex. 1B; Res. Ex. 17). In Brookhaven Service Center the facts constituting the alleged basis for the complaint were identical to those raised in a previous complaint.

A hearing was held in this matter before the undersigned in Boston, Massachusetts 1/. Both parties were afforded full opportunity to be heard, adduce relevant evidence, and to examine and cross-examine witnesses. Thereafter, the parties submitted briefs.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

At all relevant times herein Local 3555, American Federation of Government Employees (AFGE) has been the exclusive representative of a unit of federal employees employed by the Respondent.

Complainant is an Equal Opportunity Specialist, GS-12, for Respondent. He has been assigned to the Boston District Office since November 1975. In June 1976 he was elected

1/ Respondent's unopposed motion to correct the transcript is granted. The transcript is corrected in accordance with Appendix A, attached hereto.

Vice-President of Local 3555, AFGE. His duties include presiding at union meetings, carrying out provisions of the collective bargaining agreement, and participating in labor-management meetings.

On September 12, 1975 Mr. Everett O. Ware, District Director, Boston District Office, Equal Employment Opportunity Commission, issued a standard operating procedures memorandum to all employees governing, among other things, office hours. The memorandum required employees to notify their supervisors immediately upon arriving in the morning, before departing at the close of business, and of any variation in the normal lunch period of 11:45 A.M. until 12:45 P.M. (Res. Ex. 2). It was the responsibility of office supervisors to enforce the policy. Enforcement varied somewhat depending upon the supervisor and the proximity of employees to their supervisor. If the employees worked close to the supervisor the formality of the reporting lessened and was casual, sometimes consisting of no more than a greeting at the beginning and close of the day. Complainant came under the supervision of Mrs. Betty R. Anderson, Deputy District Director, on March 9, 1977. Complainant's desk was in the rear of the office and was not close to Mrs. Anderson. Mrs. Anderson explained the standard office reporting procedure to Complainant and what was expected of him in his new position.

On March 10, 1977 Mrs. Anderson called Complainant into her office at 9:30 A.M., stated that he had not reported to her as required, and reiterated the office procedure to Complainant. Complainant commented that other employees, to his knowledge, were not required to report in this fashion. Mrs. Anderson had a similar conversation with Complainant on March 22, 1977 and requested the names of those employees who allegedly were not reporting as required.

On March 24, 1977 Complainant met with District Director Ware, Mrs. Anderson and Mr. Dool concerning Complainant's continuing inquiries about the reporting requirements and the allegations that other employees were not required to report in this manner. At the March 24, 1977 meeting Mr. Ware clarified what Complainant was expected to do in terms of the reporting requirement. Mr. Ware explained that the Complainant was expected to let his superior know that he was in the office in the morning; that he should let the supervisor know if he did not adhere to the normal lunch hour, but a time function record, which had to be filled out at the end of the day, would serve the function of determining whether he was there at the end of the day. Complainant and the shop steward, Ray Dool, refused to provide names of other individuals allegedly not adhering to the reporting procedure, except to claim that Mr. Dool was not required to report in this fashion. Based on Mrs. Ander-

son's testimony, I find that Mr. Dool did comply with the reporting requirement and that other employees under her supervision did so as well in the manner generally expected of all employees in the office. Following the March 24 meeting Mr. Ware reiterated to all supervisors that all employees should closely follow the previously established policy.

During the course of the March 24, 1977 meeting Mr. Ware explained to Complainant that he was not under any unusual reporting or surveillance requirements; that he had been given the benefit of the doubt on occasion; and on one particular occasion, on March 8, 1977, he had observed him sign out at 11:50 A.M. for a 3 P.M. meeting, but did not mention it at the time because he did not want Complainant to think he was being surveilled.

The Alleged July 25, 1977 Hearing

On July 20, 1977 Mr. Lloyd F. Randolph, Supervisory Equal Opportunity Specialist, discovered, upon receiving an inquiry, that a July 5, 1977 letter from an attorney, which had been mailed to Complainant, had not been referred by Complainant for further action. Mr. Randolph submitted a report to District Director Ware concerning the incident.

On July 22, 1977, Mr. Ware directed a memorandum to Complainant regarding the failure to follow up on the letter received from the attorney. Mr. Ware requested that Complainant ascertain the status of all letters relating to charges within his possession by the close of business on July 22, 1977. The request was made to Complainant at approximately 2:30 P.M. on July 22, 1977. Complainant presented a memorandum requesting an extension to answer Mr. Ware's memorandum because he did not receive it until late in the afternoon. The time was extended until July 25, 1977.

On July 25, 1977, Complainant gave Mr. Ware a memorandum with five letters attached that had been previously prepared by a clerk-typist who started annual leave on July 15, 1977. Since it appeared to Mr. Ware that the letters represented the sum total of Complainant's work, Mr. Ware requested a meeting to discuss the Complainant's work performance and the possibility of disciplinary action. Complainant, in turn, requested that the meeting be delayed until he could have a National Representative of AFGE in attendance. The meeting was scheduled for July 26, 1977, at 9:30 A.M.

On July 26, 1977, the meeting was conducted with Complainant, Walter Flaherty, AFGE Representative, Philip

J. O'Donnell, Vice President of AFGE, Mary M. Miller, Supervisory Equal Opportunity Specialist, Frank Ammons, Supervisory Equal Opportunity Specialist, and District Director Ware. Complainant requested that Ray Dool, a co-worker, be allowed to attend the meeting as one who was familiar with his work record. Mr. Ware refused this request as he wanted to hear directly from Complainant what he was doing.

No disciplinary action was taken as a result of the July 26, 1977 meeting. Mr. Ware concluded that Complainant did not have a clear understanding of his responsibilities at that time and was satisfied with Complainant's explanation concerning his work. As a result of the incident, Mr. Ware established a system of direct assignment of charges to the deferral coordinators so that management would have better control over the work flow.

The meeting was convened and held pursuant to Article 33, Section a, of the National Labor Agreement which provides:

The Employer agrees, when practical and administratively feasible, to informally discuss with the employee and, upon request, his/her representative, the basis for a proposed disciplinary action prior to its being reduced to a written proposal. (Res. Ex. 4).

Discussion, Conclusions, and Recommendations

In making the foregoing finding, I gave greater weight to the testimony of Respondent's witnesses, including District Director Ware and former Deputy District Director Anderson than to that of the Complainant and his witnesses. I found that Mr. Ware and Mrs. Anderson made every effort to be fair, complete, and accurate in recounting relevant events, and their testimony was forthright and convincing.

During the hearing Complainant raised various other incidents, including difficulty in obtaining administrative leave for the Toastmasters Club, a dispute concerning a visit by Norman Jackson, Complainant's work production appraisal and performance rating, and alleged violation of a May 13, 1977 bilateral agreement. Although incidents and events not specified in the complaint may not themselves be independently adjudicated under the Order, they may serve as background evidence to explain and illuminate the nature and character of the events specified as the actual basis for the complaint. Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, A/SLMR No. 878 (1977). These events have been considered for this limited purpose; however, since a grievance is pending on Complainant's

employee performance appraisal (Res. Ex. 27), an appeal to the Civil Service Commission is pending on Complainant's annual performance rating (Tr. Vol. 1, pp. 174-176) and related issues were specifically included as part of Case No. 31-10989(CA) (Res. Ex. 17), these events are not discussed here in detail. Suffice it to say that these incidents, when viewed in their totality, even including the additional and earlier incidents proffered at Tr. Vol. 1, p. 42-43, which were excluded at the hearing, do not in my view, provide a substantial and persuasive basis for finding that Respondent engaged in a pattern of conduct culminating in the events which constitute the gravamen of the complaints designed to deprive Complainant of rights guaranteed by the Executive Order.

Complainant has not established by a preponderance of evidence that extraordinary reporting requirements and close scrutinization were imposed upon him in violation of the Executive Order as alleged in the complaint. Moreover, Complainant has not established by a preponderance of evidence that an official disciplinary penalty of a hearing was imposed upon him in retaliation for having filed an unfair labor practice complaint. I conclude that such actions as were taken, requiring Complainant to adhere to standard reporting procedures and the convening of an informal discussion with Complainant and his representatives to discuss the basis for a proposed disciplinary action, were taken by the Respondent in the good faith belief that Complainant was violating the work rules, that such actions did not constitute disparate treatment and discrimination in reprisal for Complainant having exercised his rights under the Executive Order, and were not motivated, even in part, by anti-union animus.

Recommendation

Having found that Respondents have not engaged in conduct prohibited by Sections 19 (a) (1), (2), and (4) of the Executive Order, as amended, it is hereby recommended that the complaints herein be dismissed in their entirety.



GARVIN LEE OLIVER
Administrative Law Judge

Dated: July 20, 1978
Washington, D.C.

GLO:hls

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

BUREAU OF ALCOHOL, TOBACCO, AND
FIREARMS, MIDWEST REGION,
CHICAGO, ILLINOIS
A/SLMR No. 1112

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to notify the exclusive representative, and give it the opportunity to be represented at a meeting held by the Area Supervisor during which a management proposal with significant impact on employee terms and conditions of employment was discussed. The NTEU asserted that the meeting was a formal discussion within the meaning of Section 10(e) of the Order and, therefore, the Respondent's failure to give notice effectively denied the exclusive representative its right to be represented at such formal discussion.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order. Thus, in his view, while the objective of the Area Supervisor was only to solicit suggestions and ideas from bargaining unit employees with respect to a management proposal, the proposal concerned personnel policies and practices and working conditions and discussing such matters with employees at a management initiated meeting without notifying the exclusive representative and giving it the opportunity to be represented at such a meeting violated the exclusive representative's Section 10(e) rights.

The Assistant Secretary essentially adopted the findings, conclusions and recommendations of the Administrative Law Judge. Accordingly, he ordered that the Respondent cease and desist from engaging in the conduct found violative of the Order and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

BUREAU OF ALCOHOL, TOBACCO, AND
FIREARMS, MIDWEST REGION,
CHICAGO, ILLINOIS 1/

Respondent

and

Case No. 62-5621(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 94

Complainant

DECISION AND ORDER

On June 9, 1978, Administrative Law Judge Randolph D. Mason issued his Recommended Decision and Order in the above entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions, and the Complainant filed a response thereto, with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order,

1/ I take administrative notice that the National Treasury Employees Union is the national exclusive representative of a Bureauwide unit of nonprofessional employees of the Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms. Since the Midwest Region has not objected to its being named as the Respondent herein, I find that there has been no prejudice to either party by the Complainant identifying as the Respondent an administrative level of the Agency's organization not identical to its level of recognition.

and the entire record in the subject case, including the Respondent's exceptions and the Complainant's response thereto, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 3/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, Midwest Region, shall:

1. Cease and desist from:

(a) Conducting formal discussions between management and employees concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit, without first notifying and affording the National Treasury Employees Union, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Notify the National Treasury Employees Union, and afford it the opportunity to be represented at formal discussions between management and employees concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit, by its own chosen representative.

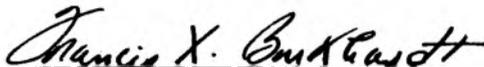
(b) Post at the facilities of the St. Louis Area Office 4/ copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor-Management Relations. Upon receipt

3/ As I have adopted the Administrative Law Judge's findings that the disputed meeting on January 24th constituted a "formal discussion" within the meaning of Section 10(e) of the Order, I do not find it necessary to pass upon his alternative findings on pages 8 and 9 of his Recommended Decision and Order.

4/ Since an area official of the Respondent's St. Louis Area Office committed the violation found herein, I will limit the required posting to the St. Louis Area Office. Compare Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Midwest Region, Chicago, Illinois, A/SLMR No. 1070 (1978), in which regional officials of the Midwest Region were directly involved in the unfair labor practices which occurred therein.

of such forms, they shall be signed by the Regional Regulatory Administrator, United States Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, Midwest Region, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Regional Regulatory Administrator shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

Dated, Washington, D.C.
August 31, 1978



Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and employees concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit, without first notifying and affording the National Treasury Employees Union, the employee's exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Executive Order 11491, as amended.

WE WILL notify the National Treasury Employees Union and afford it the opportunity to be represented at formal discussions between management and employees concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit, by its own chosen representative.

(Agency or 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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



was issued on January 11, 1978. This case was initiated by a complaint filed on September 12, 1977 by the National Treasury Employees Union and NTEU Chapter 94 (hereinafter the Union).

The issues presented are are follows:

- (1) Whether Respondent held a formal discussion with employees concerning personnel policies and practices, or other matters affecting general working conditions of employees, within the ambit of § 10(e) of the Executive Order; and
- (2) Whether respondent violated § 19(a)(1) and (6) of the Order by failing to notify the Union of the above meeting and by soliciting certain recommendations from the employees at that meeting.

At the hearing, all parties were represented and were afforded full opportunity to be heard, adduce evidence, examine and cross-examine witnesses, and argue orally. Thereafter, both parties filed briefs. Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendation.

Findings of Fact

NTEU Chapter 94 was the exclusive bargaining representative of the employees of the respondent Bureau of Alcohol, Tobacco, and Firearms (ATF), Midwest Region, at all times revelant herein.

For many years Congress has required that operations on the premises of distilled spirits plants (DSP's) be conducted under the supervision of the Secretary of Treasury. The latter "shall assign such number of [ATF] officers to [DSP's] as he deems necessary to maintain supervision of the operations conducted on such premises." 26 U.S.C. § 5202(a) (1964). The proprietor of a DSP cannot even commence production operations until an ATF officer has been assigned to the premises. 26 U.S.C. § 5221(a) (1964). Although strict supervision of DSP's is generally required, the Secretary of the Treasury is authorized to conduct temporary pilot or experimental operations for the purpose of facilitating the development and testing of improved methods of governmental supervision. 26 U.S.C. § 5554 (1964).

On December 12, 1974, the Director of ATF established a Federal Advisory Committee on DSP supervision (hereinafter the

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 In the Matter of :
 :
 BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, :
 MIDWEST REGION, CHICAGO, ILLINOIS :
 Respondent :
 : Case No. 62-5621(CA)
 and :
 :
 NATIONAL TREASURY EMPLOYEES UNION AND NTEU :
 CHAPTER 94 :
 Complainant :

Carl R. Nolte, Jr., Esquire
Robert G. Smith, Esquire
Robert D. Weiss
Bureau of Alcohol, Tobacco, and Firearms,
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For the Respondent

Alan S. Hersh, Esquire
Assistant Counsel
National Treasury Employees Union
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Washington, D.C. 20006

For the Complainant

Before: RANDOLPH D. MASON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding was heard in St. Louis, Missouri, on February 14, 1978, and arises under Executive Order 11491, as amended. Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter called the Assistant Secretary), a Notice of Hearing on Complaint

Committee). The Committee was formed to provide recommendations to the Director of ATF about methods to achieve an orderly transition from the "joint custody" concept of supervision of DSP's to a plan of more flexible supervision of such operations. Specifically, the Committee was to consider the means of implementing the planned elimination or relaxation of the following statutory requirements at DSP's:

1. Affixture of Government locks and seals;
2. Assignment of Government officers;
3. Joint Custody with respect to storage rooms or buildings in which distilled spirits are stored; and
4. Exercise of general Government supervision.

Membership on the Committee included representatives from the distilled spirits industry, the academic community, and Government Officials. On December 17, 1975 the Committee's charter was amended to expand its responsibilities to provide advice on the question of whether any change in the form of supervision at DSP's should be made.

The Committee subsequently agreed that its ATF members would examine the problems associated with implementing the elimination of joint custody and, with the assistance of the full committee, develop a manual or model to show how a system of supervision and control based on the elimination of joint custody could be implemented, and what the advantages and disadvantages of such a system would be for both industry and the Government. This paper was prepared under the title of "Proposal for Supervision and Control of DSP's Based on Elimination of the Joint Custody Concept of Supervision". This proposal was discussed during the committee meeting held on January 12, 1977.

The "proposal" recommended that the Director of ATF seek legislation which would amend those provisions of law which require the presence of a government officer on distilled spirits plant premises in order to perform certain duties. The amendment would allow government officers to perform these duties, but not require them to do so. The amendment would enable the government to change its method of supervision and control of DSP's from a system where government officers are regularly assigned to DSP's, to a more indirect and flexible system of supervision where the presence of a government officer is not regularly required on DSP premises.

The "proposal" further stated that implementation of the new concept of supervision would be on a gradual basis, with the number of ATF officers stationed at DSP's being gradually reduced over a period of four to five years. The frequency of visits by inspectors would vary with different DSP's. The implementation program would also include at least one "periodic pause." The purpose of these pauses, which would be several months to a year in duration, would be to allow operating conditions to stabilize so that developing program problems could be identified and adjustments could be made to the program.

Since the "proposal" was to be an integral part of the Committee's recommendation, the Committee attempted to work toward an agreement on its final form and content. However, the "proposal" contained certain additional details (not relevant to the instant proceeding) upon which an agreement could not be reached. Accordingly, the Committee attempted to work out a compromise proposal regarding those details. At the January 12, 1977 meeting, the Committee reached a tentative agreement resolving the questions that had been raised and affirming the fundamental proposals set forth above. The Committee chairman, Stephen E. Higgins, who was also the Assistant Director of ATF, agreed to prepare a draft report and recommendation for consideration by committee members at the next meeting scheduled for February 15, 1977.

On January 14, 1977, Assistant Director Higgins sent a telegram to all ATF Regional Regulatory Administrators. In the telegram, he indicated that Treasury had asked for the Committee's recommendation by March 1, 1977. The telegram brought the administrators up to date on the Committee's progress, and stated that the Committee had reached a tentative agreement endorsed by most of the Committee members. The Assistant Director stated that the tentative proposal was, with a few enumerated exceptions, essentially the same as the "proposal" previously referred to in these findings. It was noted that the original "proposal" had been forwarded to the administrators for their review a few months before the telegram. In its description of the Committee's present plan, the telegram specifically stated that ATF "would ultimately be relieved of the locking and supervision of bonded warehouses, responsibility of sealing, and most of the other supervision of proprietors' operations we are currently engaged in." The Assistant Director then requested that certain information be transmitted to him by February 7, 1977. The administrators were specifically asked to comment on the following:

Any significant problems or pitfalls for ATF you see in the proposal;

Any significant benefits other than those associated with manpower you see in the proposal; and

Your thoughts as to whether, and [if] the proposal is advantageous for ATF.

The Assistant Director then concluded the telegram with the following remarks:

I see this as an important proposal for ATF so I hope that in addition to seeking the advice of your most knowledgeable staff members, you will also give considerable personal thought to your response. While the information you are providing us should be kept strictly to those who have a "need to know," the tentative proposal itself may be discussed with employees at any level, and we encourage you to do so. However, in discussing it with employees, the following points should be stressed: [Emphasis supplied]

1. The proposal has only the tentative approval of most of the [Committee] members. We have scheduled another [Committee] meeting for 2/15/77, at which the Committee members will formally vote on the proposal;
2. If the proposal is adopted by the majority of the [Committee] members, the Director is completely free to recommend any course of action he wishes to Treasury. Treasury, likewise, has complete freedom as far as any legislation it may choose to propose. The Office of Management and Budget also has considerable say in what legislation Treasury proposes to Congress. And finally, of course, only Congress can change the joint custody laws; and
3. If legislation is ultimately enacted along the lines proposed, implementation in terms of the withdrawal of inspectors from DSP's would be gradual, probably over a period of about four years. It is ATF's intention that any inspector withdrawn from DSP's would be utilized in other ATF program areas.

The Regional Regulatory Administrator for the Midwest Region forwarded a copy of the above telegram to Harold Green, the Area Supervisor located in St. Louis, Missouri. Green had previously received, and was generally familiar with, the initial ATF "proposal" that was modified to some extent, as described in the above telegram. Green was responsible for supervising inspectors and plant officers engaged in the supervision of DSP's in eastern Missouri and southern Illinois.

On January 24, 1977, Green held a meeting with inspectors in his office. It was a regularly scheduled monthly meeting and about seven inspectors attended. The meeting was held in the inspectors' official work area.

During the course of the meeting, Green read the above telegram to the inspectors. Then he solicited the inspectors views and opinions regarding the current proposal to eliminate joint custody. Three or four employees responded with comments. Then Green asked Roy Legendre, the union steward, his opinion of the proposal. Legendre refused to answer but stated that he believed the discussion violated the Executive Order. At that point, Green terminated the discussion.

The respondent failed to notify the union and the employees that the topic of elimination of joint custody and the above telegram was to be discussed at the January 24 meeting. All of the inspectors attending the meeting were in the bargaining unit for which the union had exclusive recognition. Although one of the union's stewards was present during the meeting, he was not notified that this topic was to be discussed.

The meeting clearly constituted a formal discussion between management and employees concerning personnel policies and practices and other matters affecting general working conditions of employees in the unit. Clearly, the elimination of joint custody would result in a significant change in working conditions for the bargaining unit employees. For example, as the degree of supervision of DSP's decreased, inspectors would have to receive more assignments in areas such as firearms and explosives, and the amount of time spent at DSP's would significantly decrease. Hours of work and travel time would also change for inspectors. Plant officers, who formerly spent 100% of their time at DSP's, would have to be transferred to other types of ATF work.

Finally, it is noted that at the time of this meeting certain pilot projects were in effect in which the elimination of joint custody had been implemented. Some of these projects

were in the Midwest Region of ATF; inspectors and plant officers in those areas had been removed because ATF had allowed certain DSP's to operate without ATF supervision.

Conclusions of Law

The first issue presented for decision is whether respondent violated Section 10(e) of the Order by failing to give the Union the opportunity to be represented at the January 24, 1977 meeting between the Area Supervisor and certain bargaining unit employees. § 10(e) states that when a labor organization has been accorded exclusive recognition, it is the exclusive representative of the employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. That section also states as follows:

The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

I agree with the Complainant that the meeting in question constituted a "formal discussion" within the meaning of § 10(e). The meeting was called by the Area Supervisor, in part, for the purpose of soliciting the views of the inspectors regarding a matter which was of grave importance to them--the elimination of joint custody. It is clear that such elimination would result in significant changes in the working conditions of the employees in question. The inspectors were read a telegram written by the Assistant Director of ATF, who was also the chairman of a federal advisory committee regarding this subject. The telegram stated that the committee was about to recommend that legislation be enacted to eliminate joint custody and that this would be implemented over a period of about four years. The Assistant Director stated in the telegram that he considered this to be an "important proposal" and he encouraged the supervisors to discuss the proposal with the employees. After reading the telegram, the Area Supervisor asked the employees for their views on the entire proposal, which included the method of implementation.

Respondent argues that the topic of elimination of joint custody was not ripe for discussion and was not meaningful in view of the fact that Congress had not yet taken action on the matter. I disagree. In fact, the Respondent's Assistant Director felt that this was an opportune time to discuss this matter with the employees. The views of the employees would be transmitted by ATF management to the federal advisory committee

to assist it in making its recommendation regarding both the decision to eliminate joint custody and the implementation of the new program. The employees' input at this early stage could ultimately have had a meaningful impact on their working conditions.

The discussion in question took place at a regularly scheduled meeting called by the Area Supervisor. In view of the manner in which this meeting was held, and the subject matter discussed, I am constrained to conclude and hold that the meeting constituted a "formal discussion" within the meaning of § 10(e) of the Order. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242 (1973).

Respondent also argues that even if a formal discussion did take place, § 10(e) was not violated since a union steward was present at the meeting and had the opportunity to speak out on the issues raised. I must conclude that Respondent failed to give the union an opportunity to be represented at the meeting as required by § 10(e). The steward in question was called to the meeting in his capacity as an employee and was not given any advance notification of the topics to be discussed. In addition, the union has a right to choose its representative at § 10(e) formal discussions. Fort Jackson, supra. Management cannot usurp this right and deem the union to be represented by an employee who happened to be a steward.

I have concluded that the Respondent failed to give the union the opportunity to be represented at the formal discussion held on January 24, 1977. This is a right under § 10(e) that flows directly to the labor organization which has been accorded exclusive recognition. Fort Jackson, supra. Accordingly, the action taken by Respondent in this case violated § 19(a)(6) of the Order. In addition, I must also conclude that the Respondent's conduct, which effectively denied the right of unit employees to be represented by their exclusive representative, violated § 19(a)(1) of the Order. U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278 (1973), 3 A/SLMR 290.

Finally, even if a "formal discussion" under § 10(e) had not been involved, agency management was still obligated to deal solely with its employees' exclusive representative in matters concerning the terms and conditions of their employment. Internal Revenue Service, Ogden Service Center, A/SLMR No. 944 (1977). In the instant case, Respondent's Area Supervisor bypassed the union and dealt directly with unit employees, soliciting their recommendations on matters relating to personnel policies and practices and general working conditions. The

union was the exclusive bargaining representative regarding such matters. This bypassing of the Complainant NTEU Chapter 94 was in derogation of its rights as the exclusive representative of the unit employees, and tended to undermine its status as their exclusive representative. Accordingly, I find that the Respondent's conduct was violative of § 19(a)(6) and (1) of the Order even if the meeting had not constituted a "formal discussion" within the meaning of § 10(e). Internal Revenue Service, Ogden Service Center, A/SLMR No. 944 (1977).

Recommendation

Upon the basis of the foregoing findings of fact and conclusions of law and pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the Rules and Regulations, I recommend that the Assistant Secretary of Labor for Labor-Management Relations adopt the following Order designed to effectuate the policies of Executive Order 11491, as amended.

Recommended Order

Pursuant to section 6(b) of Executive Order 11491, as amended and 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby Orders that the Bureau of Alcohol, Tobacco, and Firearms, Midwest Region, shall:

1. Cease and desist from:
 - a. Conducting formal discussions between management and employees concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving the National Treasury Employees Union, Chapter 94, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.
 - b. Dealing directly with and soliciting the views of employees concerning the elimination of joint custody when such employees are represented exclusively by National Treasury Employees Union, Chapter 94.
 - c. In any like or related manner interfering with, restraining, or coercing its employees in the

exercise of rights guaranteed by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:
 - a. Notify the National Treasury Employees Union, Chapter 94, of and give it the opportunity to be represented at formal discussions between management and employees or employee representatives concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit by its own chosen representative.
 - b. Post at its facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Regulatory Administrator, United States Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, Midwest Region, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Regional Regulatory Administrator shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.
 - c. Pursuant to section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Randolph D. Mason
 RANDOLPH D. MASON
 Administrative Law Judge

Dated: JUN 9 1978
 Washington, D.C.

RDM:jps

APPENDIX

-2-

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and employees concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving the National Treasury Employees Union, Chapter 94, the employee's exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT deal directly with and solicit views from employees concerning the elimination of joint custody when such employees are represented exclusively by National Treasury Employees Union, Chapter 94.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Executive Order 11491, as amended.

(Agency or 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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri, 64106.

September 1, 1978

A/SLMR No.1113

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
NATIONAL ARCHIVES AND RECORDS SERVICE
A/SLMR No. 1113

GENERAL SERVICES ADMINISTRATION,
NATIONAL ARCHIVES AND RECORDS SERVICE

Respondent

and

Case No 22-08528(CA)

This case involved an unfair labor practice complaint filed by Local 2578, American Federation of Government Employees, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by addressing letters to union officials charging them with violations of security regulations, threatening them with disciplinary action, and forbidding the union president further entrance into the restricted area.

LOCAL 2578, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

The Assistant Secretary concluded, in agreement with the Administrative Law Judge, that dismissal of the instant complaint was warranted. He noted particularly that the Complainant's representatives were engaged in unprotected activity when they admittedly violated Agency security procedures and that the evidence failed to demonstrate that the Respondent had dealt with the Complainant's representatives based on anti-union considerations. Accordingly, he ordered that the complaint be dismissed in its entirety.

DECISION AND ORDER

On June 21, 1978, Administrative Law Judge Louis Scalzo issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and the Respondent filed an answering brief to the Complainant's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. Except as modified, 1/ the rulings are hereby affirmed. Upon

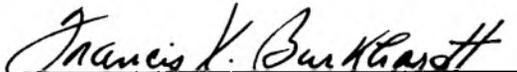
1/ Subsequent to the hearing in this matter, the Complainant transmitted certain documents to the Administrative Law Judge relating to unsuccessful attempts to reach a settlement herein. The Administrative Law Judge made the documents part of the record of this proceeding. I view the Administrative Law Judge's admission of such documents into evidence to have been improper. Thus, it has been held previously that in order to foster and afford an atmosphere conducive to the settlement of unfair labor practice allegations, matters raised in connection with settlement deliberations will not be admitted into evidence. See Directorate of Facility Engineers, Fort Richardson, Alaska, A/SLMR No. 946 (1977), and U.S. Department of Air Force, Norton Air Force Base, 3 A/SLMR 175, A/SLMR No. 261 (1973). Accordingly, in reaching a decision in the matter, I have not considered the documents relating to attempts at settlement herein.

consideration of the Administrative Law Judge's Recommended Decision and the entire record in this case, including the Complainant's exceptions and supporting brief and the Respondent's answering brief, I find, in agreement with the Administrative Law Judge, that further proceedings on the subject complaint are unwarranted. 2/ Thus, the Complainant's representatives were engaged in unprotected activity when they admittedly violated Agency security procedures. Therefore, in my view, the Respondent's issuance of letters advising them of the violation of security procedures and noting the possibility of discipline for such activity in the future was justified. Accordingly, and as the evidence failed to demonstrate that the Respondent dealt with the Complainant's representatives based on anti-union considerations, I find that the subject complaint should be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-08528(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 1, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

2/ The Complainant excepted to certain credibility findings made by the Administrative Law Judge. In Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, 2 A/SLMR 377, A/SLMR No. 180 (1972), it was held that as a matter of policy the Assistant Secretary would not overrule an Administrative Law Judge's resolution with respect to credibility unless the preponderance of all the relevant evidence established that such resolution clearly was incorrect. Based on a review of the record herein, I find no basis for reversing the Administrative Law Judge's credibility findings herein.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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In the Matter of :
: :
GENERAL SERVICES ADMINISTRATION :
NATIONAL ARCHIVES AND RECORDS SERVICE :
: :
Respondent : Case No. 22-08528 (CA)
: :
and :
: :
LOCAL 2578, AMERICAN FEDERATION OF :
GOVERNMENT EMPLOYEES, AFL-CIO :
: :
Complainant :
.....

Mr. Philip W. Spayd
Labor Relations Specialist
National Archives and Records Service
General Services Administration
Washington, D. C. 20408

James A. Friedman, Esquire
Office of the General Counsel
General Services Administration
18th and F Streets, N. W.
Washington, D. C. 20405

For the Respondent

Mr. Carmen R. Delle Donne, President
and Mr. Philip R. Kete, Special Representative
Local 2578, American Federation of Government
Employees,
National Archives and Records Service
General Services Administration
Washington, D. C. 20408

For the Complainant

Before: LOUIS SCALZO
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

This case arises under Executive Order 11491 as amended (hereinafter referred to as the Order). It was initiated by the filing of an unfair labor practice complaint on September 22, 1977, by Mr. Carmen R. Delle Donne, President of the Complainant labor organization, the exclusive representative of all non-supervisory professional and non-professional employees of Respondent's metropolitan Washington, D. C. facilities.

A hearing was held in Washington, D. C. on April 6 and 7, 1978. Following the hearing the Complainant initiated efforts to effect approval of a settlement agreement. Negotiations ensued but were not successful. Documents relating thereto were transmitted to the administrative law judge and are hereby made a part of the record. 1/

The Complaint alleges that the Respondent (herein also referred to as NARS) violated Sections 19(a)(1) and (2) of the Order by addressing letters dated March 9, 1977 to Mr. Delle Donne and Mr. Thomas Lipscomb, Vice President of Local 2578, charging both of the named Union officials with violation of NARS security regulations relating to the Washington National Records Center (WNRC) Building in Suitland, Maryland on March 3, 1977; threatening them both with disciplinary action; and by forbidding Mr. Delle Donne entrance into a restricted area of the WNRC building. The Complaint alleges further that the letters were excessively harsh, interfered with the performance of representational responsibilities of the named Union officials, held them both up to ridicule, made them a negative example in order to discourage union membership, and constituted disparate treatment based upon union affiliation.

1/ Letter dated April 20, 1978, together with enclosure, addressed to the administrative law judge by Mr. Carmen R. Delle Donne; undated Memorandum of Understanding; letter dated April 27, 1978 addressed to the administrative law judge by Mr. Delle Donne; letter dated April 28, 1978 together with enclosure addressed to the administrative law judge by Mr. Philip W. Spayd.

Findings of Fact

The allegations outlined may not be entirely understood without an awareness of details of information relating to Respondent's facilities and security regulations pertaining thereto. The Respondent's major facility is the main National Archives Building located at Seventh Street and Pennsylvania Avenue, N. W., in downtown Washington, D. C. Four components of the Respondent are located in the Washington National Records Center Building in Suitland, Maryland. They are the WNRC itself, the General Archives Division, the Records Declassification Division, and a Preservation Lab. The WNRC Building housing these components is a large two story structure the front of which is used for elements generally open to the public. These include office areas, a cafeteria, a public research room and a conference room.

The main portion of the building, to the rear of the public areas, is divided into storage modules designated as "stacks" or "vaults," each of which consists of one acre of storage space. There are ten of these storage modules on the first level and ten on the second level. The terms "stacks" or "vaults" are used interchangeably in the record; however, it clearly appeared that "vaults" are storage modules protected by additional security measures.

Of the twenty storage modules, those designated as one, two, and three, are classified as vaults. These are protected by additional doors, combination locks and special pass requirements because of the highly sensitive nature of documents stored.

Entrance to the storage module areas from segments of the building open to the public is protected by double doors on which is printed a sign carrying the notice, "Restricted Area, Badge or Escort Required." 2/ The double door entrance

2/ 41 C.F.R. 101-20.303 prohibits failure to comply with official signs of a prohibitory or directory nature, and 41 C.F.R. 101-20.314 prescribes a penalty of not more than \$50.00 or imprisonment of not more than thirty days, or both for such conduct. Section 318(c) of Title 18 United States Code makes such conduct a petty offense.

mentioned is the only entrance leading into the restricted area from the front of the WNRC. Loading docks are located at the rear of the building, and entrance to the restricted storage modules may be gained through the loading dock sections; however, that area is not open to the public. Activity there is conducted under supervision, and entrance into the restricted storage module area from the rear of the building is controlled to preclude unauthorized entrance.

On March 3, 1977, the date in question, and thereafter, overall responsibility for the security of the WNRC was with Mr. Carlton L. Brown, the Director of the WNRC. In addition he had direct responsibility for sixteen of the twenty storage modules. Mr. Daniel T. Goggin, who was Mr. Lipscomb's supervisor, and Director of the General Archives Division, was assigned direct responsibility for three storage modules designated as stacks three, four and five. The March 9, 1977 letter to Mr. Delle Donne was signed by Mr. Brown and Mr. Goggin. The March 9, 1977 letter to Mr. Lipscomb was signed by Mr. Goggin.

The primary mission of the WNRC is to store records created by federal agencies in the metropolitan Washington, D.C. area and elsewhere. Records of approximately 257 federal agencies and bureaus are stored at the WNRC. These records include sensitive investigative reports relating to individuals employed by the agencies and bureaus storing such records. Other examples of records in this category include naval officer fitness for duty reports, World War II foreign national internment files, investigative reports of the Inspector General of the Department of the Army, Immigration and Naturalization Service files, and records relating to white slave traffic and bootlegging. Records in sixteen storage modules at the WNRC contain such agency and bureau files. Legal ownership of such records is in the agency creating the records. Such documents are not considered part of the permanent National Archives collection and are subject to the Privacy Act and stringent regulatory restrictions placed upon access to such records by the various governmental agencies storing the records with NARS.

For example, Respondent's Exhibit 1 indicates that access to Public Utility Regulation Branch records stored at the WNRC by the Securities and Exchange Commission is "limited to those persons whose official duties require such access." Similarly, Civil Service Commission personnel investigation records are protected by a rule that "all officials and employees are required to have an appropriate security clearance before they are allowed access to the files and records."

Classified documents and very sensitive top secret and secret national security information is stored in vaults. The papers of former President Richard Nixon are located within a vault storage module situated within the restricted area of the WNRC. In the General Archives Division segment of the WNRC a variety of records are permanently stored, including court records, military records and patent files.

There are established procedures and regulations governing entrance to the WNRC restricted area wherein the twenty storage modules are located. Entry is gained by inserting a color-coded card key identification pass into a slot. 3/ The card key triggers a mechanism which unlocks the double door entrance and permits entry into the restricted area. 4/ All employees whose duty station is located at the WNRC are issued the card key passes which authorize their admittance into the large restricted area, and must display these passes while working in the area.

3/ The color-coded card passes also reflect the level of security clearance assigned to employees authorized to enter the restricted area.

4/ A guard is stationed at a position adjacent to the double doors, but his function is to protect the building and its equipment, and not to police ingress and egress through the double doors.

Occasionally it is necessary for National Archives employees not stationed at the WNRC to perform work assignments at the WNRC Building. In such cases admittance to the restricted area embracing the twenty storage modules may be accomplished only after following specific procedures designed to limit temporary access to the area. The reason for access must be explained, and clearance to enter may be obtained only from an individual authorized to grant clearance. The employee must fill out and sign a register, and obtain a temporary visitor's pass (card key) which then may be retained for a limited period and used to open the double doors leading into the restricted area. 5/ There is no regulatory basis for waiving procedures so as to permit unlimited freedom of access to the restricted area by National Archives employees whose work assignments involve being in the restricted area. Temporary badges are issued based upon a need to enter the restricted area to perform some work assignment. Visitor badges are not issued routinely, and National Archives employees not assigned to the WNRC are assigned to work at the WNRC only infrequently.

Under certain limited conditions persons who are not General Services Administration employees, such as employees of other government agencies and researchers, may have access to records stored in the restricted area. As a rule such persons are not permitted to enter the restricted area of the building, but must perform their research relating to the records in a public research room located out of the restricted area. Such non-General Services Administration users may sometimes be granted permission to enter the restricted storage module area. This occurs when it is not feasible to carry large quantities of records to the research room. In such cases the person must first obtain permission

5/ When a National Archives employee not assigned to the WNRC seeks to gain access to vault storage areas, additional clearance procedures are employed.

to enter the restricted area from an authorized supervisor. A WNRC staff member is then designated to escort and monitor the person at all times while such person is in the restricted area.

The regulations provide for tours of the restricted area when they have been approved by a unit head, and those on the tour are "in the continuous presence of the unit head or his designee." (Joint Exhibit 6). Such tours occur infrequently.

Under the provisions of NARS regulations, WNRC employees are responsible for challenging any person in the restricted area who either is not wearing a badge or is not accompanied by a WNRC escort wearing a badge. They must report suspected violations to supervisory authority. (Joint Exhibit 6, paragraph 4(b)). Further, any employee who uses or allows the use of his or her badge to admit an unauthorized person to the WNRC restricted area may be subjected to disciplinary action. (Joint Exhibit 6, paragraph 7(c)). WNRC employees are provided orientation concerning these responsibilities. (Respondent's Exhibit 4).

The record reflects a regulatory pattern designed to prevent unauthorized access to the restricted area of the WNRC, and even stricter security with respect to the vault storage modules. Only WNRC staff or those properly cleared or escorted are allowed to enter. This policy has been fashioned to protect the records and to preclude unauthorized access to the records stored at WNRC. It was established that records have, in the past, been stolen from the WNRC, and that a fire occurred there on May 26, 1976. Access to the restricted area is conditioned on a need to have access to WNRC records, or to perform some duty relating to the records. Although records of a very sensitive nature are located throughout the restricted area, such records are stored in vault storage modules in particular. Access to the restricted area would bring one within closer proximity to the vault storage modules.

Mr. Delle Donne is a professional archivist assigned to the main National Archives Building located in the District of Columbia. At no time did Mr. Delle Donne obtain authority to enter the restricted area of the WNRC. It was also established that he was not cleared to have access to classified records. His work on behalf of the National Archives is performed at the National Archives Building rather than the WNRC. Although it was brought out that he was temporarily assigned to work at the center in 1974 for a period of about three weeks; on the date of the alleged unfair labor practice Mr. Delle Donne was assigned work at the National Archives Building in the District of Columbia, and his duties as an archivist did not require him to be in the restricted area of the WNRC. On the other hand, Mr. Lipscomb was, on March 3, 1977, a member of the General Archives Division staff, and as a staff member had permanent access to the WNRC restricted area.

The record reflects no dispute concerning the facts relative to the security violations in question. Using his personal card pass key, Mr. Lipscomb opened the locked double door through which entrance to the restricted area is gained and permitted Mr. Delle Donne to enter to perform business related to his office in the Union. When questioned by his supervisor on March 3, 1977, Mr. Lipscomb admitted an awareness that he had no authority to permit Mr. Delle Donne's entrance into the restricted area of the WNRC, that Mr. Delle Donne obtained no authorization to enter, and further that Mr. Lipscomb had not obtained permission for Mr. Delle Donne to enter. Mr. Lipscomb also denied that he was officially escorting Mr. Delle Donne in the restricted area.

Mr. Delle Donne admitted key details regarding the unauthorized entrance in the following words:

...Tom Lipscomb and I tried to get into the stack areas at Washington National Records Center. There's a sign on the door that says 'restricted area, badge or escort required.'

He admitted that he obtained no visitor's card to be used as a key to enter, that he sought no permission to enter, and that he was in the restricted area for a period of about twenty minutes before exiting through the locked double doors used to gain entry. At the hearing Mr. Delle Donne reluctantly admitted that his entrance into the restricted area was violative of National Archives regulations. 6/

The record disclosed that Mr. Delle Donne was observed speaking to one Charles Schamel, a General Archives Division staff member, in the vicinity of stack #4, within the restricted area. Mr. Edward Hill, a General Archives Division supervisor and the individual who observed Mr. Delle Donne, reported Mr. Delle Donne's presence to Mr. Daniel T. Goggin, Director of the General Archives Division. Because the meeting occurred in a segment of the WNRC under Mr. Goggin's jurisdiction, and because it was standard procedure to investigate complaints to determine whether corrective action would be required, Mr. Goggin conducted an inquiry to ascertain whether any WNRC official in authority had authorized Mr. Delle Donne to enter the restricted area; and whether any employee had received permission to leave their job to meet with a Union representative. 7/ The incident described was admitted by Mr. Delle Donne, including his failure to obtain permission to meet with Charles Schamel.

6/ Mr. Delle Donne also admitted prior entrance into the restricted area in 1974 under circumstances apparently violative of security regulations. (Tr. 20-21, 58).

7/ According to the collective bargaining agreement, representational and consultation duties may be performed only in accordance with the terms of the agreement. Union representatives must obtain permission from an employee's supervisor before contacting such employee. (Joint Exhibit 5, Article IV, Section 3(b)). The brief filed on behalf of the Complainant appears to recognize that Mr. Delle Donne violated these rules by taking Schamel off the job. (Complainant's Brief at page 18).

Mr. Delle Donne testified that upon entering the building, he and Thomas Lipscomb walked directly to the rear of the building for the purpose of contacting one Ronald Diggs, supervisor of the WNRC Preservation Lab, in order to obtain permission to speak to Alan Johnson, an employee under Diggs' supervision; that they spoke with Diggs; obtained permission; and thereafter discussed with Alan Johnson, a matter involving the selection of members of a Joint Safety and Health Committee. 8/

Mr. Delle Donne stated that upon returning to the front of the WNRC building, he stopped to talk, chat and joke with a "number of employees" (Tr. 18). He described it as "merely idle talk." At another point he referred to a group of "five or so." (Tr. 59-60). It appeared that Mr. Delle Donne's conversation with Schamel occurred after the meeting with Alan Johnson, and at or about the time he was meeting with other employees, as Mr. Delle Donne acknowledged that he observed Mr. Hill passing while he was speaking to a group of employees in the General Archives Division section of the WNRC. Mr. Lipscomb accompanied Delle Donne throughout his stay in the restricted area except for a brief period on the way out of the building when Mr. Lipscomb left Mr. Delle Donne to visit his own office.

8/ The record disclosed that Mr. Diggs did not possess authority to grant Mr. Delle Donne permission to be in the restricted area. It should also be noted here that the status of Mr. Delle Donne and Mr. Lipscomb in the Union, together with Mr. Lipscomb's presence with Mr. Delle Donne, would have conveyed to WNRC employees the appearance of legitimacy to Mr. Delle Donne's visit.

As noted letters dated March 9, 1977 were addressed to Mr. Delle Donne and Mr. Lipscomb in connection with the March 3, 1977 episode. In the letter addressed to Mr. Delle Donne, Mr. Brown and Mr. Goggin admonished him with respect to violation of security regulations governing the WNRC restricted area and further informed him that he had failed to follow the terms of Article IV, Section 3(b) of the collective bargaining agreement when he met with Mr. Schamel without obtaining the permission of Mr. Schamel's supervisor. (Joint Exhibit 3). Mr. Delle Donne was also informed that he could not enter the restricted area to perform representational work, but that he would be provided with space in the public area of the WNRC Building if he needed to meet with employees who worked in the restricted area. In the concluding paragraph of the letter the importance of complying with security regulations was stressed and it was noted that future violations could result in disciplinary action. By way of explanation the letter closes with the following:

This step is being taken to protect the security of this building and the records entrusted to our care. It in no way is being taken to impede the work of the Union or to hamper the performance of authorized representational duties entrusted to the exclusive bargaining agent for the bargaining unit members.

Mr. Lipscomb's letter also contained an admonishment regarding the breach of security regulations in allowing Mr. Delle Donne to enter the restricted area and reminded him that he had no authority to allow admittance to the restricted area. He was informed that further violation could result in disciplinary action. A concluding paragraph similar to the language quoted above was also reflected in the letter addressed to Mr. Lipscomb.

Evidence introduced at the hearing clearly reflected that the purpose of both letters was to call attention to the violation of security procedures relating to the restricted area, and to remind both officials of the applicable security rules. No disciplinary action was intended by the Respondent and none was effected by the issuance of the letters. In this regard it should be noted that neither the letters nor their content were posted or otherwise disseminated by the Respondent. They were delivered personally to the recipients. The record indicates that special measures were taken to protect against disclosure to individuals other than those directly concerned with the matter.

It was also established that the exclusion of Mr. Delle Donne was based entirely upon the absence of an official reason or reasons for his presence in the restricted area, and not on his affiliation with the Union. That is, since his duties as an archivist in no way related to the WNRC, and since his presence there was necessarily based entirely upon his position as Union President, the Respondent concluded that he should not have been provided access into the WNRC restricted area. However, it became quite clear that the limitation imposed would not have been applicable in the event Mr. Delle Donne's duties had required his being in the WNRC restricted area. Evidence adduced indicated that in such cases he would have been assigned a temporary visitor's badge. The letter was addressed to him as one without actual duties to perform in the restricted area, and one whose only asserted justification for being there rested on his holding office as a Union Official. It was also clear that a suitable public area was offered to Mr. Delle Donne to be used for the purpose of conducting Union representational work at the WNRC.

The record reflected that since issuance of the letter, Mr. Delle Donne has been provided with a conference room at the WNRC to meet with bargaining unit employees, and that he has not been denied any opportunity to meet with them.

Complainant endeavored to establish that WNRC security regulations were not fairly enforced, and that Mr. Delle Donne and Mr. Lipscomb were subjected to disparate treatment because of their positions in the Union. However, a review of the record fails to show that the Union was made the victim of such discriminatory treatment.

It was established that responsible WNRC officials have, in the past, initiated corrective action upon learning of security violations by employees of other government agencies. Although there was no showing of violations by other employees of the National Archives, nor of instances wherein letters were issued to National Archives employees, Mr. Goggin and Mr. Brown testified that to their knowledge regulations were being enforced generally, and that NARS employees complied with the regulations. 9/ Illustrations of prompt enforcement against individuals not employed by NARS were described. A contention that retired WNRC employees were given liberal access to the WNRC restricted areas was not established. Moreover, an example of a specific denial of access was cited by Mr. Goggin. The record provides no basis for questioning the credibility of these two witnesses.

With respect to employees from the main NARS Building temporarily assigned to the WNRC, it was established that such personnel first were assigned temporary visitor's badges in accordance with security regulations. This mandatory requirement has been enforced. The unusual nature of such violations as occurred on March 3, 1977, was apparent, in the light of the absence of prior breaches of security regulations by National Archives employees.

9/ Respondent's Exhibit 4 reflects that as of January 1975, security regulations were tightened so as to preclude non-General Services Administration researchers access into the restricted area without an escort. A period of employee education was required to implement the new policy.

Similarly, an alleged pattern of security regulation violations by individuals gaining entrance to the restricted area from the loading dock was not established by the Complainant. Efforts to construe authorized tours of the area as a basis for a finding that Mr. Delle Donne and Mr. Lipscomb were not accorded similar privileges also failed, in that it was shown that such tours were conducted only infrequently, were authorized by security regulations, and were escorted at all times.

Efforts to show a basis for disparate treatment resulted in vague and non-specific assertions having no probative value. In this connection it is noted that the Complainant's case rests heavily upon the testimony of Mr. Delle Donne; however, his credibility must be questioned in important areas of concern. His testimony was unjustifiably evasive and vague with respect to the purpose and details of his visit to the restricted area of WNRC. Although employed as a professional archivist since 1966, and although aware of the warning sign at the entrance to the restricted area, he professed ignorance of rules relating to security designed to protect the restricted area.

At another point Mr. Delle Donne endeavored to leave the erroneous impression that a National Archives identification card, of a type possessed by all National Archives employees, was sufficient to authorize entrance into the WNRC restricted area. (Complainant's Exhibit 1). The record is clear that such identification did not provide a basis for entrance. From the record as a whole, and Mr. Delle Donne's own testimony, there was no plausible reason for his giving misleading testimony with respect to his National Archives identification card.

Under the terms of the collective bargaining agreement, "the Union may designate representatives whom Management will authorize to leave their duty stations during regular duty hours for reasonable periods of time to perform necessary

Union representational and consultation duties..." (Joint Exhibit 6, Article IV, Section 3(a)). Under the terms of the agreement six representatives may be appointed to handle such work at the WNRC. There was no showing that Mr. Delle Donne was a representative within the meaning of Article IV Section 3(a). As noted the record disclosed that Thomas Lipscomb, Vice President of the Union, had access to the WNRC restricted area. It was brought out that two or three Union representatives worked in the WNRC restricted area, and that WNRC bargaining unit members had access to such representatives in the restricted area.

In accordance with the provisions of Section 12(a) of the Order, the agreement is also made subject to all existing published "GSA Policies and regulations in existence at the time the agreement was approved." The agreement was approved on November 6, 1972. Regulations limiting access to the WNRC restricted area in the manner herein outlined were promulgated at least as early as July 26, 1972. (Joint Exhibit 6).

Discussion and Conclusions

The general issue posed by the complaint is simply whether the letters issued to Mr. Delle Donne and Mr. Lipscomb, by the Respondent violated Sections 19(a)(1) and (2) of the Order. These sections provide that agency management shall not:

- (1) interfere with, restrain, or coerce employees in the exercise of the rights assured by this Order:
- (2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment....

Section 203.15 of the Rules of the Assistant Secretary of Labor for Labor-Management Relations, 29 C.F.R. 203.15, provides that, "a complainant, in asserting a violation of the Order shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." This burden has not been met.

The record demonstrates that Mr. Delle Donne's entrance into and presence in the WNRC restricted area, was violative of security regulations. Mr. Lipscomb's conduct in allowing entrance also constituted unauthorized admittance of Mr. Delle Donne, and thus was a violation of procedures established by security regulations. Facts relating to these infractions were admitted by Mr. Delle Donne and Mr. Lipscomb. It was also established that Mr. Delle Donne's meeting with Charles Schamel contravened Article IV, Section 3(b) of the collective bargaining agreement, in that Mr. Delle Donne had not obtained permission to meet with Mr. Schamel, nor was there any showing that Mr. Delle Donne's visit with employees, other than Alan Johnson, was authorized representational work. 10/

The Assistant Secretary has held that Union officers must obey rules and regulations, just as must all other employees. Department of the Air Force, Headquarters, 31st Combat Group (TAC), Homestead Air Force Base, Florida, A/SLMR No. 578; U.S. Department of the Navy, Portsmouth Naval Shipyard, A/SLMR No. 445. Moreover, there is no doubt that the Respondent had the authority to institute and enforce security procedures if such procedures were not enforced in

10/ It should be noted that Respondent questions Mr. Delle Donne's use of official time to meet with Alan Johnson. However, it appeared that had Mr. Delle Donne's entrance into the restricted area been legitimate, this element of Union business would have been legitimate.

a discriminatory manner. Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, A/SLMR No. 415; Directorate of Maintenance, Production Branch, Warner Robins Air Material Area, Robins Air Force Base, A/SLMR No. 374.

The attention of Mr. Delle Donne and Mr. Lipscomb was invited to established procedures designed to protect records stored at the WNRC. The possibility of discipline was called to their attention. This was entirely appropriate as regulations in effect provided for the initiation of disciplinary action in the case of breaches of security regulations. In fact such conduct could be construed as a petty offense under the provisions of 40 U.S.C. 318(c), 41 C.F.R. 101-20.303, and 41 C.F.R. 101-20.314. The regulatory pattern is clearly reflected in Joint Exhibit 6, and Respondent Exhibits 1, 2, 4 and 5.

In this case the conduct questioned was unusual in that violations of this specific type did not, in the ordinary course of events, occur at the WNRC. That is violation of security regulations by National Archives employees was not a problem. Compliance with security regulations, rather than non-compliance, was the pattern in such cases. However, the record did establish Respondent's insistence upon compliance by those in the WNRC, and a tightening of enforcement policy generally, long before the March 3, 1977 episode. There is no credible evidence to show that either Mr. Delle Donne or Mr. Lipscomb was made the victim of disparate treatment or that there was any relationship between their Union activity and Respondent's written insistence on compliance with security regulations. In fact, it appeared that the agency had no alternative, but to insist upon compliance with security regulations after learning of unauthorized admission of Mr. Delle Donne into the WNRC restricted area. There could be no legal justification for a security regulation exemption solely by reason of the fact that Mr. Delle Donne and Mr. Lipscomb did conduct Union business during a portion of the time when Mr. Delle Donne was in the restricted area without authorization.

Such a conclusion would have the effect of abrogating security procedures in situations where there is a need to perform representational duties. Security regulations in effect required that presence in the restricted area be related to a need to have official access to the restricted area. 11/

The Union was not denied access to the restricted area. In fact the collective bargaining agreement provided for six Union representatives to function at the WNRC. Evidence adduced reflected that individuals with the necessary clearance functioned as representatives in the restricted area, and Mr. Delle Donne was never denied access to bargaining unit employees in the public area of the WNRC. In fact Respondent established a procedure whereby a suitable meeting room would be made available to Mr. Delle Donne when prior arrangements had been made to meet with WNRC employees.

It cannot be successfully argued that the issuance of letters to convey Respondent's message regarding security violations was inappropriate. The record clearly establishes that the reason for the use of letters was not based on anti-Union animus, but rather to correct what appeared as a clear breach of security procedures by individuals who presumably should have been sensitive to the need for full compliance with such regulations. Although, there was evidence that warnings issued to others were oral in nature,

11/ Mr. Delle Donne positively acknowledged that he had no right to be in the vault areas for the purpose of performing representational work because he did not possess the proper security classification. However, he argued that he should have been allowed in to perform representational work in the general restricted areas of the WNRC. Since the principle underlying security regulations would be the same in both instances, it clearly appeared that he was referring to a distinction without a difference. His position in this regard is inconsistent, and further indicates the absence of a rationale to support Complainant's position.

it was also brought out that others receiving warnings were not National Archives employees, and further that the oral method of effecting future compliance was appropriate in the situations involved. In fact, corrective steps taken in situations involving other violators, were reported to the agencies concerned. Since this case involved National Archives employees, the issuance of letters does not seem unusual or discriminatory.

Although the letter addressed to Mr. Delle Donne informs him that he may not be allowed into the WNRC restricted area because of security violations, it is determined that this may not give rise to complaint because Mr. Delle Donne's duties were not in any way related to the WNRC restricted area. Credible evidence was introduced to the effect that the letter was in fact written to Mr. Delle Donne as one having no justifiable reason for being in the area, as was shown to be the case; and further that he would be allowed the same freedom of access enjoyed by Mr. Lipscomb and other Union representatives assigned WNRC security clearance should his duty station ever be located at the WNRC.

On the surface, the letter to Mr. Delle Donne seems to imply that had Mr. Delle Donne followed security procedures he would have been allowed entrance; however, a careful reading of the letter in the light of the entire record, reflects that Mr. Delle Donne and Mr. Lipscomb were being apprised of the nature of the security violations, that is unauthorized admission to and presence in the restricted area. The record provides no basis for the conclusion that the Respondent was penalizing Mr. Delle Donne by discontinuing an established practice of allowing Mr. Delle Donne to be in the area. On the contrary, proof introduced by the Respondent makes it clear that in the absence of factors clearly related to a need to have official access to the WNRC restricted area, Mr. Delle Donne could not have acquired the type of authority needed to enter the restricted area at the WNRC.

With respect to the threats of disciplinary action reflected in the two letters, it is noted that a pattern of case authority indicates that threats which do not constitute an infringement of rights under either the Order or the agreement between the parties; but rather as legitimate restriction of an employee to his work station during working hours, do not constitute violations of the Order. Long Beach Naval Shipyard, A/SLMR No. 352; Defense Supply Agency, Defense Contract Administration Services Region, Los Angeles, California, A/SLMR No. 633.

The record reflects that Mr. Delle Donne did not pursue procedures provided in the collective bargaining agreement in connection with his conversation with Mr. Schamel in the vicinity of Mr. Schamel's WNRC work area. The warning to Mr. Delle Donne in this regard was therefore appropriate, and well within the Respondent's prerogatives, as there was no justifiable reason for his meeting with Mr. Schamel. In this regard, his own testimony describes the conversation as involving talking, chatting, and joking with a number of employees. (Tr. 18). It is clear that there would be no basis for visits of this nature.

Based upon the foregoing it must be concluded that the issuance of the letters in question did not constitute violations of Section 19(a)(1) of the Order by interfering with, restraining or coercing either Mr. Delle Donne, Mr. Lipscomb or other bargaining unit members in the exercise of rights guaranteed by the Order. It is also concluded that issuance of the letters was not violative of Section 19(a)(2) in that the letters did not have the effect of discouraging membership in a labor organization by means of discrimination or otherwise.

RECOMMENDATION

Having found that Respondents have not engaged in conduct prohibited by Sections 19(a)(1) and (2) of the Order, it is hereby recommended that the complaint herein be dismissed in its entirety.

Louis Scalzo
 LOUIS SCALZO
 Administrative Law Judge

Dated: June 21, 1978
 Washington, D. C.

LS:jp

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ENVIRONMENTAL PROTECTION AGENCY,
 ROBERT S. KERR ENVIRONMENTAL
 RESEARCH LABORATORY,
 ADA, OKLAHOMA
 A/SLMR No. 1114

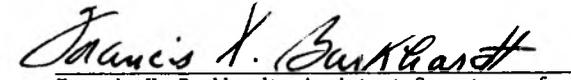
This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local Union 2897 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when it unilaterally changed from a past practice of assigning both chemists and technicians to certain projects.

The Administrative Law Judge concluded that the record failed to establish that the Respondent violated Section 19(a)(1) and (6) of the Order. In this regard, he noted that management was under no obligation to negotiate about the decision itself, and that the Complainant so conceded. Moreover, the Administrative Law Judge found that the decision to assign only chemists to the projects involved and its impact and implementation, were inextricably bound together so as to provide no negotiable area. In addition, he found that as only chemists had been assigned in the past to process effluent samples in a similar project, there existed no change in past practice which would require bargaining on impact and implementation.

The Assistant Secretary concurred in the findings, conclusions and recommendation of the Administrative Law Judge. In this regard, he noted that as there was no change in the past practice, no obligation to bargain existed on the impact and implementation of such assignment. Accordingly, he ordered that the complaint be dismissed in its entirety.

IT IS HEREBY ORDERED that the complaint in Case No. 63-7564(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 1, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ENVIRONMENTAL PROTECTION AGENCY,
ROBERT S. KERR ENVIRONMENTAL
RESEARCH LABORATORY,
ADA, OKLAHOMA

Respondent

and

Case No. 63-7564(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL UNION 2897

Complainant

DECISION AND ORDER

On July 7, 1978, Administrative Law Judge Steven E. Halpern issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation. Thus, in agreement with the Administrative Law Judge, I find that as there was no change in past practice with respect to utilizing only chemists to perform non-standardized laboratory procedures, no obligation to bargain existed on the impact and implementation of such assignment.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W
Washington, D.C. 20036
211 Main Street, Suite 600
San Francisco, California 94105



REPLY TO SAN FRANCISCO
AREA CODE 415 556-0555

In the Matter of

ENVIRONMENTAL PROTECTION AGENCY,
ROBERT S. KERR ENVIRONMENTAL
RESEARCH LABORATORY, ADA, OKLAHOMA,
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL UNION
2897,
Complainant

CASE NO. 63-7564(CA)

George Robertson
U. S. Environmental Protection
Agency
401 M Street, Southwest
Office of General Counsel (A134)
Washington, D. C. 20460
For the Respondent

O. D. Sanders, Esquire
1733 Vine Street
Norman, Oklahoma 73069
For the Complainant

Before: STEVEN E. HALPERN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding under Executive Order 11491, as amended, was initiated by complaint filed July 15, 1977, with an amended complaint having been filed March 1, 1978. Notice of Hearing was originally issued on March 17, 1978, by the Regional Administrator, United States Department of Labor, Labor-Management Services Administration, Kansas City Region.

Pursuant to supplemental notice a hearing was held at Ada, Oklahoma, on May 25, 1978. Thereafter the record closed on June 26, 1978, upon the receipt of the transcript at the undersigned's office in San Francisco, California.

Respondent is charged with having violated section 19(a)(1) and (6) of the Executive Order. The factual basis on which the complaint is premised is set forth therein as follows:

On May 5, 1977 Mr. Marvin Wood, Assistant Director, of Robert S. Kerr Environmental Research Laboratory at Ada, Oklahoma, made a unilateral change of working conditions affecting employees in a bargaining unit without meeting and conferring with Local 2897 as required by Executive Order 11491 as amended. Specifically Mr. Wood changed from a practice of long standing whereby both technicians and chemists processed effluent samples at RSKRL to limiting the processing of said effluent samples to chemist (sic).

Complainant by letter brief of June 8, 1978, has withdrawn its contention that management was required to negotiate with it on the decision to utilize only chemists to perform the work at issue. The remaining basis for the complaint is stated as follows: "It still is the position of the Complainant that the local agency Activity was bound by the order to meet and confer as to the procedure to be used and impact of said decision prior to its implementation."

The parties have been afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses, to make oral argument and to file briefs. Based upon the evidence of record, having observed the witnesses and assessed their credibility and having considered the arguments of the parties, I make the within findings, conclusions and recommendation.

Findings of Fact

I

Complainant Union has, and at all times material had, exclusive recognition as representative of the bargaining unit of which Respondent's physical science technicians are members.

II

Respondent Activity is an arm of the Environmental Protection Agency and is engaged principally in research on the treatment and control of waste water effluents (Tr. 101). In the course of its work it is required to analyze water samples, for which purpose it employs three Physical Science Technicians and four graduate Chemists. Both groups have expertise acquired through practical experience and training while the chemists additionally are possessed of a high degree of theoretical knowledge as a consequence of their academic background.

III

Both chemists and technicians perform the standardized non-experimental procedures involved in the analysis of samples in Respondent's routine work.

IV

Sporadically, Respondent is involved in special non-routine technical assistance projects. Such arise in situations where "almost without exception there is a need for the agency to meet some legal deadline to publish a regulation, to publish a manual, to promulgate numbers." (Tr. 92). During the period from 1969 to the special project here at issue, Respondent participated in two major special assistance projects, one in 1970 and the other in 1975-76. (As to a minor special project which apparently took place some time later in 1976, the knowledge of the witness who testified was limited and I make no findings thereon.)

In the 1970 special project, in which there was no experimental work, both chemists and technicians performed the tests and analyses. In the 1975-76 special project, both chemists and technicians performed the tests and analyses except as to certain experimental work "of a nature that chemists would normally be assigned" (Tr. 96, 97); the technicians did not participate in such experimental work (Tr. 107). For the performance of the latter management apparently went to the trouble and expense of importing additional chemists from an out of state facility; although no evidence was adduced on the question it is unlikely, considering the relatively small number of technicians and chemists employed by the Activity, that the presence of the outside chemists went unnoticed by Complainant.

V

In the fall of 1976, Respondent became aware that it would be assigned the "toxics special assistance project" out of which this case arises. In March 1977, the laboratory work, virtually all of which was overtime, began. Approximately two weeks prior thereto, Respondent made the decision that the actual tests and analyses required in the project would be performed only by chemists and that technicians would be excluded therefrom. Prior advice of neither the decision nor its implementation was given to Complainant.

VI

In approximately April or May 1977, pursuant to Complainant's request, a meeting was held with Respondent's Deputy Director, who was in charge of the toxics project and who was responsible for the aforesaid decision. Complainant's representative initially expressed concern that the technicians were receiving no overtime on the project. After explanation of the reason for management's decision, Complainant's concern turned to the merits and propriety of the decision itself.

VII

Management's decision that the actual tests and analyses be performed exclusively by chemists was premised on the following: the testing procedures were non-standardized and experimental (except for a percentage so small as to be considered de minimus); theoretical chemical knowledge not possessed by the technicians was considered a necessity because of the special nature of the samples (Tr. 82); the civil service classification standards for technicians were inconsistent with the skills required by the project (Tr. 67); it was considered likely that the individuals performing the testing would be required to give legal testimony and in view of their superior credentials it was preferred that such be given by the chemists.

VIII

No intent to deprive the technicians of overtime has been shown. On the contrary, as was pointed out in testimony, it would have been less expensive to complete the project if technicians had been utilized in the testing procedures, and certainly their assistance would have been beneficial to the overworked chemists. In fact, overtime work was available in non-testing aspects of the project. Such was approved by management and

offered to all three technicians on several occasions; only one accepted and he worked a total of approximately 150 overtime hours.

Conclusions of Law

The original dispute in this matter comprehended management's obligation to negotiate both on its decision to utilize only chemists to perform the tests and analyses, and the implementation and impact (loss of overtime) of that decision.

The Decision

The parties' negotiated agreement provides that "Management officials of the employer retain the right, in accordance with applicable laws and regulations: to maintain the efficiency of the government operations entrusted to them; to determine the methods, means, and personnel by which such operations are to be conducted..." (Article 4 section 1.(5)). In dealing with "Matters Appropriate For Negotiation" the agreement expressly provides that management's "obligation to meet and confer does not include matters with respect to the numbers, types and grades of positions or employees assigned to a ... work project...." (Article 3, section 2). In dealing with the question of overtime the agreement provides "whenever overtime work is to be performed, it shall be made available to qualified employees on as equitable a basis as practicable and consistent with the employer's needs." (Article 15, section 3) (emphasis supplied).

Thus, there can be no doubt that under the parties' agreement the management decision at issue required no negotiations; and, Complainant now so concedes. Furthermore, it is well established by case law that the Executive Order requires no such negotiations. 1/

Impact and Implementation

Nevertheless, the procedures used by management in the implementation of such decision and the impact thereof on employees adversely affected remains negotiable. 2/

The area of negotiability, however, is circumscribed. Thus, while a proposal which deals with "procedures which

1/ Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center Norfolk, Virginia, FLRC No. 71A-56.

2/ Ibid.

management would observe leading to the exercise of the retained management right" is negotiable, a proposal which "interfere(s) with the exercise of that right itself" is not. In short, "management's options in determining which personnel and the type of personnel who will conduct (its) operations" may not be constricted. 3/

Management in the instant case having made the determination that the assignment of only chemists to perform all phases of the testing procedures in the toxics project would best serve its mission, it was an incidental result that the technicians' overtime was limited. It seems clear that only if the technicians were permitted to participate in some phase of the testing procedures would additional overtime be available to them; it is that very participation against which management had decided.

Thus, in the circumstances of this case management's decision and the implementation thereof would appear to be inextricably bound together. The record, in any event, is devoid of any proposal which would not impose "limitations on which types of positions or employees will actually perform the duties involved" 4/, therefore, I perceive no negotiable area.

Accordingly, while I do not pass upon the propriety of management's decision to exclude the technicians (whose abilities, the record reveals, it holds in high esteem) from all but housekeeping aspects of the toxics project, I conclude that such decision was its right unilaterally to make and implement and I shall recommend that the complaint be dismissed.

Additional Considerations

Management's mid-contract obligation to negotiate upon implementation of a decision arises only when such brings about a "change in, or addition to, personnel policies and practices or matters affecting working conditions." 5/

3/ Tidewater, supra; Veterans Administration Hospital, Canandaigua, New York and Local 227, Service Employees International Union, Buffalo, New York, FLRC No. 73A-42.

4/ NAGE, Local R12-58 and McClellan Air Force Base, FLRC No. 75A-90.

5/ Executive Order, section 11(d).

The record reveals that it was management's practice, established in the prior technical assistance project, which occurred in 1975-6, to utilize chemists rather than technicians to perform work of an experimental nature. Management's decision in the toxics project was consistent with that practice.

In other circumstances it might well be argued that a policy is not established and a practice does not arise on the basis of what was done on one prior occasion. However, that only two prior major special assistance projects had been assigned to Respondent in the six or seven years preceding the toxics project magnifies in significance management's practices in conducting those projects, particularly in the crucial area of who is qualified to do its work.

I therefore conclude that prior to the toxics project a policy and practice of utilizing only chemists to perform non-standardized experimental testing had been established; that Respondent's decision in the toxics project merely continued that prior practice; and, accordingly, no duty to negotiate arose upon implementation of that decision. I further conclude that the technicians, at no prior time having had overtime work in connection with the performance of non-standardized and experimental procedures, cannot be said to have been subjected to a change in working conditions by their foreclosure from such in the toxics project.

Accordingly, in resolution of the issue of whether or not there was a change in or addition to personnel practices or policies affecting working conditions in connection with management's decision to utilize only chemists to perform non-standardized experimental techniques in the analyses of effluent samples, particularly in the context of the legal implications of the toxics project, I conclude that there was not.

Thus, even independent of my earlier conclusions, for the foregoing reasons I conclude that there was no obligation to negotiate and that there has been no violation of sections 19(a)(1) and (6) of the Executive Order.

Recommendation

I recommend to the Assistant Secretary that the complaint be dismissed in its entirety.



STEVEN E. HALPERN
Administrative Law Judge

Dated: July 7, 1978
San Francisco, California

SEH:vag

September 5, 1978

A/SLMR No. 1115

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION,
CONCORD, CALIFORNIA
A/SLMR No. 1115

DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION,
CONCORD, CALIFORNIA

Respondent

and

Case Nos. 70-5705 (CA) and
70-5707 (CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1931, AFL-CIO

Complainant

DECISION AND ORDER

This case involved two unfair labor practice complaints filed by the American Federation of Government Employees, Local 1931, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by failing to consult, confer, or negotiate prior to issuing a letter on February 24, 1977, which altered a past practice by limiting the amount of official time permitted the Complainant's President in the discharge of his representational responsibilities and by charging the President with annual leave for periods of time used in excess of the limitation. The Respondent argued, in part, that the February 24, 1977, letter was merely a reaffirmation of an existing policy and that the proper forum for resolving disputes over the amount of time considered reasonable under the terms of the parties' agreement was the grievance and arbitration procedure contained therein.

On May 22, 1978, Administrative Law Judge James J. Butler issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the subject complaints and recommending that they be dismissed in their entirety. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Administrative Law Judge recommended dismissal of the complaints. He found that the Respondent's February 24, 1977, letter did not alter a past practice regarding the use of time but, rather, the change had been instituted earlier as a result of a 1974 Memorandum of Understanding between the parties. He further found no evidence to support the allegation regarding the charge to annual leave.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in these cases, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, to the extent consistent herewith.

The Assistant Secretary concurred with the Administrative Law Judge's dismissal of the complaints, finding that the proper forum for the resolution of the dispute involved herein was the contractual grievance-arbitration procedure. In this regard, the Assistant Secretary noted that, essentially, the dispute involved differing and arguable interpretations of the reasonable time provision of the negotiated agreement, rather than a clear, unilateral breach of the agreement. Accordingly, and noting that it has been previously held that such matters are proper subjects for resolution under a contractual grievance-arbitration procedure, rather than through the unfair labor practice procedures of the Executive Order, the Assistant Secretary ordered that the complaints be dismissed.

The instant complaints allege, in effect, that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to consult, confer, or negotiate prior to issuing a letter on February 24, 1977, which unilaterally altered a past practice with respect to the amount of official time permitted the Complainant's President in the discharge of his representational responsibilities. They further allege that the Respondent violated Section 19(a)(1) and (2) of the Order by charging the Complainant's President with annual leave for periods of time used in excess of the specified limitation. The Respondent argued, among other things, that the February 24, 1977, letter was merely a reaffirmation of an existing policy, and that the proper forum for resolving

disputes over the amount of time that is considered reasonable under the terms of the parties' negotiated agreement is the grievance and arbitration procedure contained therein. 1/

In reaching his conclusion, the Administrative Law Judge found that the parties' negotiated agreement provided for the use by the Complainant's president of a reasonable amount of official time to conduct union-management business. He further found, in essence, that subsequent to the execution of the negotiated agreement, on or about June 13, 1974, the parties altered their previous practice of allowing the Complainant's President official time for union-management business for up to 100 percent of his duty time by restricting the amount of official time available for such purpose to 25 percent of his duty time. Under these circumstances, the Administrative Law Judge found, in effect, that the Respondent's February 24, 1977, letter to the Complainant, restricting the amount of official time available to Complainant's President to 25 percent of his duty time, did not constitute a unilateral change in past practice in violation of its bargaining responsibilities under the Order, but rather, was concerned with a past practice dating

1/ The parties' agreement, which became effective on March 19, 1974, for a three-year period, provided, in pertinent part, as follows:

ARTICLE VI UNION REPRESENTATION AND CONDUCT OF BUSINESS

Section 7. Time off during the regular working hours, as may be necessary, will be authorized to permit the recognized Union Officers and stewards to properly and expeditiously discuss with employees grievances and appropriate matters directly related to work situations, and for attendance at meetings with the Employer. The Union agrees that it will guard against the use of excessive time whenever business of any nature is transacted during working hours, and that only that amount of time necessary to bring about a prompt disposition of the matter will be utilized.

Section 11. The Union representative (President or his duly authorized representative) will be allowed a reasonable time during regular working hours to properly pursue his official liaison duties with the Employer and to provide appropriate representation for employees.

ARTICLE XXIII GRIEVANCE PROCEDURE

Section 1. This Article provides a method for prompt and equitable settlement of grievances over the interpretation and application of the Agreement. It is agreed that this will be the exclusive procedure available to parties and employees for resolving such grievances. It may not cover any other matters, including matters for which statutory appeal procedures exist.

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back to 1974. Consequently, the Administrative Law Judge further found the Respondent's action in charging the Complainant's President annual leave for time spent in excess of the 25 percent official time on union-management business was not violative of Section 19(a)(1) and (2) of the Order.

While I agree with the Administrative Law Judge's conclusion that dismissal of the instant complaint is warranted, I reach such conclusion for different reasons. Thus, the Complainant's allegation that the Respondent violated Section 19(a)(1) and (6) of the Order is based upon an asserted breach of the parties' negotiated agreement. Its allegation of violation of Section 19(a)(1) and (2) is based upon the Respondent having charged the Complainant's President with annual leave for excessive time spent on union-management business. Essentially, what is involved herein are the conflicting contentions of the parties as to the proper interpretation of the provision of their negotiated agreement establishing "reasonable" official time for the Complainant's President or his duly authorized representative to engage in representational activities. In this context, I find that a resolution of the issues presented herein requires an interpretation of the parties' negotiated agreement in relation to the use of official time.

It has been previously held that where a matter involves differing and arguable interpretations of a negotiated agreement, as opposed to a clear, unilateral breach of the agreement, such a matter is a proper subject for resolution under a contractual grievance-arbitration procedure, rather than through the unfair labor practice procedures of the Executive Order. 2/ Accordingly, as I find the dispute herein to be a matter of contract interpretation, and as, in my view, the Respondent's conduct did not constitute a clear, unilateral breach of the agreement, I shall order that the complaints herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 70-5705(CA) and 70-5707(CA) be, and they hereby are, dismissed.

Dated, Washington, D.C.
September 5, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

2/ See Norfolk Naval Shipyard, 6 A/SLMR 486, A/SLMR No. 708 (1976); Department of Army, Watervliet Arsenal, Watervliet, New York, 6 A/SLMR 127, A/SLMR No. 624 (1976); Federal Aviation Administration, Muskegon Air Traffic Control Tower, 5 A/SLMR 457, A/SLMR No. 534 (1975); and General Services Administration, Region 5, Public Buildings Service, Chicago Field Offices, 5 A/SLMR 424, A/SLMR No. 528 (1975).

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U.S. DEPARTMENT OF LABOR
 OFFICE OF ADMINISTRATIVE LAW JUDGES
 Suite 700-1111 20th Street, N.W.
 Washington, D.C. 20036
 211 Main Street, Suite 600
 San Francisco, California 94105



REPLY TO SAN FRANCISCO
 AREA CODE 415 556-0555

Background of Case

This case arises as a result of two consolidated complaints filed by Local 1931 of the American Federation of Government Employees, AFL-CIO (herein called "the union") alleging that Department of the Navy, Naval Weapons Station, Concord California (herein sometimes called "the activity") engaged in unfair labor practices in violation of section 19(a)(1), (2) and (6) of Executive Order 11491, as amended (herein called "the Order"), "by issuing letter (dated 24 February 1977) from Ordnance Officer, that changed a past policy and practice, without conferring and consulting."

The letter referred to in the complaint reads in its entirety as follows:

From: Ordnance Officer
 To: Mr. Wilfred J. Scott, Ordnance
 Department Code 20611

Subj: Use of Official Time for Union Business

Ref: (a) Commanding Officer, WPNSTA Concord
 ltr to AFGE President Serial 064:WBC:ct
 12720 dtd 28 Jan 1975

1. It has been past practice aboard this Station, in accordance with reference (a), to allow the Union President approximately 25% of his time as "reasonable" under the provisions of the Basic Agreement for conduct of authorized union activities. It has come to my attention that you may be using excessive time for union business. While it is recognized that you have had need for this excessive time in regard to your transition to President of AFGE Local 1931, good management practice requires that a moratorium of 1 March 1977 be called on this excessive time usage.

2. It is therefore requested that commencing 1 March 1977 you limit your official time to 25% of your workweek or 10 hours. It is further requested that you follow the provisions of the Basic Agreement concerning checking out and checking in at your work area when you must be absent on authorized union business.

G. C. RHINEBECK

In the Matter of)	
)	
DEPARTMENT OF THE NAVY)	
NAVAL WEAPONS STATION)	
CONCORD, CALIFORNIA)	
)	Respondent
and)	
)	CASE NOS. 70-5705 (CA)
)	70-5707 (CA)
AMERICAN FEDERATION OF GOVERNMENT)	
EMPLOYEES, LOCAL 1931, AFL-CIO)	
)	Complainant

W. Don Wilson
 Labor Relations Advisor
 Western Field Division
 Office of Civilian Personnel
 Department of the Navy
 760 Market Street, Suite 865
 San Francisco, California 94102
 For the Respondent

Wilfred J. Scott
 President, American Federation
 of Government Employees, Local 1931,
 AFL-CIO, P. O. Box 5548 (Naval Weapons
 Station)
 Concord, California 94524
 For the Complainant

Curtis Turner
 National Representative
 American Federation of Government
 Employees
 620 Contra Costa Boulevard
 Pleasant Hills, California
 For the Complainant

Before: JAMES J. BUTLER
 Administrative Law Judge

The reference indicated in the above set out letter reads as follows:

064:WBC:Ct
12720
28 Jan 1975

From: Commanding Officer, Naval Weapons Station, Concord, CA 94520
To: President, AFGE Local 1931, Building 181, Naval Weapons Station, Concord, CA 94520
Subj: Allegation of Unfair Labor Practice (Memo from F. Tallerico dtd 15 Oct 74)
Ref: (a) Memo from F. Tallerico, Senior Captain, Fire Department to Tom Gedrich, Hoseman dtd 15 Oct 74
(b) AFGE ltr dtd 24 Oct 74 Subj: Unfair Labor Practice
(c) Memo of 2 Jan 75 from CDR A. R. Nash to C.O., Subj: Investigation into Unfair Practice, w/encl
(d) Executive Order 11491, as amended
(e) A:JCD:we Memo 13 Nov 73 from C.O. to Tom Gedrich, Subj: 'Time to be Used for Union Management Activities'
(f) 06:ARC:gn Memo dtd 22 Feb 74, Subj: Extension of Time for Administrative Duties
(g) AFGE ltr dtd 21 Mar 74, Subj: Extension of Time for Union-Management Business
Encl: (1) Memo of Understanding re 25% of 8 hour work period as reasonable amount of time

1. Reference (a) limited the amount of duty time during which you were authorized to conduct Union business to four and one-half hours per workday. Reference (b) charged the Station with an Unfair Labor Practice for failure or refusal to consult prior to the issuance of reference (a). While the test of reference (b) fails to cite sections of Executive Order 11491 which are alleged to have been violated, it is assumed that references to reference (b) provide such specifics.

2. Reference (c) forwarded a report of an impartial investigation and review by CDR A. R. Nash into a separate allegation of an Unfair Labor Practice by the Station. In it, the

question of the reasonableness of the four and one-half hours per workday limitation was addressed. CDR Nash found that in light of arbitration rulings, and by comparisons of time authorized at other Naval activities in the Bay Area, the time limitation imposed on the Union President is reasonable.

3. The allegation of a violation of Section 11(a) of reference (d) is considered inappropriate to the subject charge in that Section 11(a) applies to the negotiation of agreements and not to an obligation to consult. Further, the Station has, and will continue to meet and confer in good faith on applicable matters, as evidenced by the bi-monthly Labor-Management meetings conducted by the Civilian Personnel Department and by my Union open-door policy.

4. The allegation of a violation of Section 19(a) of reference (d), assumed to mean 19(a)(6), is considered not founded in fact. On 13 November 1973 reference (e) provided you, as Union President, with additional time for a 90-day period to clear up the back log of Union-Management work and to train Union Representatives (Stewards) to handle grievances and appeals. (In addition, Management provided 96 man-hours of instruction to Union Stewards on the subject of employee representation at formal hearings.) The elimination of the backlog was intended to allow you to begin to perform the full scope of your assigned duties as a Fireman. At our 21 February 1974 meeting you indicated that progress had been made in training Union Officials and Stewards to handle most labor relations matters, but that a considerable backlog still existed. Accordingly, reference (f) was issued which extended the conditions of reference (e) to 1 April 1974. It further requested a reply in writing as to whether you considered the extension reasonable. Your reply, written one month later, concurred with the proposal cited in reference (f). At our meeting of 4 April 1974, you indicated that another extension of time was necessary to complete your training of Stewards and Union Officials. The extension was granted on 12 April 1974 by reference (h) and suggested a meeting on or about 1 May 1974 to discuss the amount of time to be spent on Union-Management business.

5. On 13 June 1974 Mr. Del Frerichs, then Civilian Personnel Officer, provided you with a copy, enclosure (1), for your review and comments. You responded that you would comment promptly. On 18 July 1974 when Mr. Frerichs requested your reply and comments, you stated that you were preparing a written reply which would claim that you should continue to have eight hours allowed time per day as established by "past practice." To date no such written reply is on record.

6. In light of the efforts enumerated in paragraphs 4 and 5 above, it is felt that Management allowed you a reasonable opportunity to comment on, or to provide input to, any subsequent action modifying the amount of duty time allowed for Union-Management business.

7. This correspondence is intended as this activity's final decision on the charge as alleged in reference (b).

J. G. DENHAM

Following the hearings held in this case, it was decided to withhold a formal decision on the merits of the complaint pending completion of negotiations on a new agreement wherein the question of the use of official time for union representational purposes had become a pivotal subject. As it now appears that the parties have reached an impasse in their negotiations there is no reason why this matter should not be decided without further delay.

Discussion, Preliminary Finding and Conclusions

Section 19(a)(1) and (6) of the Order provide as follows:

Sec. 19. Unfair Labor practices. (a) Agency management shall not-

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order:

(2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment;

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

The Federal Labor Relations Council (FLRC) recently had occasion to rule on the applicability of Section 19(a)(1) to the "right" of a local union president's use of official time for employee representational activities as permitted under the terms of the negotiated agreement between her union and the activity accused of an unfair labor practice. In that case, Department of the Air Force Base Procurement Office, Vandenberg Air Force Base, California, FLRC No. 75A-25 (November 19, 1976), Report No. 118, the Council concluded, in part, as follows:

Thus, in order for the Assistant Secretary to find a violation of section 19(a)(1), he must determine that a right assured by the Order is involved, and that agency management has interfered with, restrained, or coerced an employee in the exercise thereof. Where either element is absent, no violation of section 19(a)(1) can be established.

In the instant case, as previously stated, the Assistant Secretary found that the "right" in question concerned the local president's use of official time for employee representational activities as "permitted by the negotiated agreement." He found this right notwithstanding his further finding, with which we agree, that section 20 of the Order expressly prohibits the use of official time by employees to engage in the internal business of a union and that there is no inherent right under the Order for employees, in their capacity as union officials or representatives, to use official time for employee representational activities.

It is clear that the Order does not prohibit the parties from negotiating contractual provisions for the use of official time in contract administration and other representational activities, as they did in the instant case (n. 1, supra). Thus, as the Council explained in a policy statement in this regard:

... nothing in the Order prohibits an agency and a labor organization from negotiating provisions ... which

provide for official time for union representatives to engage in contract administration and other representational activities which are of mutual interest to both the agency and labor organization and which relate to the labor-management relationship and not to "internal" union business. Examples of such representational and contract administration activities include the investigation and attempted informal resolution of employee grievances, participation in formal grievance resolution procedures, attending or preparing for meetings of committees on which both the union and management are represented and discussing problems in agreement administration with management officials.

However, the negotiation of such provisions into an agreement does not thereby convert a contractual right into a "right assured by this Order." And, contrary to the reasoning of the Assistant Secretary, "to deprive, or to threaten to deprive, employees or their representatives of the rights accorded them under a negotiated agreement" would not of itself "interfere with, restrain, or coerce employees in the exercise of the rights assured by section 1(a) of the Order." [Emphasis added.] Stated otherwise, the use of official time for employee representational activities, as recognized by the Assistant Secretary, is a contractual right, not a right guaranteed by the Order, and the threatened violation of that provision in the agreement as here found to have occurred is not thereby a violation of a section 1(a) right remediable under section 19(a)(1) of the Order. Accordingly, we must hold that the considerations relied upon by the Assistant Secretary in this case fail to support his finding of a 19(a)(1) violation.

This does not mean that to penalize or threaten to penalize employees for asserting or exercising rights accorded them under a negotiated agreement could not constitute a violation of section 19(a)(1) of the Order where, unlike here, the effect of such penalty or threat of

penalty is to interfere with, restrain, or coerce such employees in the exercise of rights assured by the Order, e.g., the rights to form, join, or assist a labor organization. Cf. Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, A/SLMR No. 582, FLRC No. 76A-13 (July 27, 1976), Report No. 108.

Moreover, the Council's decision herein should not be construed as holding that no contractual violation may independently constitute an unfair labor practice. In fact, many acts by agency management and labor organizations can conceivably constitute separate violations of both the Order and negotiated agreements. Indeed, section 19(d) of the Order recognizes that certain acts by a party can constitute separate independent violations of both the Order and a negotiated agreement.

Finally, the Council's conclusion that the Assistant Secretary's 19(a)(1) finding in the instant case must be set aside clearly does not mean that the union is without recourse in this and similar situations. Rather, the relief for alleged violations of negotiated rights (such as involved herein) would be available through the negotiated grievance procedure, which section 13 of the Order requires the parties to include in their agreement. (Footnotes omitted).

The pertinent parts of the basic agreement between the parties in effect during the time in question here are found in Article VI, sections 7 and 11, and in Article XXIII, section 1 (Joint Exhibit No. 1, pages 8, 9 and 44). They provide as follows:

ARTICLE VI

Union Representation and Conduct of Business

Section 7. Time off during regular working hours, as may be necessary, will be authorized to permit the recognized Union Officers and stewards to properly and expeditiously discuss with employees grievances and appropriate matters directly related to work situations,

and for attendance at meetings with the Employer. The Union agrees that it will guard against the use of excessive time whenever business of any nature is transacted during working hours, and that only that amount of time necessary to bring about a prompt disposition of the matter will be utilized.

Section 11. The Union representative (President or his duly authorized representative) will be allowed a reasonable time during regular working hours to properly pursue his official liaison duties with the Employer and to provide appropriate representation for employees.

ARTICLE XXIII GRIEVANCE PROCEDURE

Section 1. This Article provides a method for prompt and equitable settlement of grievances over the interpretation and application of the Agreement. It is agreed that this will be the exclusive procedure available to parties and employees for resolving such grievances. It may not cover any other matters, including matters for which statutory appeal procedures exist.

It should be expressly noted at this point, however, that the complaints filed on March 18, 1977, do not allege that any "right," whether assured by the Order or the basic agreement, to the use of official time for union representational activity has been infringed upon in any manner. In fact, the instant consolidated complaint in case no. 70-5705 (CA) affirmatively states that: "The union is not contesting what is reasonable time (for conduct of authorized union business), only that management (the activity) refused to confer or consult prior to changing past policy and practice." In addition, it should be noted that the union also takes the alternate and somewhat inconsistent position in its complaint that if it was the "policy" for the past union president to use approximately 25% of his official time "to conduct Labor Management business, it was never enforced."

The activity, on the other hand, declares that "past practice" aboard the station was the basis upon which it

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sought "to allow the Union President approximately 25% of his time as 'reasonable' under the provisions of the Basic Agreement for conduct of authorized union activities."

It is seen, therefore, that since each party insists on the compulsion of an alleged different past practice in support of their respective positions, a determination must be made whether one or the other practice actually prevailed as, quite obviously, both could not, in fact, co-exist at one and the same time.

Perhaps one of the best statements regarding the nature and effect of prior or past practices in labor controversies is found in Ford Motor Co. and U.A.W., Local 600, Decision of Arbitrator (Shulman), 1952, 19 LA 237, selected by the Labor Law group and published in Unit 8, Labor Relations and Social Problems (BNA 1972), at pages 203-212. Although this arbitration case was concerned with a question of work classification in the private sector, the following observations found on page 209 of the last work mentioned are germane to the instant inquiry:

A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding. And in some industries there are contractual provisions requiring the continuance of unnamed practices in existence at the execution of the collective agreement. A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement on which it is based.

But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the

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absence of contractual provision to the contrary, subject to change in the same discretion. The law and the policy of collective bargaining may well require that the employer inform the Union and that he be ready to discuss the matter with it on request. But there is no requirement of mutual agreement as a condition precedent to a change of a practice of this character.

With the above few check points in mind, we proceed to a consideration of the pertinent factual aspects of the matter at hand.

The union's president Wilfred J. Scott, who lodged the consolidated two complaints in this matter took office on January 10, 1977. Mr. Scott was only the second president the union had elected since its inception. From 1965 until December of 1976, Thomas Gedrich, a station firefighter, had enjoyed the office of president. During his tenure, Mr. Gedrich conducted his union's representational activities under three separate agreements, at least the last two of which provided that he be allowed "a reasonable time" during working hours to properly pursue his official liaison duties with the activity and to provide appropriate representation for employees. It must be clearly understood, however, that Gedrich, unlike his predecessor in office, worked a 24-hour shift consisting of 8 hours work, 8 hours standby and 8 hours sleep.

The record indicates that beginning June 1, 1973, several communications were interchanged and discussions were had between the activity's military and civilian personnel in authority and the then union president (Gedrich) on the subject of the union president's use of work or duty hours for union activity instead of his assigned fire fighting duties. (Respondent's Exhibits 1-5, transcript pp. 72-87). The record further shows that at sometime prior to June 13, 1974, an undated "Memorandum of Understanding" was prepared for or by John G. Denham, then the commanding officer of the activity, on the subject therein set forth. This instrument (Respondent's Exhibit No. 6) together with the handwritten notes set out thereon when offered and accepted without objection, reads as follows:

MEMORANDUM OF UNDERSTANDING

It is agreed and understood that in the interest of the Union and Management, a clari-

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fication of "reasonable amount of time" is needed and will be so defined as it pertains to the Office of President, AFGE Local 1931. Accordingly, the following is set forth --

"Reasonable amount of time" spent on Union-Management business is understood to mean no more than 25% of your 8 hour work period. It is also understood that this time will be utilized in processing of grievances, adverse actions, or other types of appeals or instances where Management-Union meetings are considered necessary.

Additional time on the second shift (Stand-by) may be utilized for other Union-Management business if it does not interfere with previously assigned work or unplanned emergency responses.

Further, it is mutually agreed that, as President of the Local, you are not excused from performing the full scope of firefighter duties which include, but are not limited to, responding to fire alarms, drills, inspections and other duties as assigned.

It is also to be understood that maximum use of stewards and other Union officials will be used to provide assistance in accomplishing the workload of the Local.

In the event that it is found that this Memorandum of Understanding is unworkable, either party may request a conference to discuss it.

A copy of the above set out "Memorandum of Understanding" was, as indicated on the copies introduced, given to Gedrich on June 13, 1974. According to Gedrich, he made an oral, but not a written response to the memorandum. Denham was unable to recall whether any response was made.

Although the record does not reflect the precise nature of Gedrich's oral response, it is reasonable to conclude from all of the evidence that Gedrich felt that the position taken by the activity and reflected in the memorandum furnished him, if implemented, was inconsistent with the "past practice" of the activity to allow him whatever time was necessary during working hours to

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conduct his union management business. What Gedrich failed or refused to recognize, however, was that it was this very past practice the activity was seeking to change for the reason that Gedrich had been, and was, in its reasoned opinion, devoting less time to his fire fighting duties than the security of the station required. The activity was, under its contractual agreement with the union, certainly not obligated to allow Gedrich all the official time he, in his sole opinion, deemed necessary to conduct what he felt was union representational activity. The mere fact that the activity in its permitted discretion allowed Gedrich broad latitude in the past with respect to his use of official time to engage in representational activities which it then felt were of mutual interest to both the union and the activity, did not, in itself; create some further right to use of official time for union representational business other than that provided for by the contract in effect between the parties. The right to use of time by union representatives for appropriate representative purposes during working hours being purely the product of a negotiated agreement to that effect, no conversion of that right into one protected by the Order may be accomplished by a "past practice," even when clearly established as such.

Now, as to the contention by the union that the policy of restricting the union's president's time spent on union-management business to no more than 25% of his 8-hour work period was never enforced; Gedrich finally admitted under recross-examination that he complied with the memorandum given him on June 13, 1974, and that the time he spent on union business declined accordingly. Further, it should be noted that Gedrich, from February 26, 1976, until succeeded in office on January 1977, conducted all the affairs of the president of the union while on sick leave for four months, and following that, while on full retirement. Quite obviously, the time Gedrich utilized in the conduct of union-management business during this latter period was unrestricted. The union president's full time activity on behalf of the union's business during this term, however, could hardly be called a "past practice" to which either party would thereafter be bound in any respect. Unhappily, this prosecution of union business by a full time representative under the terms of an agreement contemplating only a part time or working union representatives has, no doubt, given rise to the misconception reflected in the complaints and elsewhere, that the unrestricted use of time for union representational activity was established past practice.

Turning now to another source of confusion, the letter of G. C. Rhinebeck to Wilfred J. Scott dated February 24, 1977, the content and supposed impact of which is the primary basis for the instant charge by the union of an unfair labor practice on the part of the activity. Although this instrument was earlier set out, it bears repeating here with emphasis supplied not only because of its impact, but for the convenience of the reader.

From: Ordnance Officer
To: Mr. Wilfred J. Scott, Ordnance
Department Code 206011

Subj: Use of Official Time for Union Business.

Ref: (a) Commanding Officer, WPNSTA Concord
ltr to AFGE President Serial 064:WBC:ct
12720 dtd 28 Jan 1975

1. It has been past practice aboard this Station, in accordance with reference (a), to allow the Union President approximately 25% of his time as "reasonable" under the provisions of the Basic Agreement for conduct of authorized union activities. It has come to my attention that you may be using excessive time for union business. While it is recognized that you have had need for this excessive time in regard to your transition to President of AFGE Local 1931, good management practice requires that a moratorium of 1 March 1977 be called on this excessive time usage.
2. It is therefore requested that commencing 1 March 1977 you limit your official time to 25% of your workweek or 10 hours. It is further requested that you follow the provisions of the Basic Agreement concerning checking out and checking in at your work area when you must be absent on authorized union business.

/s/
G. C. RHINEBECK

With the above at hand (Respondent's Exhibit No. 6), consider the following discourse between Wilfred Scott, acting at this time as counsel for the union, and Commander Rhinebeck, the author of the above letter and head of the activity's ordnance department:

Q In your memo dated 24th of February 1977, were there any latitude given for excuse time for the present union president?

A The letter dated 24 March was not the union president. It was for an ordnance worker. And there was no latitude. It said, requested that you hold time to 25 percent.

Q I'm speaking of the memo dated the 24th of February 1977.

A Yes.

Q It was adressed to who?

A To Mr. Wilfred Scott, Ordnance Worker, Ordnance Department, Weapons Station, Concord.

Q Okay. At that particular time did you know whether or not Mr. Wilfred Scott was union president?

A Yes, he was.

Q Okay. When you speak of representation times in terms of Wilfred Scott, are we speaking about Wilfred Scott or as the union president?

A I'm speaking about Wilfred Scott as an ordnance worker.

Q Not as the union president?

A No.

Q In other words, as Wilfred Scott, the past union president -- Wilfred Scott was limited to 25 percent of his official 40 hours but the union president was not? I am speaking of the 25 percent.

A The union president represents the entire unit of the Station. The appropriate person to restrict the union president is the commanding officer. I am only concerned with what happens within the Ordnance Department.

Q I see. In other words then, the union president was restricted to 25 percent of

his time for conducting labor-management business in the Ordnance Department. Is this what your are telling me?

A I am telling you that that letter was written to Mr. Wilfred Scott not the union president, because I felt it was inappropriate for me, as one department on the Station, to direct the union president. But it was within my span of control to direct the employees of the Ordnance Department.

Q No, I am not talking about the Ordnance Department. I am speaking about the union president. Now what I am trying to find out is whether or not this 25 percent was place upon Wilfred Scott as an employee of the Ordnance Department --

A That's correct.

Q Not as the union president?

A I think it is inappropriate for me to try to direct the union president. He represents many departments not just my own.

Q In your memo, Cdr. Rhinebeck, it made reference to the basic agreement. Do you know any place in the basic agreement where the union president is restricted to 25 percent of his official time?

A In the basic agreement he is restricted to a reasonable amount, I believe.

Q Not 25 percent of his official time?

A (Nods no.)

Q Cdr. Rhinebeck, if Wilfred Scott, as an employee of the Ordnance Department, exceeded his 25 percent of his 40-hour work week for conducting appropriate labor-management business, was additional time granted to him?

A Not my intention.

Q If he needed additional time to conduct appropriate labor-management business, whom should the request go to?

A As an ordnance worker, it should have gone to this supervisor. If no satisfaction, through normal channels to me.

Q If Wilfred Scott wanted to use an additional 25 percent of his time to conduct business as the union president, then who should he go to?

A Through normal channels to me and, if it didn't get cleared at that level, he should have gone on to command.

Q Cdr. Rhinebeck, I'm still kind of confused reading this memo, because this memo speaks of the union president, and you told me that this was pertaining to Wilfred Scott. Now what I am trying to figure out is -- are we talking about one and the same person when we are speaking of the 25 percent?

A As far as I know, there is no way we can divide it. However, as far as my direction was going, it was to Mr. Scott as an individual. Now, as far as his position, he does hold a position which I have to recognize.

Q Cdr. Rhinebeck, can you read into the record -- and we are speaking about C-5, Complainant's Exhibit C-5. That is the 24th of February 1977 memo from Cdr. Rhinebeck, Ordnance Officer to Wilfred Scott, Ordnance Department, Union President. From where the first arrow is to the second.

A "To allow the union president approximately 25 percent of his time as reasonable under the provisions of the basic agreement for conduct of authorized union activities." Is that arrow to arrow?

Q Yes. Thank you. And this memo is speaking to the union president, am I correct?

A May I see the front line again? To allow the union president -- correct.

Q Cdr. Rhinebeck, do you know if the past union president was placed on annual leave

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or leave without pay when he exceeded his normal amount of duties that he was limited to?

A No, I do not know.

MR. SCOTT: I have no further questions.

JUDGE BUTLER: Mr. Wilson, do you wish to inquire of Cdr. Rhinebeck?

MR. WILSON: Your Honor, I had intended calling him as a witness on behalf of the Respondent. If I might take him on direct, now it will save some time, perhaps, and just ask a few basic questions.

JUDGE BUTLER: Proceed.

DIRECT EXAMINATION

BY MR. WILSON:

Q Cdr. Rhinebeck, as I understood your testimony, you indicated that you, prior to issuing the 24th of February 1977 letter to Mr. Scott, that you reviewed the past history at the Activity. Is this correct?

A Yes.

Q As I understand your testimony, you based your determination to limit or to place some kind of a limitation on Mr. Scott's time as union president on the R-9, which is a letter dated 29 January 1975 from the then commanding officer to the then president of the local, giving a response on an unfair labor practice charge. Is this correct?

A That's correct.

MR. WILSON: I have no further questions.

JUDGE BUTLER: Cdr. Rhinebeck, I am still a little confused about the memorandum of February 24th, 1977. Is it your testimony that this memorandum was directed to Mr. Scott as an employee of your unit, being the Ordnance Department, and not in his capacity as president of Local 1931?

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WITNESS: Yes, sir. I grant it was a bit on the hazy side, but it was my intention that this letter be addressed to an employee of the Ordnance Department rather than to the union president. Again, as I have testified, because I do not control the entire station. I control the Ordnance Department. If it was unsatisfactory, it was my belief that he would probably file a grievance, which would then go to the station level and either reach into arbitration or be determined by the commanding officer that I was either in line or out line. And I would have, in that way, put the decision at higher levels.

JUDGE BUTLER: Then was it your understanding that if he did have some quarrel with the memorandum, that he would proceed in a grievance procedure as outlined in the basic agreement? In what capacity? As an employee of the Ordnance Department or as president of the union?

WITNESS: Either one. It did not matter.

After considering the record as a whole and taking into account evidence from which inferences conflicting with mine might reasonably be drawn, I am persuaded that the February 24, 1977, letter from Rhinebeck to Scott, the subject of the above testimony, was intended to limit Scott's representational activity on behalf of the union. That is to say, it was directed to Scott exclusively in his capacity as president of the union, not to Scott as simply an employee of the Ordnance Department of the activity. Why else would Scott be singled out? No precedent appears on the record pertaining to the specified maximum use of official time for union-management activity other than that fixed 25% limitation intended to be applicable to the president. More than that, the letter expressly makes reference to a letter of January 28, 1975, (Respondent's Exhibit No. 9, also set out above), which was directed to the then president of the union and by its terms and conditions, made applicable only to him in that capacity. It should also be noted that the above mentioned "Memorandum of Understanding" given to Gedrich as president of the union on June 13, 1974, and delivered with the letter of January 28, 1975, as an enclosure, specifically states that the clarification of "reasonable amount of time" contained therein "will be so defined as it pertains

to the Office of President AFGE Local 1931." (Emphasis mine). I am most persuaded, however, by Rhinebeck's affirmative answer to the suggestive but nevertheless comprehensive question posed by the activity's counsel on direct examination, to wit:

Q As I understand your testimony, you based your determination to limit or to place some kind of a limitation on Mr. Scott's time as union president on the R-9, which is a letter dated 29 January 1975 from the then commanding officer to the then president of the local, giving a response on an unfair labor practice charge. Is this correct?

A That's correct.

However, as has been observed, Rhinebeck, while unsure as to his intentions in issuing the letter, was positive that he had no authority to direct Scott in his capacity as union president. This being so, the letter of February 24, 1977, was not an order at all; it was merely exhortation and entreaty. But, be that as it may, the letter of February 24, 1977, will be treated here as a valid directive to the extent it remotely repeats by reference thereto the "Memorandum of Understanding" heretofore mentioned and made a part of the letter of January 28, 1975, by enclosure therewith. As will be further demonstrated, it was this 1974 memorandum which brought about the change in past practice about which the union belatedly complains, not the letter of February 24, 1977. Of course, if the union had intended to say that management did not sit down with its president and explain how it thought the "Memorandum of Understanding" delivered to his predecessor in office on June 13, 1974, which contemplated both an 8-hour work shift and an 8-hour standby shift, could be translated into a meaningful and workable application to the new president who worked only a straight 8-hour shift, and thereby afford him some participation in the decision making process related to the continuing implementation of the memorandum, it would have been entirely correct. But even had this been the nature of a complaint, the failure of management to follow this procedure hardly constitutes an unfair labor practice under the terms of either the Order or the station agreement.

It should also be clearly pointed out, that the time limitation policy and practice came about, according to the commanding officer of the activity, not in an attempt to restrict the president's employee representational

activity, although it would at times surely have had that effect, but to restrict the time he could be away from his required and essential duties as a fireman. Indeed, the memorandum itself and the letter of January 28, 1975, the reference of the letter of February 24, 1977, both reflect this fact. It is also to be observed that although the purpose of the memorandum directed to the past president of the union no longer exists, the invitation to request a conference contained therein should remain open so long as the memorandum is still in effect and the terms thereof are found to be unworkable. It should be kept in mind, however, that it is the past practice which the memorandum put in motion with which we are primarily concerned here, not the content of the memorandum itself nor the reasons behind its issuance. If, pursuant to the memorandum, it was the practice of the past president of the union to spend no more than 25% of his 8-hour work-period on union-management activity, and Gedrich finally admitted it was, the contention on the part of the union that the imposition of the same time limitation on Scott was a change in past policy and practice is without any substantial merit. To be sure, Scott's department head did not consult or confer with him prior to issuing the letter of February 24, 1977, but Rhinebeck, admittedly without the authority to do so, was only trying to continue, not change, the past policy and practice reflected in the January 28, 1975, letter referred to therein which, in turn was based upon the "Memorandum of Understanding" originally enclosed therewith.

Still later on March 9, 1977, the then acting commanding officer of the activity, F.C. Leisentritt, III, wrote Scott the following letter in response to the instant allegation of an unfair labor practice:

Subj: Alleged Unfair Labor Practice

Ref: (a) AFGE ULP #8 dtd 4 Mar 77
(b) AFGE ULP #1 dtd 28 Feb 77
(c) Basic Agreement of 19 Mar 74

1. This is to acknowledge receipt of reference (a) which alleges that Management failed to consult concerning the placing of certain limitations on the use of official time by the Union President.

2. In response to your allegation, I direct your attention to reference (b). This allegation comes under the purview of reference (c)

and is a matter to be pursued under the provisions of Articles XXIII and XXIV of that document, and not under the auspices of an Unfair Labor Practice.

3. In view of this, Management is agreeable to waiving the preliminary steps of the grievance procedure and requesting an arbitration to determine if there has been a violation of the Basic Agreement as you contend. As in reference (b), this is my final decision on this matter.

Considering the nature of its complaints, the letter set out above correctly indicates the duly prescribed and most expeditious recourse open to the union in this situation. While it cannot be said that a cliché so inveterate as "reasonable time" is devoid of meaning altogether, the activity in aid of the safety of the station or, for that matter, any other legitimate reason, may still provide amplifying provisions when amplification is not inconsistent with the contractual agreement between the parties and, of course, the Order.

The record indicates that beginning some time prior to November 13, 1973, management made an effort to resolve the problem confronting it in connection of the division of Gedrich's time between union activities and his assigned duties as a fire fighter. The plan and purpose of management's proposals toward this end are reflected in the letters from Captain Denham to Gedrich dated November 13, 1973, February 22, 1974, and April 12, 1974, (Respondent's Exhibits Nos. 2, 3 and 5 respectively).

The letter of November 13, 1973, reads as follows:

From: Commanding Officer
To: Thomas Gedrich

Subj: Time to be Used for Union Management Activities

1. A recent meeting with you indicated that your present workload of Union Management business makes it difficult for you to perform the full scope of your assigned duties. I am sympathetic to your position and, after consideration, feel that perhaps a solution that is mutually acceptable can be worked out.

2. I would like to propose that you be allowed to use the next ninety (90) days to clear up the backlog of Union Management work and, also to train adequate Union representatives to assist you in presenting appeals and representing Union members, etc. I would also like to suggest that during this period your stewards be given additional training and indoctrination in order that problems may be handled at the lowest possible adequate level.

3. Also, it is proposed that during this 90-day period you continue to work the shifts and in the locations in the same manner that you are presently performing.

4. I am proposing the above approach with the sincere thought in mind that upon completion of the 90 days you will thereafter require less time to reasonably fulfill your Union Management responsibilities as Union President and you will be able to perform the normal scope of your duties in your position as a member of the station Fire Department.

5. At your earliest convenience please advise me whether you feel that this proposal is a reasonable solution. If your answer is affirmative, I intend to put it into effect immediately.

The above letter, it should be noted, contains the first of several invitations extended to Gedrich to respond to the proposal set forth therein. Later, on February 22, 1974, after a meeting between the two the previous day, Denham again wrote Gedrich expressing the wish to arrive at a clearer definition of what to consider as a reasonable amount of time to be spent on union-management business "that would be mutually agreeable." Denham once more stated that the main object in extending the time that Gedrich had indicated was necessary was to get a "reasonable balance" between the time spent on union-management business and the time spent as a fireman. On this particular occasion, Denham asked Gedrich for a written reply whether he considered the proposal set forth in the above letter dated November 13, 1974, and again in the instant letter of February 22, 1974, a reasonable one. On March 21, 1974, some four weeks after the last letter from Denham, Gedrich replied as follows (Respondent's Exhibit No. 4):

21 March 1974

From: President, AFGE Local 1931

To : Commanding Officer, Naval Weapons Station, Concord, Calif

Subj: Extension of Time for Administrative Duties

Ref : (a) CO NWS ltr subj: Time Used for Union Management Activities, dtd 13 Nov 73
(b) CO NEW ltr subj: Extension of Time used for Union Management Activities, dtd 22 Feb 74

1. Concur with your proposal cited in reference (b).

Respectfully submitted,

Thomas Gedrich

I take the above reply to mean that Gedrich was fully aware of the content and purpose of both letters referred to therein and that he concurred with the latest proposal that the time to accomplish the results intended would be extended to April 1, 1974.

Thereafter, on April 12, 1974, in accordance with still another request from Gedrich during a meeting between the two, Denham extended the time for compliance with the aims of management and suggested that a meeting be held on May 1, 1974, "to discuss the amount of time to be spent on union-management business." It is not shown whether this proposed meeting took place, let alone what was actually discussed. It is apparent, however, that Gedrich, prior to the time the memorandum from Denham was placed in his hands on June 13, 1974, was afforded ample opportunity to participate in the decision making process involved in arriving at a fair determination of what, under the terms of the effective station agreement, ordinarily constitutes a "reasonable time" for the union president's representational activity during working hours. Thus, assuming that it was a past practice for the union's president to use whatever time he deemed necessary during his work period to engage in union-management business, this past practice, even if recognized and condoned, was intentionally and legitimately changed after management informed the union of its intentions to do so and invited its participation in the

process. There is no requirement of mutual agreement as a condition precedent to a change of practice of this character. The Order only requires the activity to inform the union of the proposed change and be ready to discuss the matter or, if you will, consult and confer, upon request. It is plain, therefore, that not only has the union failed to show that the letter of February 24, 1977 instituted a change in past practice as charged, the activity has affirmatively demonstrated that the change in the past practice of allowing the union president whatever time he deemed necessary during working hours to pursue union-management business was made approximately two and one-half years earlier and only then, after allowing the union over six months to participate in the decision making process toward that end.

(In all fairness, and notwithstanding any of the above, I should state that I am convinced that Scott was not aware of the fact that Gedrich had complied with the memorandum handed him on June 13, 1974, until Gedrich finally admitted that he had done so at the hearing).

The only remaining question in this matter is whether the activity violated sections 19(a)(1), (2) and (6) of the Order when it charged the union's president annual leave for exceeding the time limitation imposed by Rhinebeck's letter of February 24, 1977. Beside the fact that the union's complaint in this respect is not adequately clear, there is no evidence in the record which even suggests the basis of such an allegation. It has been pointed out that Rhinebeck's letter, if it had any validity at all, was merely an urgent request that Scott, in his capacity as president of the union, follow in the future a past practice on the station. The letter created no new policy, it only sought to continue a past one. Therefore, since the record would support no more than mere observations on my part based on pure conjecture, I am precluded from engaging in any discussion whether, under certain circumstances, not shown to be present here, the involuntary forfeiture of annual leave could be inherently destructive of the right assured every employee, including presidents of unions, in Section 1(a) of the Order, to assist a labor organization freely and without fear of penalty or reprisal. It follows that it also becomes unnecessary for me to even attempt to determine under what circumstances is agency management entitled to utilize a disciplinary process to protect the mutually agreed to provisions of the collective bargaining contract, particularly the negotiated provisions which provide for official time for union representatives to engage in representational activities related to the

labor-management relationship, from abuse or misuse by union representatives.

Recommendation

Having found that the activity did not engage in unfair labor practices in violation of section 19(a) (1), (2), or (6) of the Order as charged, I recommend that the consolidated complaints heretofore filed in this matter be dismissed in their entirety.


JAMES J. BUTLER
Administrative Law Judge

Date: May 22, 1978
San Francisco, California

JJB:tl

September 5, 1978

A/SLMR No. 1116

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

SOCIAL SECURITY ADMINISTRATION,
HEADQUARTERS BUREAUS AND OFFICES,
BALTIMORE, MARYLAND
A/SLMR No. 1116

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1923, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally changing a policy with respect to overtime compensation of unit employees without affording the Complainant an opportunity to bargain on the procedures and impact of the change.

The Administrative Law Judge concluded that the Respondent had violated Section 19(a)(1) and (6) of the Order. In this regard, he found that the Respondent changed a policy on overtime for unit employees and did so without giving the Complainant reasonable notification prior to the change and without giving it ample opportunity to meet and confer with respect to the procedures and impact of the change. Moreover, the Administrative Law Judge found that the subsequent conduct of the parties in negotiating a new agreement containing provisions covering overtime compensation during administrative closings in emergency situations did not render the violation herein moot or de minimus and he recommended the issuance of an appropriate remedial order.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations and issued an appropriate remedial order for the violation found.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
HEADQUARTERS BUREAUS AND OFFICES,
BALTIMORE, MARYLAND

Respondent

and

Case No. 22-07970(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923, AFL-CIO

Complainant

DECISION AND ORDER

On May 25, 1978, Administrative Law Judge Robert J. Feldman issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the Respondent's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. ^{1/}

In agreement with the Administrative Law Judge, I find that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to provide the Complainant with a timely opportunity to bargain on the impact and implementation of a change in policy, announced in the Respondent's memorandum of January 14, 1977, which concerned overtime compensation during periods of administrative closings occasioned by hazardous weather and other emergency situations. I also agree with the Administrative Law Judge's conclusion that the violation herein was not rendered "moot" by virtue of the parties' negotiation in the Spring of 1977 and their negotiated agreement of May 1977, which covered the subject of the

^{1/} On page 5 of his Recommended Decision and Order, the Administrative Law Judge inadvertently referred to Section 19(d) of the Order instead of Section 19(a). This inadvertent error is hereby corrected.

management of overtime. Thus, while the new negotiated agreement contained provisions relating to overtime compensation during administrative closings in emergency situations, it did not, in my view, clearly and unequivocally waive the Complainant's right to bargain on the impact and implementation with respect to any change in such policy. Furthermore, I reject the Respondent's contention that its conduct herein was de minimus and that therefore, under the Federal Labor Relations Council's holding in Vandenberg Air Force Base, 4392nd Aerospace Support Group, Vandenberg Air Force Base, California, FLRC No. 74A-77, 3 FLRC 491 (1975) dismissal of the complaint was warranted. The Vandenberg case concerned whether a specific act by a party, which occurred in the context of the totality of bargaining conduct during the negotiation of a negotiated agreement, should be deemed violative of the Order. The instant case, on the other hand, concerns a unilateral change in an existing policy and the failure by the Respondent to provide the Complainant with a prior opportunity to bargain on the impact and implementation of such change, a matter which I view as factually distinguishable from the Vandenberg case.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Social Security Administration, Headquarters Bureaus and Offices, shall:

1. Cease and desist from:

(a) Unilaterally instituting a new policy for the overtime compensation of employees represented exclusively by the American Federation of Government Employees, Local 1923, AFL-CIO, or any other exclusive representative, without first affording such representative an opportunity to meet and confer, to the extent consonant with law and regulations, concerning the impact and implementation of such policy.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

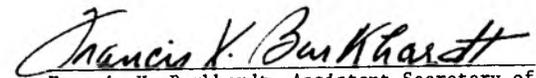
2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Notify the American Federation of Government Employees, Local 1923, AFL-CIO, or any other exclusive representative, of any decision to change its policy of overtime compensation prior to its effectuation, and, upon request, afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

(b) Post at the facilities of the Social Security Administration, Headquarters Bureaus and Offices, Baltimore, Maryland, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, and shall be posted and maintained by him for 60 days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
September 5, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally institute a new policy for the overtime compensation of our employees represented exclusively by the American Federation of Government Employees, Local 1923, AFL-CIO, or any other exclusive representative of our employees, without first affording such representative an opportunity to meet and confer, to the extent consonant with law and regulations, concerning the impact and implementation of such policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify the American Federation of Government Employees, Local 1923, AFL-CIO, or any other exclusive representative, of any decision to change our policy of overtime compensation prior to its effectuation and, upon request, afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

(Agency or Activity)

Dated: _____ By _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



including my observation of the witnesses and my judgment of their credibility, I make the following findings of fact, conclusions of law and recommendations.

Findings of Facts

1. At all times material herein Complainant was the exclusive bargaining representative for a unit consisting of Respondent's General Schedule and Wage Grade employees. Included in this unit are employees working in Respondent's Bureau of Disability Insurance.

2. The Bureau of Disability Insurance has instituted a flex time system of work hours on an experimental basis. Under this system, employees are permitted to vary their worktimes from the standard shift hours. In addition, the Bureau of Disability Insurance is the only Bureau in Respondent's central office complex which permits its employees to work overtime. The combination of these two factors results in employees occasionally working morning overtime - performing overtime work prior to the commencement of their standard shift.

3. Inclement weather and other hazardous conditions sometimes forces the administrative closing of buildings in which Disability Insurance Bureau offices are located. An agency directive issued on November 30, 1976, focused on the management of leave during these situations. Entitled "LEAVE FOR HAZARDOUS WEATHER AND OTHER EMERGENCY SITUATIONS," this directive had the effect of cancelling flex time for all regular employees when an announcement is made that an office will open late. Regular employees then revert to their prescribed fixed shift for that day. This directive was involved strictly with the management of leave during these periods and did not indicate how morning overtime was to be effected.

4. On January 14, 1977, Mr. Arthur P. Simermeyer, Assistant Bureau Director for Disability Operations, issued a memorandum to all Division Directors for Disability Operations. The memorandum dealt with the cancellation of flex time and overtime during administrative closings occasioned by hazardous weather and other emergency situations. Mr. Simermeyer testified that the memorandum was prompted by the Agency directive and employee questions and was designed to clarify Bureau policy in this respect. After explaining the effect of late openings on the use of flex time, the memorandum stated:

.....
In the Matter of
SOCIAL SECURITY ADMINISTRATION,
HEADQUARTERS BUREAUS AND OFFICES,
BALTIMORE, MARYLAND
Respondent
and
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923; AFL-CIO
Complainant
.....
IRVING L. BECKER, ESQ.
Social Security Administration
6401 Security Boulevard
Baltimore, Maryland
For the Respondent
ALVIN S. LEVY, ESQ.
American Federation of Government
Employees, Local 1923, AFL-CIO
6401 Security Boulevard
Baltimore, Maryland
For the Complainant
Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is an unfair labor practice proceeding in which a formal hearing of record was held pursuant to Executive Order 11491 as amended (hereafter referred to as "the Order") and 29 CFR Part 203.

Respondent is charged with violating Sections 19(a)(1) and (6) of the Order by unilaterally changing a policy with respect to overtime compensation of unit employees without affording the exclusive bargaining representative an opportunity to meet, confer, or negotiate on the procedures or impact of this decision. Upon all the evidence adduced,

In any case, if an announcement is made that the building will open late, there can be no overtime work performed during the time the building has been declared closed. . . .

Employees who report to work during the period the office is closed, or who remain after the office is closed due to emergency situations, may not be required to work (except for "essential service employees") before the office officially opens or after it officially closes. These employees, as well as those employees providing essential services, who do work when the office is closed, either during their regular tour of duty or before, cannot receive extra compensation such as compensatory time, overtime, administrative leave at the end of the day, etc., for that work.

To assure that flex time employees were aware of these policies, the memorandum suggested that each employee should sign and date a statement to that effect. A sample statement was attached, which read in pertinent part: "No special compensation will be paid for any work performed before the official time at which the building was declared to be open."

5. The above-mentioned memorandum was issued and circulated without any prior notice to, or consultation or negotiation with, Complainant.

6. On January 21, 1977, a meeting was held between Mr. Simermeyer, the Division Directors, and some of Complainant's officers and stewards. Complainant's President, Mr. Harold D. Roof, was among those in attendance. The meeting's purpose was ostensibly to raise issues of mutual concern and to try to establish a better relationship between the parties, Mr. Roof and Mr. Simermeyer both being relatively new to their respective positions.

7. Several matters were discussed at this meeting, including Mr. Simermeyer's January 14 memorandum. Complainant's representatives were the first to raise this issue, indicating concern that management had not met and conferred with the Union prior to issuing the memorandum. They also indicated that the Union intended to file an Unfair Labor Practice charge based on this failure.

8. While Complainant's and Respondent's versions of management's response differ, I find that, at this meeting, management did not indicate a willingness to negotiate on the decision to cancel overtime or on the procedures or impact flowing therefrom. To the contrary, management took the position that the decision was a fait accompli: they indicated a willingness to "discuss" the decision, but not reconsider or rescind it.

9. As of the January 21 meeting with Union officials, management had not had occasion to apply the overtime restrictions enunciated in Mr. Simermeyer's memorandum to any employee. Indeed, from January 14, 1977, to the date of the hearing, no employee has been deprived of overtime as a result of the implementation of the memorandum-directed policy, since to date there have been no administrative closings.

10. During this period the parties were subject to a negotiated agreement which became effective on September 24, 1974. The agreement covers the management of leave and overtime in general, but it does not cover the specific situation addressed in the January 14 memorandum, i.e., the management of overtime during periods of administrative closings.

11. Complainant filed an unfair labor practice charge on March 8, 1977, alleging violations of Sections 19(a)(1) and (6) of the Order stemming from Respondent's unilateral change in policy respecting overtime compensation for unit employees. Informal settlement efforts proved unavailing and on May 16, 1977, Complainant filed the complaint leading to the instant proceeding.

12. In May 1977, the parties began negotiations on a new agreement which ultimately went into effect on September 15, 1977. Unlike the previous agreement, the new agreement incorporated provisions dealing with the management of morning overtime during periods of late building openings. Article 10, Section 6 of this agreement states, in pertinent part:

6. An employee scheduled for overtime will be allowed to work and will be paid a minimum of two (2) hours overtime for Saturdays, Sundays, and holidays and one (1) hour for weekdays unless the building has been closed and the employees released before the end of the workday or a late opening is announced in accordance with 7, below.

7. When an announcement (that the office will open late) is made no later than 6:00 a.m. for previously scheduled morning overtime, the overtime for that morning is automatically cancelled. Failure to meet the 6:00 a.m. announcement deadline will result in the scheduled employees being allowed to work unless the building is declared uninhabitable by competent authority.

Conclusions of Law

Respondent contends that, since Mr. Simermeyer's statements in the January 14, 1977 memorandum constitute an arguable interpretation of the provisions of the parties' negotiated agreement, the appropriate remedy lies within the agreement's grievance machinery and not in an unfair labor practice proceeding. The specific problem addressed in the memorandum, however, is not covered by the agreement then in effect and therefore is not grievable under that contract. Furthermore, the issue in this case does not involve an alleged breach of this agreement, but rather an alleged failure to negotiate as required by the Order. Accordingly, I conclude that the issue raised in this dispute is properly cognizable in an unfair labor practice proceeding under Section 19(d) of the Order.

The extent of an Agency's bargaining obligation is outlined in Sections 11(a), 11(b) and 12(b) of the Order. Section 11(a) of the Order provides that an Agency must meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions of unit employees. Section 11(b) states that this obligation does not include matters in regard to the agency's mission; its organization; the number of employees and the numbers, types, and grades of positions or employees assigned to a unit work project or tour of duty; the technology of performing its work; or its internal security practices. Furthermore, under Sections 12(b)(1), (4), (5) and (6) of the Order, management is accorded the right to direct Agency employees; maintain the efficiency of the Government operations entrusted to them; to determine the methods, means and personnel by which such operations are conducted, and to take whatever actions necessary to carry out the agency's mission in situations of emergency.

Consistent with this bargaining scheme, it has been held that management is obliged to negotiate with respect to the assignment and management of overtime for unit employees. See Philadelphia Metal Trades Council, AFL-CIO and Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, FLRC No. 72A-40, 1 FLRC 457(1973); Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO, and Department of the Army, Corps of Engineers, Little Rock, Arkansas, FLRC No. 71A-46, 1 FLRC 220 (1972). It follows, a fortiori, that management therefore has an obligation to meet and confer with respect to the procedures and impact of a decision to change an established scheme with respect to the allotment and management of overtime. This obligation requires management to afford the exclusive representative reasonable notification of the contemplated action and an ample opportunity to fully explore the matters involved prior to the agency's making the change. Department of the Treasury, Internal Revenue Service, Manhattan District, A/SLMR No. 841 (May 16, 1977); Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, A/SLMR No. 486. (Feb. 28, 1975); Federal Railroad Administration, A/SLMR No. 418 (July 31, 1974).

Here, it is undisputed that management's January 14, 1977 memorandum effected a change in the allocation and management of overtime compensation for unit employees. Prior to the issuance of this memorandum, employees in Respondent's Bureau of Disability Insurance would occasionally take morning overtime; afterwards, these employees were precluded from receiving such extra compensation on days of late building openings. Accordingly, Respondent was required to bargain with Complainant over the procedures and impact of this change. This it did not do. When confronted with its dereliction some seven days after its decision went into general circulation and effect, management evidenced a willingness to "discuss" the change, but not reconsider or rescind it. This clearly falls short of satisfying management's obligation under the Order. See Department of the Treasury, supra. Accordingly, I conclude that Respondent failed and refused to bargain with Complainant prior to the issuance of its decision changing the overtime compensation of unit employees during periods of administrative closings, contrary to the obligation imposed by the Order.

Notwithstanding such a finding, however, Respondent argues that its action was no more than a technical de minimus violation of the Order, which defect was promptly cured during negotiations leading to the adoption of a new General Agreement on September 15, 1977. In defense of this claim, Respondent notes: (1) no employee has ever had overtime cancelled due to the policy enunciated in the January 14 memorandum since to date there have been no administrative closings due to hazardous weather or other emergency situations, and (2) any bargaining violation was mooted when Respondent met and conferred with Complainant in the spring of 1977 during negotiations leading to an agreement covering the management of overtime in these situations.

The record indicates that Respondent's decision to cancel overtime was effective immediately upon issuance of the January 14 memorandum. Therefore Respondent's obligation to bargain commenced no later than this date. The fact that this decision had no immediate adverse consequences on unit employees is immaterial, since it effected an immediate change in employee working conditions, and therefore Respondent had a duty to negotiate on the impact and procedures of this change. Accordingly, Respondent's first argument must be rejected as without merit.

In support of its second contention, Respondent cites Vandenberg Air Force Base, 4392d Aerospace Support Group, FLRC 74A-77 (1975) and Assistant Secretary decisions in A/SLMR No. 851 and A/SLMR No. 860. However, Respondent's reliance on these decisions is misplaced. These cases all involve situations where management immediately or very shortly thereafter retreated from an improper position and rescinded the actions deemed violative of the Order. Here, Respondent's purported rectification of its failure to bargain occurred a full five months after the issuance of the decision which gave rise to this duty to bargain. Further, Respondent's bargaining on this point even at that time was only incidental to negotiations leading to adoption of a more general agreement. In these circumstances I cannot find that Respondent's conduct was de minimus; rather, Respondent engaged in a clear violation of Sections 19(a) (1) and (6) of the Order.

RECOMMENDATION

Having found that Respondent engaged in conduct violative of Sections 19(a)(1) and (6) of the Order, I recommend that the Assistant Secretary adopt the order hereinafter set forth, which is designed to effectuate the policies of the Order.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Social Security Administration, Headquarters Bureaus and Offices, shall:

1. Cease and desist from:

(a) Unilaterally instituting a new policy for the overtime compensation of employees represented exclusively by the American Federation of Government Employees, Local 1923, AFL-CIO, or any other exclusive representative, without first affording such representative an opportunity to meet and confer concerning the implementation and impact of such policy.

(b) In any like or related matter interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

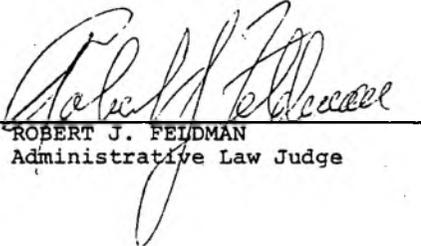
2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Notify the American Federation of Government Employees, Local 1923, AFL-CIO, or any other exclusive representative of the employees, of any future decision to change its policy of overtime compensation prior to its effectuation, and, upon request, afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

(b) Post at the facilities of the Social Security Administration, Headquarters Bureaus and Offices, Baltimore, Maryland, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms,

they shall be signed by the Director, and shall be posted and maintained by him for sixty(60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.



ROBERT J. FELDMAN
Administrative Law Judge

Dated: May 25, 1978
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally institute a new policy for the overtime compensation of employees represented exclusively by the American Federation of Government Employees, Local 1923, AFL-CIO, or any other exclusive representative of our employees, without first affording such representative an opportunity to meet and confer concerning the implementation and impact of such policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify the American Federation of Government Employees, Local 1923, AFL-CIO, or any other exclusive representative of our employees, of any future decision to change our policy of overtime compensation prior to its effectuation, and, upon request, afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision

September 6, 1978

and on the impact such decision will have on the employees adversely affected by such action.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

(Agency or Activity)

Dated: _____ By _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19194.

LOUISIANA ARMY NATIONAL GUARD,
NEW ORLEANS, LOUISIANA
A/SLMR No. 1117

This case involves a complaint filed jointly by Locals 1708 and 1737, National Federation of Federal Employees (Complainants) alleging, essentially, that the Respondent violated Section 19(a)(1) and (6) of the Order by virtue of unilaterally changing the manner of wearing a utility uniform.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (6) of the Order when it unilaterally issued a regulation which instituted a change in policy with respect to the manner of attire for civilian technicians. In this regard, he noted the previous finding of the Federal Labor Relations Council that the attire of civilian technicians while performing technician duties as opposed to military duties is a negotiable matter.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the Respondent cease and desist from the conduct found violative and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

LOUISIANA ARMY NATIONAL GUARD,
NEW ORLEANS, LOUISIANA

Respondent

and

Case No. 64-3911(CA)

LOCAL 1708, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Complainant

and

LOCAL 1737, NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On July 17, 1978, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations as modified herein.

1/ The Respondent filed untimely exceptions to the Administrative Law Judge's Recommended Decision and Order which have not been considered.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Louisiana Army National Guard shall:

1. Cease and desist from:

(a) Instituting a change in policy with respect to the manner of wearing the utility uniform by employees of the Louisiana Army National Guard without notifying Locals 1708 and 1737, National Federation of Federal Employees, the exclusive representatives of its employees, and affording such representatives the opportunity to meet and confer on the decision to effectuate such a change.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

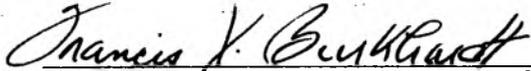
(a) Rescind the provision concerning the removal of shirts and the wearing of olive green T-shirts contained in Part 3-2.b.(1) of the regulation issued on June 20, 1977, entitled Chapter 3, Uniform and Insignia, Field, Work and Hospital Uniforms, with respect to employees represented exclusively by Locals 1708 and 1737, National Federation of Federal Employees.

(b) Notify Locals 1708 and 1737, National Federation of Federal Employees, of any intended change in policy with respect to the manner of wearing the utility uniform by unit employees of the Louisiana Army National Guard and, upon request, meet and confer in good faith on such intended change.

(c) Post at each of its facilities at which employees represented by Locals 1708 and 1737, National Federation of Federal Employees, are employed, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Adjutant General of the Louisiana Army National Guard and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Adjutant General shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
September 6, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a change in policy with respect to the manner of wearing the utility uniform by employees of the Louisiana Army National Guard without notifying Locals 1708 and 1737, National Federation of Federal Employees, the exclusive representatives of our employees, and affording such representatives the opportunity to meet and confer on the decision to effectuate such a change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind the provision concerning the removal of shirts and the wearing of olive green T-shirts contained in Part 3-2.b.(1) of the regulation issued on June 20, 1977, entitled Chapter 3, Uniform and Insignia, Field, Work and Hospital Uniforms, with respect to employees represented exclusively by Locals 1708 and 1737, National Federation of Federal Employees.

WE WILL notify Locals 1708 and 1737, National Federation of Federal Employees, of any intended change in policy with respect to the manner of wearing the utility uniform by unit employees of the Louisiana Army National Guard and, upon request, meet and confer in good faith on such intended change.

(Agency or Activity)

Dated: _____ By _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



..... :
 In the Matter of :
 :
 LOUISIANA ARMY NATIONAL GUARD, :
 NEW ORLEANS, LOUISIANA :
 Respondent :
 :
 and : Case No. 64-3911 (CA)
 :
 LOCAL 1708, NATIONAL FEDERATION :
 of FEDERAL EMPLOYEES :
 Complainant :
 :
 and :
 :
 LOCAL 1737, NATIONAL FEDERATION :
 of FEDERAL EMPLOYEES :
 Complainant :
 :

CAPTAIN THOMAS K. KIRKPATRICK
Office of the Staff Judge Advocate
Louisiana National Guard
Jackson Barracks
New Orleans, Louisiana 70146
For the Respondent

IRVING I. GELLER, ESQUIRE
General Counsel
National Federation of Federal Employees
1016 Sixteenth Street, N.W.
Washington, D.C. 20035
For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION AND ORDER
Statement of the Case

Pursuant to a complaint filed on January 3, 1978, under Executive Order 11491, as amended, by Locals 1708 and 1737, National Federation of Federal Employees (hereinafter called NFFE or the Union), against The Adjutant General's Office,

Louisiana Army National Guard (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Regional Administrator for the Kansas City, Missouri Region on March 24, 1978. The complaint alleges that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in unilaterally instituting and/or applying a regulation which required unit employees to change their mode of dress.

A hearing was held in the captioned matter on May 23, 1978, in New Orleans, Louisiana. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

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

Findings of Fact

NFFE Locals 1708 and 1737 have been accorded exclusive recognition as the representatives of various Louisiana Army National Guard technicians working in the warehouse, the organizational maintenance shop and the State maintenance shops.

For some twenty-five years the Louisiana Army National Guard technicians followed the practice of shedding their fatigue jackets and wearing only white tee shirts while working in the warehouse and maintenance shops during the warm weather months. 1/ The statements of three first line supervisors which were stipulated into the record makes it clear that the supervisors were aware of the aforementioned practice of wearing white tee shirts.

On June 20, 1977, the Adjutant General of the Louisiana Army National Guard, without any prior notice to the Union, issued a regulation entitled "Uniform and Insignia". Chapter 3, Field Work and Hospital Uniforms, of the aforementioned regulation reads in pertinent part as follows:

1/ The warm weather months could begin as early as March and continue as late as November.

Shirts may be removed and olive T-shirts worn when pulling details and working in areas such as motor pools and warehouses.

Subsequent to June 20, 1977, the civilian technicians were required to wear green tee shirts when they saw fit to remove their fatigue jackets because of the warm weather.

Despite a number of requests from the Union, the Respondent refused to meet and confer with the Union concerning that portion of the regulation dealing with the wearing of green tee shirts when fatigue jackets are removed. Although not clear from the record, it appears that Respondent's refusal to consult and confer also ran to the impact of the new regulation on unit personnel

Discussion and Conclusions

The parties stipulated that the issue presented for resolution "is whether the Louisiana Army National Guard is required to meet and confer on the wearing of a green or white tee shirt, under Executive Order 11491, Section 11(a), or on the impact of the issuance of such regulation".

The Agency takes the position "that the color of the tee shirt is non-negotiable, in that it goes to the essence of what constitutes a regulation uniform, and only the Agency may prescribe what does constitute a regulation uniform".

As noted above, the resolution of the instant controversy turns on the negotiability of the regulation concerning the uniform to be worn by the civilian technicians while working in the motor pools and warehouses. In a consolidated decision 2/ the Federal Labor Relations Council had an opportunity to consider the negotiability of various National Guard Regulations dealing with the wearing of uniforms by civilian technicians while performing their non-military duties. The Council concluded that the attire of civilian technicians while performing technician duties as opposed to military duties is a negotiable item. Accordingly, in

2/ National Association of Government Employees, Local R14-87 and Kansas National Guard, FLRC No. 76A-16 (and other cases consolidated therewith) (January 19, 1977), Report No. (continued on next page)

view of the aforesaid Council decision, I find that the Respondent violated Sections 19(a)(1) and 19(a)(6) of the Executive Order when it unilaterally and without prior notice to the Union issued the regulation requiring the wearing of green tee shirts when fatigue jackets were removed during warm weather. 3/

Moreover, even assuming arguendo the non-negotiability of the regulation concerning the wearing of green tee shirts, Respondent was obligated, however, to bargain with the Union concerning the impact of the change on unit personnel. 4/

Recommendation

Having found that Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purposes of Executive Order 11491.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Louisiana Army National Guard should:

1. Cease and desist from:

(a) Instituting a change in policy with respect to the manner of wearing the utility uniform by employees of the Louisiana Army National Guard without notifying Locals 1708 and 1737, National Federation of Federal Employees, the exclusive representative of its employees, and affording such representative the opportunity to meet and confer on the decision to effectuate such a change.

2/ - continued

Report No. 120; request for reconsideration denied (May 18, 1977), Report No. 125.

3/ Pennsylvania Air National Guard, A/SLMR No. 866.

4/ Department of the Treasury, Internal Revenue Service, Greensboro District Office, A/SLMR No. 1007.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Notify Locals 1708 and 1737, National Federation of Federal Employees of any intended change in policy with respect to the manner of wearing the utility uniform by unit employees of the Louisiana Army National Guard and, upon request, meet and confer in good faith on such intended change.

(b) Post at the facility of the Louisiana Army National Guard, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.


BURTON S. STERNBURG
Administrative Law Judge

Dated: July 17, 1978
Washington, D.C.

BSS:hjc

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a change in policy with respect to the manner of wearing the utility uniform by employees of the Louisiana Army National Guard without notifying Locals 1708 and 1737, National Federation of Federal Employees, the exclusive representative of our employees, and affording Locals 1708 and 1737, National Federation of Federal Employees the opportunity to meet and confer on the decision to effectuate such a change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify Locals 1708 and 1737, National Federation of Federal Employees of any intended change in policy with respect to the manner of wearing the utility uniform by unit employees of the Louisiana Army National Guard and, upon request, meet and confer in good faith on such intended change.

(Agency or Activity)

Dated: _____ By _____
Commanding Officer

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 materials.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator for Labor Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. CUSTOMS SERVICE, REGION IV,
MIAMI, FLORIDA
A/SLMR No. 1118

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Respondent violated Section 19(a)(1), (2), and (6) of the Order by transferring Customs Inspector Ken Brown for two weeks from the Dodge Island Seaport to the Miami International Airport; by soliciting written complaints concerning Brown's behavior as a Customs Inspector; by failing to afford Brown an opportunity to respond to said complaints; and by interrogating two union officers concerning their union activities.

The Administrative Law Judge concluded that the Respondent had violated Section 19(a)(1) and (2) of the Order. He found that, under all the circumstances, Inspector Brown's transfer was discriminatorily motivated. In regard to the Section 19(a)(6) allegation, the Administrative Law Judge found that in addition to the fact that there had been no clear policy in regard to the solicitation of written complaints or the granting of an opportunity to respond, there was no evidence of an intent on the part of the Respondent to establish a change from past practices in regard to Inspector Brown. With regard to the independent Section 19(a)(1) allegation, the Administrative Law Judge concluded that the remarks, taken in context, did not constitute coercive interrogation of the employees involved and, therefore, did not violate Section 19(a)(1) of the Order.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations. Accordingly, he ordered the Respondent to cease and desist from engaging in the conduct found violative of the Order and to take certain affirmative actions. He also ordered that the portion of the complaint alleging a violation of Section 19(a)(6) of the Order and an independent violation of Section 19(a)(1) of the Order be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. CUSTOMS SERVICE, REGION IV,
MIAMI, FLORIDA

Respondent

and

Case No. 42-4106 (CA)

NATIONAL TREASURY EMPLOYEES UNION (NTEU)

Complainant

DECISION AND ORDER

On July 14, 1978, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent's two week transfer of an employee was discriminatorily motivated in violation of Section 19(a)(1) and (2) of the Order and recommending that it cease and desist from such conduct and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge also found that the Respondent had not violated Section 19(a)(6) of the Order and that certain other conduct was not violative of Section 19(a)(1) of the Order and recommended that those aspects of the complaint be dismissed. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26 of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Customs Service, Region IV, Miami, Florida, shall:

1. Cease and desist from:

(a) Transferring, assigning, disciplining, or discriminating in any manner against Kenneth W. Brown in regard to hiring, tenure, promotion,

or other conditions of employment in order to discourage membership in the National Treasury Employees Union, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

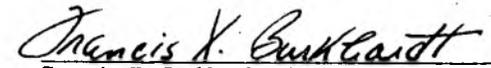
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Post at its facilities located in the Miami, Florida, area copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Commissioner and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Regional Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges violation of Section 19(a)(6) of the Order, and an independent violation of Section 19(a)(1) of the Order, be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 6, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT transfer, assign, discipline, or discriminate in any manner against Kenneth W. Brown in regard to hiring, tenure, promotion, or other conditions of employment in order to discourage membership in the National Treasury Employees Union, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

Agency or Activity

Dated: _____ By: _____ (Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



In the Matter of

U.S. CUSTOMS SERVICE, REGION IV,
MIAMI, FLORIDA

Respondent

and

NATIONAL TREASURY EMPLOYEES
UNION (NTEU)

Complainant

Case No. 42-4106 (CA)

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For the Respondent

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For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on February 28, 1978 by the Regional Administrator for Labor-Management Services of the U.S. Department of Labor, Atlanta Region, a hearing was held before the undersigned in this case on April 20, 1978 at Miami, Florida.

This proceeding arises under Executive Order 11491, as amended (herein called the Order). An original complaint was filed on December 7, 1977 by National Treasury Employees Union (herein called the Complainant) against U.S. Customs Service, Region IV, (herein called the Respondent). A first amended complaint was filed on February 27, 1978. The amended complaint, upon which this proceeding is based, alleged that Respondent violated Sections 19(a)(1), (2) and (6) of the Order by: (a) interrogating employees as to their union activities; (b) transferring Inspector Ken Brown for two weeks from the seaport to the airport because of his union activities; (c) soliciting written complaints concerning Brown's behavior as a Customs Inspector, which was a unilateral change in practice; (d) failing and refusing to afford Brown an opportunity to respond to said complaints, which constituted a unilateral change in past practice. Respondent filed an answer to the complaint on January 23, 1978 denying that it had violated the Order. 1/

Both parties were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed by both parties which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and based on all the testimony and evidence adduced at the hearing, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

1. At all times material herein the National Treasury Employees Union (NTEU) has been the exclusive bargaining representative for all unit employees, including inspectors, in the U.S. Customs Service attached to Region IV, Miami, Florida. This region covers the seaport at Dodge Island and the Miami International Airport. During such times NTEU Chapter 146 has represented the bargaining unit employees at the Dodge Island Seaport.

1/ At the hearing Respondent's counsel objected to any evidence re the alleged discriminatory transfer of Brown. He insisted that since Complainant agreed not to prosecute this aspect of the charge, the issue should not be litigated. His objection was overruled since the undersigned did not consider it proper to go behind the complaint which alleged such discrimination.

2. Kenneth W. Brown was hired as a Customs inspector by Respondent in 1972 and attached to the Miami airport. In 1975 he was detailed to the Dodge Island Seaport where he continued to serve as a permanent inspector until he was transferred for two weeks to the airport on April 18, 1977. Upon his return to the Seaport, 2/ Brown remained thereat until he was transferred as a customs inspector to Knoxville, Tennessee in the spring of 1977.

3. Brown became a member of NTEU in 1975. Since that time he served as vice-president of NTEU Chapter 146 and was active on its behalf. His activities included: participating in the contract negotiations between Complainant and Respondent, filing grievancies on behalf of employees and Chapter 146, and the filing of unfair labor practice complaints against Respondent.

4. In late February or early March 1977, Brown was assigned to inspect merchandise stored at the Withers Van Lines warehouse located in Miami, Florida. The goods to be inspected were in several large containers - 20' to 40' x 8' x 7' - which held furniture and household effects for various consignees. Some of the merchandise came from Jamaica - a high risk country since marijuana might be among these goods. Brown visited the warehouse, and in order to perform a thorough inspection he requested a dog and a dog handler. Two containers, each of which was completely filled with merchandise, were unloaded in part, but the slow process convinced Brown the examination wouldn't finish by noon of that particular day. Although the dog handler was satisfied that the pieces examined were clean, 3/ Brown requested that the warehousemen make an aisle into the containers in order to inspect all the pieces or effects. This was not done. Moreover, the warehousemen were on a 10:30 a.m. check and no progress had been made in the examination. Thus, Brown decided that the inspection be conducted at a later date when personnel would be available to perform the job thoroughly. He left the warehouse, the merchandise was reloaded onto the containers, and the examination was continued subsequently. As a result of this occurrence, each consignee was required to pay \$30 for Brown's overtime devoted to this task.

2/ Record testimony reveals the employees considered and I find that the working conditions were better at the seaport, and an assignment thereat was deemed preferable to one at the airport.

3/ The term "clean" connotes the items did not contain forbidden material as marijuana, etc.

5. In March 1977 Brown went to inspect freight located at Ryder Truck Lines, Inc. He was given some papers, including a logbook of merchandise and directed to the dock area. The examination was completed, but Brown returned a week later on March 28, 1977 for further inspection. Upon being given the same documents, Brown objected to being required to hold on to these papers. He went downstairs but found nobody with whom to consult re the examination of the freight. Brown spoke to Robert J. Crumbley, office manager of Ryder Trucking, concerning the failure of that company to locate the shipment and have it ready for inspection. Moreover, Brown stated he couldn't wait around since he had other work to do. Accordingly he left the warehouse.

6. Companies such as Ryder Trucking receive "in bond" freight, which is merchandise received by them for storage and delivery after posting a sufficient bond to enable them to retain the goods without direct supervision by U.S. Customs. Upon receipt of the shipment, Ryder must notify the consignee and Customs that the merchandise is in its possession. When the consignee has made an entry of the shipment and storage, there is a scheduled examination by Customs within two or three days after its receives notification of the entry.

An inspector may have several examinations to conduct in a day. Record testimony reflects, and I find, that if the cargo is not ready and available for inspection when the Customs official arrives, the practice has been - in accordance with instructions - for the inspector to leave the premises and not delay the matter further.

7. In respect to the incidents at Ryder Trucking, the record indicates that shortly after Brown's last visit thereat Crumbley telephoned Paul Wyche who was a supervisory Customs inspector at Dodge Island. Crumbley related his dissatisfaction with Brown's conduct during his attendance at the Ryder warehouse. In respect to the incidents at Withers Van Lines, record facts show that a representative from this firm, "Chuck" Charles mentioned Brown's behavior to Harold Zagar, Chief Inspector at Dodge Island. Zagar in turn, related the complaints to James E. Townsend, Respondent's District Director, and the latter told Zagar to get both complaints in writing.

8. Supervisor Wyche, upon instruction from Zagar, telephoned Ryder Trucking representative Crumbley and asked him to reduce to writing his complaint about Brown's visit to that firm's warehouse. A written complaint dated March 30, 1977 was thus sent to Zagar from Crumbley. Upon being asked to submit in writing its complaint concerning Brown's activities at Withers Van Lines, the latter's representative, F.A. Brook, sent a letter dated April 1, 1977 to Respondent. 4/

9. The record reflects that no express or declared policy existed whereby complaints about the conduct of Customs inspectors were required to be in writing. While District Director Townsend testified he had told supervisors in the past that complaints of a serious nature should be in writing, Chief Inspector Wyche testified that complaints similar to those leveled against Brown were not usually required to be reduced to writing by a complainant. Record facts also reveal that Respondent had received written complaints in the past concerning inspectors who were called into the supervisor's office; that the matters were usually discussed with each inspector; and that no further action was taken in respect thereto.

10. Brown, who had been on leave for several weeks, reported for duty at the seaport on April 18, 1977. He was called into the supervisor's office where supervisors Zagar and Dunham were present. Zagar handed Brown a letter from Townsend, with the written complaints from Ryder Trucking and Withers Van Lines attached thereto, and he remarked that the employee had "done it again" and was being transferred. Brown protested and some discussion ensued as to the merits of the complaints, whereupon Dunham told Brown to report to the airport and the latter then left the office.

11. The Townsend letter, which was addressed to Brown, informed him that the two recent complaints against him, in addition to an incident occurring between Brown and Belcher Oil 5/ employees on November 7, 1976, raised questions as to

4/ Both written complaints were substantially corroborative of Brown's version of the events which transpired at the two warehouses.

5/ While working at this firm's premises on Fisher Island, Brown was accused of threatening someone, throwing a flashlight at a Belcher Oil employee, and attacking the firm's dog. The matter was investigated but no action taken against him. Prior thereto, Brown filed a grievance based on management not allowing all inspectors to gauge and board oil tankers. He also charged one of the three inspectors thereat with a criminal offense, and the said inspector was removed from Fisher Island.

his ability to deal effectively and maintain good relations with the public at importers' premises. It further advised Brown that in view of the Ryder and Withers complaints, he was being reassigned to the Miami International Airport, effective April 18, 1977; that with the increase in supervision further incident of similar nature, which occurred when Brown was left alone, would be eliminated.

12. The record establishes, and I find, that other employees who had committed "offenses" similar to that engaged in by Brown, or had been the object of such complaints, either with Ryder Trucking, Withers Van Lines or other firms, were not transferred or reassigned as a result thereof.

13. Upon leaving Zagar's office, Brown notified Ronald Rizzo, President of Chapter 146, as to what had happened and asked him to intervene. Rizzo and Daniel Casale, Regional Vice Chairman for Complainant union, attempted to locate Regional Commission Bazemore. Casale telephoned for an appointment without success. Supervisor Wyche inquired what they were doing and Rizzo stated they were trying to see the Commission re Brown's transfer. Wyche asked them to come to his office and the union officials complied. Wyche remarked he was not certain he could spare the men even if they had arranged an appointment with the Commissioner. 6/ He asked the men where their priorities lay; that if they had a conflict with job and union responsibilities, which would take precedence. Casale replied that he saw no difference between the two functions. Rizzo stated that in respect to Brown's transfer the union duties took precedence.

14. Brown remained at the airport for two weeks when Respondent returned him to the seaport. Townsend testified he rescinded his decision upon receiving word that Commissioner Bazemore requested he do so.

15. On May 21, 1977 Casale spoke to Townsend re Brown's transfer to the airport. During the conversation Townsend commented he received a letter from Rizzo concerning Brown; that he was going to reply and acknowledge the existence of anti-union animus; that he had spoken to the supervisors,

6/ Since the record does not clearly establish otherwise, I find these events took place during working hours.

including Wyche, and couldn't understand why the latter said what he did; that Brown had made himself unpopular with his supervisors; that he was going to straighten "those people out," as he straightened out the former Chief Inspector who had a bad attitude toward blacks; that he changed the Chief Inspector's attitude toward blacks and he'll change "these guys" attitude toward unions. 7/

16. An investigative committee was formed to ascertain the details re the Ryder and Withers' incidents. It was composed of Zagar, Casale and Assistant Director Hengst. It issued a report on May 18, 1977 describing the incidents which occurred. Further, the employees at Withers and its agent Charles stated therein that the letter re Brown was written without solicitation. Neither Ryder nor Withers Van Lines objected to Brown's performing his inspection duties at these sites in the future.

Conclusions

In contending that Respondent has violated the Order herein, complaint alleges as follows: (1) the transfer of Inspector Brown on April 18, 1977 from the seaport to the airport was discriminatory and violative of Sections 19(a) (2) and (1); (2) comments made by Supervisor Wyche to Inspectors Rizzo and Casale, regarding priority between job and union responsibilities constituted interference, restraint, and coercion under 19(a)(1); (3) management unilaterally changed its past practice of not soliciting written complaints concerning inspectors, as well as providing them with an opportunity to respond to such complaints in violation of 19(a)(6) and (1) of the Order.

(1) It is axiomatic that an employer may transfer, or otherwise assign, employees within its agency without running afoul of the Order if such action is not based on the union activities of the employees. In the instant case Respondent urges that the transfer of Brown was not because of his protected activities as vice-president of NTEU Chapter 146, but was directly related to his conduct while conducting inspections at Ryder Trucking and Withers Van Lines in early 1977.

While not free from doubt, several factors persuade me that the transfer of Inspector Brown on April 18, 1977 from the seaport to the airport was bottomed on his activities on behalf of the local union.

7/ Townsend testified he was unaware of Brown's union affiliations.

Upon his assignment in 1975 to the Dodge Island seaport Brown became very active as a representative of the union. His zeal in filing grievances, negotiating contracts, and otherwise pursuing his union duties did not gain him favor with his supervisors. This is attested to by Director Townsend, along with the latter's admission to Casale that the supervisors maintained a hostile attitude toward unions. I consider it significant that, in the context of a discussion between the Director and Casale concerning Brown's conduct at the two inspection sites, Townsend conceded there was anti-union animus on the part of management. 8/ It is true that Townsend denies knowledge of this inspector's unionism. However, Brown's activities were so open and well known - as admitted by Wyche - that it is reasonable to impute knowledge as to his union activities during his tenure at the seaport. There is, therefore, sufficient evidence to demonstrate that management was well aware of Inspector Brown's participation in filing unfair labor practice complaints, negotiating with the employer as to conditions of employment, and representing, as a union official, the inspectors who had grievances concerning their working conditions. See Federal Aviation Administration, A/SLMR No. 704. Further, the remarks to Rizzo and Casale by Wyche concerning "priority" between union and job responsibilities, together with the admitted anti-unionism on the part of management, furnishes sufficient motivation to act discriminatorily toward this particular employee who was so active in union activities.

Note is taken that in other instances, where inspectors were the objects of complaints, the customary procedure resulted in said individuals being called in by management to explain the incidents. No such opportunity was afforded Brown on or before his transfer to the airport on April 18. Respondent accepted the version offered by both Ryder and

8/ In further support of anti-union animus, Complainant relies upon testimony of Rizzo and Pearson that management representative Ross stated that Rizzo's former difficulties with Respondent were due to his union activities. Since the "difficulties" adverted to were the subject of a prior case (42-3807) which was settled by the parties, I do not deem it proper to consider such testimony to establish anti-union motivation herein. Accordingly, such evidence is rejected.

Withers as to the occurrences, and it was prepared to discipline Brown without any consideration being given to his explanation of the events. 9/

Such conduct by the employer herein seems unreasonable under the circumstances, and precipitous treatment of this nature, together with other factors, may well give rise to an inference of illegal motivation. In Department of the Air Force, Offcutt Air Force Base, A/SLMR No. 784 the activity likewise failed to obtain the alleged discriminatee's version of events which management claimed caused her termination, and it also neglected to discuss these incidents with the employer before terminating her employment. These factors, together with the existence of anti-union animus, gave rise to a finding of illegal motivation.

Further, the case at bar discloses other actions by Respondent which resulted in disparate treatment being accorded Brown vis a vis other inspectors. Thus, it was not the usual practice, as testified to by supervisor Wyche, for management to contact the public and ask that oral complaints, theretofore made, be reduced to writing. While charges of a serious nature may have been the subject of a written complaint, even at the suggestion of management, the "solicitation" of such writings was not undertaken in similar situations. The record reflects, moreover, that other incidents involving misconduct by inspectors at Ryder or other firms did not prompt a reassignment to the airport or another location. Moreover, the complaining firms declared they had no objection to Brown's returning to their premises and conducting inspections. The failure to transfer a non-union official, who is employed by the activity, for having been the target of similar complaints by the same or other firms is significant. The disparate treatment accorded Brown herein, who was so active as a union representative on behalf of employees, is a factor suggestive of discrimination under the Order. Federal Aviation Administration, supra.

Based on the foregoing indicia, and the anti-union animus 10/ on the part of management, I am persuaded that the two week transfer of Brown on April 18, 1977 from

9/ Moreover, attempts by Respondent to advance the Belcher Oil incident as a further reason for reassigning Brown lend credence to pretextual conduct by management. This incident occurred a year earlier and the matter had been dropped.

10/ Such anti-union antipathy was found to exist toward a union official by this Respondent in A/SLMR No. 764.

the Dodge Island Seaport to the Miami International Airport was effected discriminating. Accordingly, I find Respondent has violated Sections 19(a)(2) and (1) of the Order by such transfer.

(2) In respect to the alleged violation by Respondent of 19(a)(1) as a result to Supervisor Wyche's remarks to Rizzo and Casale, I do not agree with Complainant that these statements were coercive or constituted interference under the Order. While these remarks might imply the existence of anti-union sentiment, they could well be referable to the use of time by the union agents for union versus non-union business. Taken in context, Wyche's questioning Rizzo and Casale as to priority between union and non-union business did not constitute coercive interrogation regarding union activities. Neither did the statement, *per se*, tend to manifest disdain for the union as the bargaining representative or denigrate the union in the eyes of the employees. No aspersions were cast upon the representative, nor did the supervisor vilify the union. Cf. Mare Island Naval Shipyard, Vallejo, California, A/SLMR No. 1026.

(3) Complainant contends that, in respect to Inspector Brown, Respondent unilaterally changed its past practices of permitting employees to respond to complaints against them, and that it solicited the complaints against Brown in contrast to its usual procedure in the past. These changes, it is urged, were unilateral in nature and constituted a by-passing of the union in violation of Section 19(a)(6) of the Order. I do not agree.

It has been established and reaffirmed that an employer may not unilaterally change conditions of employment without running afoul of 19(a)(6). Internal Revenue Service, Office of the Regional Commissioner, Western Region, A/SLMR No. 473; Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 828. However, in the instant case I do not view Respondent's actions in respect to Inspector Brown as a change in working conditions or a unilateral attempt to alter past practices involving conditions of employment. The employer's conduct toward Brown constituted a failure to apply certain past practices when changes were leveled against its employees. While such omission may be an indication of discrimination, it falls short of a sweeping unilateral change in employment conditions. Apart from the fact that the non-solicitation of complaints, or the

granting of an opportunity to inspectors to respond to complaints, was not an avowed practice, I am not convinced that Respondent intended to establish a new condition of employment and change its policies, practices and matters affecting working conditions. See Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 979.

Moreover, and assuming *arguendo* that such conduct by Respondent in respect to the Ryder and Withers complaints be deemed a change in past practices and working conditions, I would conclude the action by management herein neither materially affected, nor had a substantial impact on personnel policies, and general working conditions. Under 11(a) of the Order it is necessary to establish that an employer's actions resulted in a substantial impact thereon. Department of Defense, Air National Guard, et. al, A/SLMR No. 738.

Accordingly, and in view of the foregoing, I conclude that Respondent did not violate 19(a)(6) and (1) by (a) its requesting Ryder and Withers to reduce their complaints against Brown to writing, (b) failing to afford Brown an opportunity to respond to the said complaints against him.

RECOMMENDATION

Having found that Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (2) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purposes of Executive Order 11491, as amended. 11/ In respect to the alleged violations of 19(a)(1) based on the statements by Supervisor Wyche, and the alleged violation of 19(a)(6) based on unilateral changes in personnel practices and working conditions, it is recommended that such allegations in the complaint be dismissed.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25 of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations, hereby order that the U.S. Customs Service, Region IV, Miami, Florida, shall:

11/ Inasmuch as Respondent has reassigned Brown to the seaport, and there has been no loss of pay or other benefits sustained, the remedy herein is confined to a cease and desist order together with the posting of an appropriate notice.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT transfer, assign, deisipline, or discriminate in any manner against Kenneth W. Brown in regard to hire, tenure, or other condition of employment in order to discourage membership in National Treasury Employees Union, Chapter 146, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured by Executive Order 11491, as amended.

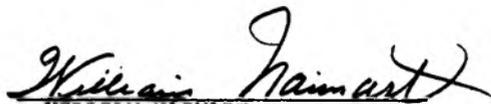
1. Cease and desist from:
(a) Transferring, assigning, disciplining or discriminating in any manner against Kenneth W. Brown in regard to hire, tenure, or other conditions of employment in order to discourage membership in National Treasury Employees Union, Chapter 146, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purpose and policies of the Order:

(a) Post at its facilities located in the Miami, Florida area copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Regional Commissioner and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Regional Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.


WILLIAM NATMARK
Administrative Law Judge

Dated: 14 JUL 1978
Washington, D.C.

Agency or 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 Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

WN:mjm

September 7, 1978

A/SLMR No. 1119

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
FRESNO SERVICE CENTER
A/SLMR No. 1119

INTERNAL REVENUE SERVICE,
FRESNO SERVICE CENTER

Respondent

and

Case No. 70-5468(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND CHAPTER 97 (NTEU)

Complainant

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and NTEU Chapter 97 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when it refused to allow the Complainant to examine the Respondent's investigatory file which formed the basis for its decision to terminate a probationary employee.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (6) of the Order. He reasoned that Respondent's refusal to make the file available denied the Complainant access to relevant and necessary information essential to the performance of its representative function. In reaching this conclusion, the Administrative Law Judge found, among other things, that the meeting involved concerning the employee's dismissal, requested by the Complainant pursuant to the parties' negotiated agreement, was a formal discussion within the meaning of Section 10(e) of the Order.

With certain modifications in the Administrative Law Judge's theory of violation and in the proposed remedial order, the Assistant Secretary adopted the Administrative Law Judge's conclusion that the Respondent's conduct was violative of Section 19(a)(1) and (6) of the Order.

DECISION AND ORDER

On May 25, 1978, Administrative Law Judge Ben H. Walley issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent and Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order. The Complainant subsequently filed an answering brief to the Respondent's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the parties' exceptions and supporting briefs and the answering brief filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The complaint herein alleges that the Respondent violated Section 19(a)(1) and (6) of the Order when it refused to allow the Complainant to examine the investigatory file which allegedly formed the basis for its decision to terminate a probationary employee.

The essential facts of the case are set forth, in detail, in the Administrative Law Judge's Recommended Decision and Order, and I shall repeat them only to the extent necessary.

By letter dated April 14, 1976, the Director of the Respondent Service Center informed a probationary employee of the Respondent's determination to terminate his employment. Among other things, the letter referred to an incident in which the employee was arrested in the company of an individual who was subsequently convicted of theft. The letter then noted that during a subsequent investigation of the incident by the Respondent, the manner in which he responded to some questions and his answers to other questions raised significant doubts as to his character and suitability. The letter indicated that the employee was to be separated because of his undesirable suitability characteristics and advised the employee of his rights under Civil Service rules. It also stated that pursuant to Article 30 of the negotiated agreement between Complainant and Respondent, the probationary employee could submit a written statement and/or request a meeting regarding his termination. 1/

Thereafter, the probationary employee involved designated a National Field Representative of the Complainant as his representative, indicated his desire to have a meeting with Respondent pursuant to Article 30, Section 1(c) of the negotiated agreement, and his representative made a written request for the investigatory file which formed the basis of the Respondent's decision to terminate the employee. The Respondent refused to make the file available. On April 30, 1976, a representative of the Respondent met with the probationary employee and his representative. The representative of the Respondent stated that he was there only to hear any mitigating circumstances presented by the employee, and then prepare a recommendation to the Director of the Respondent. During the meeting, the Respondent's representative discussed and answered certain questions relating to contents of the investigatory file, but insisted that he could not furnish the Complainant with a copy of the file.

The Respondent defended its refusal to make the file available to the Complainant's National Field Representative by asserting, among other things, that the Order does not grant the Complainant access to the file; a probationary employee has a narrow scope of rights, and the Order should not be construed so as to expand those rights; access to files on the termination of a probationary employee is not required by Section 10(e) of the Order; access to the files sought is not relevant and necessary, considering that the Complainant's role in an Article 30 hearing is merely to be present and the fact that the only matter to be considered at the meeting is the possible mitigation of the proposed

1/ Article 30, Section 1(c) of the negotiated agreement provides, in pertinent part: ". . . The Employer agrees to meet with an affected probationary employee upon request and/or accept a written statement from him/her relating to his/her termination, whether or not the employee is on the rolls. If the employee elects the written statement, it must be delivered to the Employer on or before the date of the meeting. If the affected employee elects to request a meeting or to submit a written statement the request for meeting or receipt of written statement must be within fifteen (15) days of the date of receipt of the notice. If a meeting is held, the employee may be accompanied by a local Chapter steward and/or a National Representative of the Union."

punishment; any possible "right" of access to the file by the Complainant has been waived; 2/ the instant complaint is barred by Section 19(d) of the Order; and the remedy sought by the Complainant is too broad. On the other hand, the Complainant asserts, among other things, that the file is relevant and necessary for it in the performance of its responsibilities in the administration of the parties' negotiated agreement; it did not waive its right to the evidentiary file during negotiations leading to the negotiated agreement; and the complaint is not barred by Section 19(d) of the Order.

In concluding that the Respondent violated Section 19(a)(1) and (6) of the Order, the Administrative Law Judge found that the Complainant had a duty on behalf of the unit employee involved to gather, prepare and submit all information that would be helpful in discharging its responsibilities. Thus, he reasoned, the Respondent's refusal to make the file available denied the Complainant access to relevant and necessary information essential to the performance of its representative function. In reaching this conclusion, the Administrative Law Judge found that there was no clear and unequivocal waiver by the Complainant of any right to information it had under the Order; that the meeting requested was a formal discussion within the meaning of Section 10(e) of the Order; and that Section 19(d) of the Order did not preclude the processing of the complaint since the employee was a probationary employee and, as such, the notice to terminate was not an adverse action from which he could appeal. The Administrative Law Judge also found that there was no prohibition in statute or regulation precluding the Respondent from furnishing the file to the Complainant. 3/

While I concur in the recommendation by the Administrative Law Judge that the Respondent's conduct was violative of Section 19(a)(1) and (6) of the Order, I do so for different reasons.

Section 10(e) of the Order provides that a labor organization accorded exclusive recognition has the responsibility to represent the interests of all employees in the unit. 4/ It has previously been held

2/ In this regard, the Respondent contends that because the Complainant sought to include a clause in the negotiated agreement that delineated its "right" to the investigatory file, that any "right" to the investigatory file was waived by the Complainant when it agreed to the present wording of Article 30, which does not provide for such "right."

3/ The Respondent did not except to the Administrative Law Judge's finding that the subject complaint had been filed timely.

4/ Section 10(e) of the Executive Order provides: "When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in

(Continued)

that an exclusive representative cannot meet this responsibility if it is prevented from obtaining relevant and necessary information relating to its duty to administer its negotiated agreement, and to represent and counsel employees regarding the exercise of their rights under the Order and the negotiated agreement. 5/

In the instant case, the Respondent refused to make available to the Complainant the investigatory file which formed the basis of its decision to terminate a probationary employee because of "undesirable suitability characteristics". I find, in agreement with the Administrative Law Judge, that this ambiguous language contained in the Respondent's termination letter had the effect of making the investigatory file prima facie relevant and necessary to the exclusive representative if it were to understand the reasons for the Respondent's action, and to fulfill its representative function with regard to the probationary employee, as well as the administration of the parties' negotiated agreement. 6/

I also find, in agreement with the Administrative Law Judge, that the record does not establish a clear and unequivocal waiver by the Complainant of its right to the investigatory file. The Respondent contends that any right to the investigatory file was waived by the Complainant when it withdrew its original negotiation demand that such a right be delineated in the parties' agreement and accepted a clause which did not establish such a right. I disagree. It is well-established that in order to establish a waiver of a right granted under the Executive Order, such waiver must be clear and unmistakable, and that a waiver will not be found merely from the fact that an agreement omits specific reference to a right granted by the Executive Order, or that a labor organization has failed in negotiations to obtain protection with

4/ the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

5/ See Department of Health, Education and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, 4 A/SLMR 466, A/SLMR No. 411 (1974).

6/ As I view the exclusive representative's right of access to information to arise from its obligation to represent the interests of all unit employees, and not solely from its right to be represented at formal discussions between management and unit employees, I find it unnecessary to determine whether or not the meeting conducted pursuant to Article 30 of the parties' negotiated agreement constituted a formal discussion within the meaning of Section 10(c) of the Order.

respect to certain of its rights granted by the Order. 7/ In my view, the Complainant's withdrawal of its original negotiation demand did not, standing alone, evidence a clear and unequivocal waiver in this regard.

Under all of these circumstances, I find that the Respondent, by its action in refusing the Complainant's request for information necessary and relevant for the latter to discharge its obligations to represent all employees in the exclusively recognized bargaining unit, improperly refused to negotiate with the Complainant in violation of Section 19(a) (1) and (6) of the Executive Order.

ORDER 8/

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Fresno Service Center, Fresno, California, shall:

1. Cease and desist from:

(a) Withholding or failing to provide, upon request by the National Treasury Employees Union and NTEU Chapter 97, any information, including investigatory files, in connection with representing probationary employees at meetings called to consider their proposed termination, which is relevant and necessary to enable the National Treasury Employees Union and NTEU Chapter 97 to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

7/ Cf. NASA Kennedy Space Center, Kennedy Space Center, Florida, 2 A/SLMR 566, A/SLMR No. 223 (1972).

8/ In its exceptions, the Complainant seeks to modify the proposed remedial order of the Administrative Law Judge by providing for the reinstatement of the probationary employee, and for the holding of a new meeting pursuant to Article 30 of the parties' negotiated agreement. Based upon the entire record herein, I find insufficient evidence to support a finding that but for the refusal of the Respondent to furnish the investigatory file, the probationary employee would not have been discharged. Therefore, I do not find sufficient basis in the record to order the reinstatement of the probationary employee. However, it was noted that Article 30, Section 1(c) of the parties' negotiated agreement provides additionally that an affected probationary employee and his representative may meet with the Respondent "...whether or not the employee is on the rolls." Under these circumstances, I conclude that the Complainant is entitled to a new meeting, pursuant to Article 30, Section 1(c) of the parties' negotiated agreement, upon its request, subsequent to being given the information it seeks.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, make available to the National Treasury Employees Union and NTEU Chapter 97 all information, including the investigatory file, in connection with the separation of Richard Combs, a probationary employee, which is relevant and necessary to enable the National Treasury Employees Union and NTEU Chapter 97 to discharge its obligation to represent effectively all employees in the exclusively recognized unit.

(b) After receipt by the National Treasury Employees Union and NTEU Chapter 97 of the relevant and necessary information referred to in Section 2(a) above, upon request, meet with the National Treasury Employees Union and NTEU Chapter 97, pursuant to Article 30 of the parties' negotiated agreement, concerning the decision to separate Richard Combs.

(c) Post at its Fresno Service Center, Fresno, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Fresno Service Center and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
September 7, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT withhold or fail to provide, upon request by the National Treasury Employees Union and NTEU Chapter 97, any information, including investigatory files, in connection with representing probationary employees at meetings called to consider their proposed termination, which is relevant and necessary to enable the National Treasury Employees Union and NTEU Chapter 97 to discharge its obligation as the exclusive representative to represent effectively all employees in the exclusively recognized unit.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, make available to the National Treasury Employees Union and NTEU Chapter 97 all information, including the investigatory file, in connection with the separation of Richard Combs, a probationary employee, which is relevant and necessary to enable the National Treasury Employees Union and NTEU Chapter 97 to discharge its obligation to represent effectively all employees in the exclusively recognized unit.

WE WILL, upon request, and after the receipt of relevant and necessary information by the National Treasury Employees Union and NTEU Chapter 97, meet with the National Treasury Employees Union and NTEU Chapter 97, pursuant to Article 30 of our negotiated agreement, concerning the decision to separate Richard Combs.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 600
San Francisco, California 94105



REPLY TO SAN FRANCISCO
AREA CODE 415 556-0555

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 9061 Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

In the Matter of)
INTERNAL REVENUE SERVICE)
FRESNO SERVICE CENTER)
Respondent)
and)
NATIONAL TREASURY EMPLOYEES)
UNION AND CHAPTER 97 (NTEU))
Complainant)

CASE NO. 70-5468 (CA)

Fred D'Orazio
Assistant Counsel
National Treasury Employees Union
209 Post Street, Suite 1112
San Francisco, California 94108
For the Complainant

Merle Meyers
Office of the Regional Counsel
Western Region
Internal Revenue Service
Department of the Treasury
Two Embarcadero Center
Suite 900
San Francisco, California 94111
For the Respondent

Before: BEN H. WALLEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on September 23, 1976, by National Treasury Employees Union and NTEU Chapter 97, 209 Post Street, Suite 1112, San Francisco, California, 94108, hereafter referred to as Complainant, which Complaint was amended on March 3, 1977, and filed against Department of the Treasury, Internal Revenue Service, Fresno Service Center, P. O. Box 12866, Fresno, California, hereafter referred to as Respondent, a Notice of Hearing on said amended Complaint was issued by the Regional Administrator for Labor-Management Services Administration, San Francisco Region, San Francisco, California, for a hearing to be held in Fresno, California, on June 21, 1977.

Prior to the hearing, Respondent filed a Motion to Dismiss or Remand the Amended Complaint and on March 16, 1977, the Regional Administrator denied said Motion. An Order rescheduling the hearing was entered on July 18, 1977, and pursuant thereto a hearing was held on August 30, 1977, in Fresno, California.

The parties requested and were granted time within which to file briefs and post-hearing briefs were received and filed on November 30, 1977, and the entire record has been received and considered.

The Complaint was filed pursuant to the provisions of Executive Order 11491, as amended, hereafter referred to as the Order, and alleged a breach of section 19(a), subsections (1) and (6), as follows:

On April 14, 1976, Mr. Fredric F. Perdue, Director of the Fresno Service Center, speaking for Respondent wrote a letter to Mr. Richard Alan Combs, a Probationary Employee, terminating Mr. Combs' employment with the Center. Among other things, the letter contained the following:

In accordance with Part 315 of the Federal Personnel Manual, this is a notice of my decision to terminate your employment during your probationary period, effective April 30, 1976, for the reason set forth below:

There is sufficient belief that you possess undesirable suitability characteristics. On March 11, 1975, you

were arrested in company of Charles Resner who was ultimately convicted of theft. On February 17, 1976, you were interviewed by representatives of the Inspection Service regarding the extent of your involvement both with Mr. Resner and with other thefts.

The manner in which you responded to some questions and your answers to other questions raise significant doubts as to your character and suitability.

My decision is to separate you from the Federal Service because of your undesirable suitability characteristics.

The letter further advised Mr. Combs of certain rights in the premises and how, when and where to assert them. One of such "rights", existing by virtue of the provisions of Article 30 of the Multi-Center Agreement (hereafter referred to as the Agreement) entered into between the parties hereto on July 18, 1975, provided that a meeting may be held and Mr. Combs "may be accompanied by a local Chapter steward and/or a National Representative of the Union."

Mr. Combs, by written instrument, designated Mr. Scott Schaefer, National Field Representative of Complainant, to represent him "concerning my termination procedures from I.R.S.", and Mr. Schaefer requested of Mr. Fredric Perdue a meeting pursuant to Article 30 to discuss the termination and Mr. Schaefer requested "the evidentiary file which formed the basis for your decision to terminate Mr. Richard Combs..." The "evidentiary file" was not made available and Complainant has charged a violation of section 19(a)(1) and (6) of the Order.

At the hearing held on August 30, 1977, the parties were afforded full opportunity to be heard, to offer, examine, and cross-examine witnesses and to introduce evidence considered relevant to their positions in the premises. After hearing the testimony of the witnesses and observing their demeanor, having reviewed the exhibits, post-hearing briefs filed herein, and based upon the entire record, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

1. An agreement under the provisions of Executive Order 11491, as amended, was negotiated and entered into

by and between the parties hereto (all heretofore identified) on July 18, 1975, and at all times material to the issues here involved was in full force and effect.

2. Richard Alan Combs, a Probationary Employee, was terminated within the probationary period pursuant to the provisions of FPM, Chapter 315, Subchapter 8-4.a. (1)-(4) and IRM 0315.1, (1)-(2). In addition, termination was effected in compliance with Article 30 of the Agreement. There is no question about the right to terminate nor the manner in which it was done, only the clarity of the reasons given therefor is questioned and that secondarily.

3. Prior to the effective date of the termination and within the specified time, Combs designated Scott Schaefer, a National Field Representative of the union, to represent him in matters "concerning my termination procedures from IRS" and Schaefer made written request of Respondent "for the evidentiary file which formed the basis for your decision to terminate Mr. Richard Combs...". Respondent refused to make the "file" available. As a result of this refusal, Complainant contends that it was denied access to information which would have, or most certainly may have, enabled it to assist Mr. Combs in formulating a written reply or an oral statement in full and/or satisfactory explanation of the stated basis for the termination. Thus, the primary question: was Respondent obligated to make available to Complainant the evidentiary file for the purpose of representing Mr. Combs, a probationary employee, in connection with his termination at a pre-dismissal meeting? And incidental to that question, did Complainant waive its right to the information requested when bargaining the parties negotiated agreement?

In denying the request for the evidentiary file, Respondent has asserted several grounds therefor. Some of the more cogent are: (1) The Order does not grant Complainant access to the "file"; (2) Combs, a probationary employee, had "a narrow scope of rights" and the Order should not be construed to interfere with such rights delineated by the Civil Service Commission; (3) access to "files" on termination of a probationer is not required by Section 10(e) of the Order; (4) access to those "files" is not relevant and necessary to Complainant's role as the exclusive representative; (5) if such a right exists under the Order, it has been waived; (6) the present dispute is one of contract interpretation, not an unfair labor practice; (7) the Complaint is barred by Section 19(d) of the Order; (8) the amended Complaint is

untimely filed and should be dismissed; and (9) the remedy sought is too broad.

To support the request for the "file", Complainant asserts that the information is relevant and necessary in the administration of the agreement; that it (NTEU) did not waive its right to the evidentiary file; and that the Complaint is not barred by Section 19(d) of the Order.

Conclusions

For reasons hereinafter set out, I find and conclude that Complainant was entitled to the information contained in the evidentiary file and Respondent's refusal to furnish such information was violative of Sections 19(a)(1) and (6) of the Executive Order. Department of Defense, State of New Jersey, A/SLMR 323, FLRC No. 73A-59 (1975).

As stated above, Complainant was, at all times material to the questions under consideration, the exclusive representative of all unit employees, including Richard Allan Combs, a probationer, according to the provisions of Section 10(e) of the Order. In addition thereto, Complainant was responsible for representation of Combs pursuant to the provisions of Article 30 of the agreement negotiated and entered into by the parties hereto. It had been designated by Combs, in writing.

Despite the number of assertions made, the thrust of Respondent's denial is the fact that Combs was a probationary employee and as such he had what Respondent chose to describe as "a narrow scope of rights". It is true that a probationer has limited rights, as compared to a non-probationary employee, but that very fact demands that those rights be scrupulously protected. One of the "rights" recognized by Respondent is the action required by FPM Chapter 315, Subchapter 8-4. a.(3) 1/ and IRM

1/ (3) When separation action is based entirely on deficiencies in performance or conduct after entrance on duty, the probationer is notified in writing why he is being terminated and the effective date of the action. The information in the notice on why he is being terminated must, at a minimum, consist of the agency's conclusions on the inadequacies of his performance or conduct; it need not require complete and specific reasons as with career or career-conditional employees who have completed their probationary periods and have competitive

0315.1 (2). 2/ In addition, 5 C.F.R. § 315.804, requires notice as to why he is being terminated. 3/ All of these authorities speak of the "minimum" to be furnished to the probationer and the last sentence of Note 1 denies the probationer "a right of reply." Too, it is observed that the subsequent paragraph (4) of the FPM states that "although it is not required, it is good personnel practice to furnish every separated probationer with enough factual information ... about his ... conduct to make the agency's basis for the action clear". (Emphasis added).

Although the authorities cited did not grant Combs, the probationer, "a right of reply", Complainant was instrumental in negotiating the right to such a "reply" and in accordance with Article 30, Section 1-C. of the agreement 4/, Respondent was committed to meet with him

1/ (Continued) status. The employee is not given a right of reply. (Emphasis added).

2/ If after a full and fair tryout, it is apparent that an employee is unsuited for continued employment in the Service, he/she will be separated during the probationary period. Fifteen days' advance notice should be given prior to actual separation, except that the appointing officer may establish a lesser notice period if circumstances warrant such action. All notices of separation for disqualification will include sufficient information to inform the employee why the action is being taken. (Emphasis added).

3/ § 313.894 Termination of probationers for unsatisfactory performance or conduct.

When an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct. (Emphasis added).

4/ The Employer agrees to meet with an affected probationary employee upon request and/or accept a written statement from him/her relating to his/her termination, whether or not the employee is on the rolls.

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and receive (and consider) information and advise him of the results. 5/ But, it was because of this provision that Respondent asserts that Complainant has waived his right to the evidentiary file. 6/

Respondent contends that any "...right" to the "evidentiary file" was waived by Complainant because that "very right" had been requested in negotiating the agreement, had been refused by Respondent and was urged to impasse by Complainant but not accepted. Instead, upon offer by Respondent, the parties to the agreement accepted Article 30 aforesaid. Absent evidence to the contrary, and I find none, it appears and I so find that Article 30 is the product of negotiation and not a resolution of an impasse by the Federal Service Impasses Panel as provided by Section 17 of the Order.

I find the agreement of waiver advanced by Respondent to be untenable. The waiver of a right existing under the Order, an agreement, or one established by custom and use, must be clear and unequivocal. NASA, Kennedy Space Center, Florida, A/SLMR No. 223 (1972); Veterans Administration Center, Bath, New York, A/SLMR No. 335 (1974). This rule of law applies to an "existing" right. As stated by Respondent, the probationary employee had "a narrow scope of rights" and it is equally true that Complainant submitted to negotiation an elaborate process for elevating rights of "probationers" to

4/ (Continued) If the employee elects the written statement, it must be delivered to the Employer on or before the date of the meeting. If the affected employee elects to request a meeting or submit a written statement the request for meeting or receipt of written statement must be within fifteen (15) days of the date of receipt of the notice. If a meeting is held, the employee may be accompanied by a local Chapter steward and/or a National Representative of the Union.

5/ Although counsel for Respondent states in his brief that he (Combs) was advised of the results, I failed to observe any evidence to support the statement.

6/ A Multi-Center Agreement was entered into by the parties hereto on April 13, 1973, which contained no provisions dealing with probationary employees. Since the existing agreement contains an article on the subject, Respondent urges a waiver of a right to information on the reasons for termination.

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that of a non-probationary employee. That effort failed but Complainant succeeded in obtaining Article 30, and particularly section 1-C of the agreement. Certainly, this did not constitute the "waiver" of a right because none existed. Instead, it created a "right" (a right of reply). Thus, a right was created where none existed to waive. It is incongruous to argue that the failure to obtain all that you seek constitutes a waiver of that which you did acquire.

Once the "right to reply" was obtained, the right to furnish any information reasonably considered that would explain his conduct and to mitigate, modify, or reverse the decision to terminate became absolute. Since Complainant was the exclusive representative of the probationer and had the responsibility under section 10(e) of the Order to represent his interest at the meeting provided, it has been concluded that "clearly, it (a labor organization) cannot meet this responsibility if it is prevented from obtaining relevant and necessary information in connection with the processing of grievances" (in this case the "evidentiary files" which formed the basis ...to terminate). Department of Defense, State of New Jersey, A/SLMR No. 323 (1973); Department of HEW, SSA, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 411 (1974).

Respondent insists that Complainant was not authorized to participate in the meeting but only to be present and certainly it had no right to the evidentiary file. This argument is without merit. Clearly, Complainant had a right to be present and had a duty to represent the probationer under both section 10(e) of the Order and Article 30, section 1-C of the agreement. The meeting was a "formal discussion" within the meaning of section 10(e), and NASA, Johnson Space Center, FLRC No. 74A-95 (1975), cited by Respondent. This meeting had passed the stage of the "investigatory interview" claimed by Respondent and is clearly distinguishable from Internal Revenue Service, Washington, D. C., 2 FLRC 229 (No. 74A-23, 1974), and Social Security Administration, Great Lakes Programming Center, Chicago, Illinois, A/SLMR No. 804 (1977), both of which dealt with investigation of conduct "prior" to termination. The meeting in the instant case was after the fact. It was probationer's last chance to "meet ... and/or offer a written statement" in explanation or mitigation of his "manner" of response to certain questions that had been propounded by Revenue Inspection Service, a third party assertedly not responsible to Respondent. Then, Respondent was obligated to consider the submission (oral or written) and

advise probationer (through Complainant) of the decision (which may have sustained or rescinded the prior decision to terminate). It is illogical to argue that this meeting was not a "formal discussion" within the meaning of section 10(e) of the Order. It meets every test laid down by the authorities cited by Respondent to support a position to the contrary.

Therefore, when Mr. Bennett, in his representative capacity, appeared to conduct the meeting it became his responsibility to receive and transmit to Mr. Perdue the information provided. Likewise, it became Complainant's representational duty to gather, prepare and submit (orally or in writing) any and all information considered by it to be helpful for consideration. Thus the refusal to make available the "evidentiary file" and force probationer to a reliance on impressions thrice removed (the "manner" of response) was a denial of a basic constitutional right to be faced by his accusers and a refusal to provide information that Complainant thought would or may be helpful in discharging its representational duties. Complainant cannot be expected to effectively exercise its rights or discharge its responsibilities if it is denied information necessary and relevant to intelligently act in such matters. To deprive Complainant of necessary and relevant information is to deprive Combs, a probationer, of effective representation. This is not in conformity with the purposes or policies of the Order.

The information contained in the "evidentiary file" may or may not be helpful and relevant to the cause of probationer. One thing for sure, it is not irrelevant per se. Only by examination can its relevancy be determined. Accordingly, the refusal of Respondent to make available all necessary and relevant information in its possession, barring any statute or regulation prohibiting disclosure, constitutes a violation of section 19(a)(1) and (6) of the Order, Department of HEW, SSA, Kansas City Pay Center, Bureau of Retirement and Survivors Insurance, A/SLMR No. 411 (1974); Department of Defense, State of New Jersey, A/SLMR No. 323 (1973); Department of the Treasury, IRS, Milwaukee District, A/SLMR No. 974 (1978).

Respondent argues with much force that the present dispute is not properly an unfair labor practice, that it is barred by section 19(d) of the Order, and as a violation of section 19(a)(6) was untimely filed. However, I am not persuaded. Combs was a probationary employee and, as such, the notice to terminate was not an adverse action from which he could appeal. The "reasons" for

termination did not come within any of the grounds for appeal as set out in the statutes or the personnel manuals, i.e., "discrimination because of race, color, religion, sex, or national origin; or because of age..." Because of this, the Complaint could not be consolidated with an acceptable section 19(d) appeals procedure, but it does not foreclose him from filing an unfair labor practice. Veterans Administration, Veterans Benefits Office, A/SLMR No. 296 (1973). Too, I find the argument that the section 19(6) violation was untimely filed and should be dismissed not to be well taken for the reasons stated by the Regional Administrator in his ruling on the Motion to Dismiss (Assistant Secretary Exhibit 1(d)). Further elaboration on this question is considered unnecessary and would unduly add to the prolixity of these recommendations.

Finally, from several different approaches, Respondent claims disclosure of the information requested is prohibited by statutes, regulations and/or personnel manuals. I reject these arguments. In addition to the basic constitutional right of every individual to have made available to him, upon proper request, any and all information that would enhance his position properly pursued, unless barred by some specific law or regulation, 5 U.S.C., § 552, commonly referred to as the Freedom of Information Act, establishes a public policy that all agencies of government will generously make available to the public information under their contract. There are specific exemptions set out in this section, particularly section 552(b)(7), 7/ invoked by Respondent for its contentions. I do not find in this "exemption" the shield Respondent seeks. He argues that the "evidentiary file" was compiled by Revenue Inspection Service, over which it had no control for enforcement

7/ investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings; (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

purposes and, as such, comes within the exemptions mentioned above. Again, I do not agree. Clearly, the "evidentiary file" was not compiled for law enforcement purposes but for administrative function, i.e., determining the "suitability" of a probationary employee, and did not come within the exemption claimed. Center for National Policy Review on Race and Urban Issues v. Weinberger, 1974, 502F.2d 370. The basic purpose of the statute is to promote disclosure of information, Charles River Park "A", Inc. v. Department of Housing and Urban Development, 1975, 519F.2d 935, and the exemptions are to be given a narrow construction. Washington Research Project, Inc. v. Department of Health, Education, and Welfare, 1974, 504 F.2d 238, 164 U.S. App. D.C. 169, certiorari denied 95 S.Ct. 1951, 421 U.S. 963, 44 L.Ed.2d 450. For these reasons I conclude that Respondent has no valid reason for withholding the "evidentiary file" requested.

Based upon the aforesaid findings and conclusions, I conclude that Respondent, by its refusal to make available to Complainant the "evidentiary file which formed the basis" for Respondent's decision to terminate Mr. Richard Combs," refused to consult, confer or negotiate with a labor organization as required by the Order and thereby violated section 19(a)(6) of the Order. I further conclude that by that same refusal, Respondent violated section 19(a)(1) of the Order because such refusal inherently interferes with, restrains and coerces unit employees, in the instant case probationers, in their right to have their exclusive representative act for and represent them and their interests in matters concerning personnel policies and practices as assured by section 10(e) of the Order.

Recommendations

Having found that Respondent has engaged in certain conduct prohibited by section 19(a)(1) and (6) of Executive Order 11491 as amended, I recommend that the Assistant Secretary adopt the following order designed to effectuate the policies of the Order.

RECOMMENDED ORDER

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Fresno Service Center, Fresno, California, shall:

1. Cease and desist from:

(a) Refusing to make available to Complainant, National Treasury Employees Union and NTEU Chapter 97, 209 Post Street, Suite 1112, San Francisco, California, the evidentiary file which formed the basis for the decision to terminate Mr. Richard Combs, a probationary employee, effective April 30, 1976.

(b) Interfering with, restraining or coercing its employees by refusing to make available to National Treasury Employees Union and NTEU Chapter 97, the evidentiary file which formed the basis for the decision to terminate Mr. Richard Combs, a probationary employee, effective April 30, 1976.

2. Take the following affirmative action in order to effectuate the purposes and provision of the Executive Order:

(a) Upon request make available to National Treasury Employees Union and NTEU Chapter 97, San Francisco, California:

The evidentiary file which formed the basis for the decision to terminate Mr. Richard Combs, a probationary employee, effective April 30, 1976.

(b) Post at its Fresno Service Center, Fresno, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director and they shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(c) Pursuant to section 203.27 of the regulations, notify the Assistant Secretary in writing within 20 days from the date of this Order as to what steps have been taken to comply therewith.

B. H. Walley
BEN H. WALLEY
Administrative Law Judge

Date: May 25, 1978
San Francisco, California

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to make available to National Treasury Employees Union and NTEU Chapter 97, San Francisco, California, the evidentiary file which formed the basis for the decision to terminate Richard Alan Combs, a probationary employee, effective April 30, 1976.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Executive Order.

(Agency of Activity)

Dated _____ by _____
Director

September 8, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
CHICAGO DISTRICT,
CHICAGO, ILLINOIS
A/SLMR No. 1120

This case involved an unfair labor practice complaint filed by the National Treasury Employees (NTEU) and NTEU Chapter 10 (Complainants) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by conducting three meetings with unit employees without providing the Complainants with an opportunity to be represented, as required by Section 10(e) of the Order. The Respondent argued that the meetings were training sessions and did not constitute formal discussions within the meaning of Section 10(e).

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In reaching this conclusion, he found that the meetings involved herein did not constitute formal discussions under Section 10(e) of the Order because they were essentially instructional in nature and were not attempts to bypass the Complainants and deal directly with unit employees. Further, he noted that even if these meetings were found to be Section 10(e) discussions and that the exclusive representative thus had the right to be represented at them, in two of the three, notification to the Complainants' representatives as employees and attendance by those representatives satisfied the requirements under the Order. With respect to the remaining meeting, he found that the evidence failed to support the Complainants' allegation that they were not afforded an opportunity to attend the meeting.

The Assistant Secretary agreed with the Administrative Law Judge's conclusion that the complaint should be dismissed. He agreed that two of the meetings were not formal discussions within the meaning of Section 10(e) of the Order, as they were called solely for an instructional purpose. In this connection, he found that questions from employees which arguably related to personnel policies and practices and matters affecting working conditions did not transform the meetings into formal discussions as the Respondent did not raise such issues, nor did it attempt to bypass the Complainants when questions were raised by unit employees, since the Respondent clearly indicated that it could not give any direct or conclusive response to those questions.

The Assistant Secretary also adopted the Administrative Law Judge's conclusion that the circumstances surrounding the third meeting likewise did not give rise to a violation of Section 19(a)(1) and (6) of the Order. Contrary to the Administrative Law Judge, however, the Assistant Secretary found that this meeting was a formal discussion within the meaning of Section 10(e). Thus, in this meeting, as distinguished from the others, the Respondent raised issues which clearly involved personnel policies and practices and matters affecting working conditions of unit employees. However, under the particular circumstances, the Assistant Secretary found that the Complainants were not deprived of their Section 10(e) right to be represented at a formal discussion, as they had actual notice of and were represented at the meeting by the union steward who customarily attended such formal discussions. As a result, the Complainants suffered no detriment from their lack of formal notice.

Under these circumstances, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
CHICAGO DISTRICT,
CHICAGO, ILLINOIS

Respondent

and

Case No. 50-15458(CA)

NATIONAL TREASURY EMPLOYEES
UNION (NTEU) and NTEU Chapter 10

Complainants

DECISION AND ORDER

On April 5, 1978, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainants filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Respondent filed a response to the Complainants' exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainants' exceptions and supporting brief and the Respondent's response thereto, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, as modified herein.

This case arose as a result of a complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 10 alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by conducting three meetings with unit employees, on January 13, 14 and 18, 1977,

without providing the Complainants with an opportunity to be represented, as required by Section 10(e) of the Order. 1/

The first of these meetings was called by the Respondent on January 13, 1977, to inform unit employees about revised disclosure provisions of the Tax Reform Act of 1977, and to discuss the prospective effect of these changes on employee liability for wrongful disclosure of taxpayer records. The meeting, held in the Audit Branch of the Respondent's Chicago District Office, consisted of a half-hour speech about the Tax Reform Act by Alternate Disclosure Officer Vince Killen, followed by an hour-long question-and-answer session. Among the issues raised by the unit employees were the scope of permissible disclosure, the possibility of legal representation by the Respondent in the event of taxpayer lawsuits for wrongful disclosure, the restrictions that conceivably could be placed on pre-litigation discovery in these lawsuits, the prospect of indemnification by the Respondent for fines assessed to employees for wrongful disclosure, and the kind of information that could be included in an employee's personnel folder as a result of wrongful disclosure. While Killen stated that he was unable to give conclusive answers to many of these questions, he indicated that employee records could reflect actions taken for wrongful disclosures. The record does not disclose whether the Complainants were given advance notice of this meeting or if any participant was an NTEU representative.

A second meeting on the disclosure policy revisions, substantially similar to the first, was held in the Respondent's Regional Training Facility in Skokie, Illinois, on January 18, 1977. This session, attended by approximately 150 bargaining unit employees, consisted of an hour-long presentation by District Disclosure Officer Fred Brody, followed by a period of approximately one-half hour during which Brody responded to written questions from the employees. As in the earlier meeting, employees were concerned about their rights and liabilities as prospective defendants in taxpayer suits for wrongful disclosure, and raised issues such as whether the Union would be permitted to represent them in these actions, whether Brody's assertion that the Respondent would represent them was contained in writing, whether they would be granted administrative leave to prepare defenses to suits, whether an employee would undergo a formal administrative investigation if accused of wrongful disclosures, and whether an

1/ Section 10(e) of the Order states, in pertinent part, that an exclusive representative "...shall be given the opportunity to be represented at formal discussions between management and employees... concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

employee counterclaim filed against a taxpayer-plaintiff would have any effect on a suit. Brody's answers were represented as the Respondent's interpretation of the various disclosure provisions and were similar to those given to employees at the Chicago District Office in the earlier presentation. It is conceded that the Complainants were not notified of this meeting, although the Complainant Chapter's Executive Vice President attended in his capacity as a Revenue Agent.

The meeting of January 14, 1977, dealt with the general topic of "fraud awareness" and stressed the need for employee awareness of possible fraudulent concealment of income by taxpayers. The two-hour session was conducted at the Respondent's Chicago District Office by three of its officials. Attendance by bargaining unit employees in the Special Enforcement Groups was compulsory. In underscoring their position that "fraud awareness" was the Chicago District's greatest priority, the Respondent's spokesman told employees that their promotion evaluations would contain comments regarding the fraud cases that they had worked on, and that promotion ranking panels had been instructed to award extra points to agents working on fraud cases. Thereafter, approximately one-half hour was devoted to questions and answers between unit employees and the Respondent's representatives. The Complainants were not notified in advance of this meeting, although one of the attending employees was a union steward who customarily represented the Complainants at formal discussions between management and employees.

I agree with the Administrative Law Judge's conclusion that the meetings of January 13 and January 18, 1977, dealing with the revised disclosure provisions, did not constitute "formal discussions" within the meaning of Section 10(e) of the Order, as the evidence establishes that these meetings were called solely for an instructional purpose. In this connection, I find that questions from the audience which arguably related to personnel policies and practices and matters affecting working conditions did not transform the meetings into formal discussions; the Respondent did not raise such issues, nor did it attempt to bypass the Complainants when questions were raised by unit employees, since the Respondent clearly indicated that it could not give any direct or conclusive response to the employees' questions. 2/

Further, I agree with the Administrative Law Judge's conclusion that the circumstances surrounding the "fraud awareness" meeting likewise did not give rise to a violation of Section 19(a)(1) and (6) of the Order, although I do so for different reasons. Contrary to the Administrative Law Judge, I find that this meeting was a formal discussion within the meaning of Section 10(e) because in this meeting, as distinguished from the other meetings discussed above, the Respondent

2/ See Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 957 (1977).

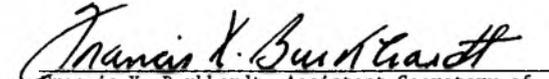
raised the issues of personnel file entries and promotion evaluations, items which are clearly personnel policies and practices and matters affecting working conditions of unit employees. However, under the particular circumstances herein, I find that the Complainants were not deprived of their Section 10(e) right to be represented at a formal discussion, as they had actual notice of and were represented at the meeting. Thus, the evidence establishes that the union steward who customarily attended such formal discussions was, in fact, present at the meeting and had an opportunity to represent the Complainants during the discussion which ensued. 3/ As a result, I find that the Complainants suffered no detriment from the lack of formal notice.

Under these circumstances, I find that the Respondent's conduct herein was not violative of the Order. Accordingly, I shall order that the instant complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-15458(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 8, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

3/ See Rocky Mountain Arsenal, Denver, Colorado, A/SLMR No. 933 (1977). Compare Department of the Navy, Puget Sound Naval Shipyard, A/SLMR No. 1003 (1978), which was considered factually distinguishable since in that case the union representative who normally attended formal discussions between management and unit employees was not present at the meeting involved.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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In the Matter of .

DEPARTMENT OF THE TREASURY, INTERNAL .
REVENUE SERVICE, CHICAGO DISTRICT, .
CHICAGO, ILLINOIS .
Respondent .

and .

NATIONAL TREASURY EMPLOYEES UNION .
(NTEU) AND NTEU CHAPTER 10 .
Complainant .

.....

Case No. 50-15458 (CA)

THOMAS BORDERS, ESQ.
Regional Counsel, I.R.S.
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Chicago, Illinois 60604
For the Respondent

WILLIAM E. PERSINA, ESQ.
Assistant Counsel, NTEU,
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Suite 1101
Washington, D.C. 20006
For the Complainant

Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding arises under the provisions of Executive Order 11491, as amended (hereinafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter referred to as the Assistant Secretary), a Notice of Hearing on Complaint issued on July 21, 1977 with reference to alleged violations of Sections 19(a)(1) and (6) of the Order.

The Complaint, filed on May 23, 1977 by the National Treasury Employees Union (NTEU) and NTEU Chapter 10 (hereinafter referred to as the Union or Complainant) alleged that the Department of the Treasury, Internal Revenue Service, Chicago District, Chicago, Illinois (hereinafter referred to as the Activity or Respondent) violated the Order by its conducting three meetings with unit employees on January 13, 14 and 18, 1977 without providing the Union with an opportunity to attend as required by Section 10(e) of the Order. 1/

At the hearing held on September 7, 1977 the parties were represented by counsel and were afforded full opportunity to adduce evidence and call, examine and cross-examine witnesses and argue orally. Briefs were filed by both parties.

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

Findings of Fact

At all times material herein the Union has been the exclusive collective bargaining representative of all professional and non-professional employees located in the Activity's Chicago District with the exception of various employees excluded under the Order.

On January 13, 1977 Alternate Disclosure Officer Vince Killen, on behalf of the Respondent, conducted a meeting with bargaining unit employees in Audit Branch 4 regarding the disclosure provisions of the Tax Reform Act of 1976 which became effective January 1, 1977. The new Act substantially revised the regulations dealing with employee disclosure of tax information. The meeting consisted of an approximately thirty-minute speech by Killen on the general subject of the revisions as interpreted by the Agency, including the ramifications of negligent disclosures by IRS employees. Approximately one hour was devoted to a question and answer session where the subjects discussed were

1/ Section 10(e) provides, in relevant part, that an exclusive collective bargaining representative "...shall be given the opportunity to be represented at formal discussions between management and employees...concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

permissible and negligent disclosure; legal representation of IRS employees by the Activity in the event of a suit by a taxpayer for violation of the disclosure laws; the Activity indemnifying employees for fines and penalties resulting from such suits; the role of union attorneys and private attorneys in such actions; and what information could be included in an employee's personnel file as a result of disclosure. Killen indicated that his statements represented the Activity's position on the matters which were discussed and if employees followed his instructions, they would not be penalized by the Activity.

No evidence was offered as to whether or not the Union was given advance notification of this meeting or whether any participant was a Union representative.

A similar meeting was conducted at another location on January 18, 1977, with District Disclosure Officer Fred Brody representing management. Approximately 150 persons from the bargaining unit were in attendance at the meeting which was conducted via closed circuit television. The session consisted of an approximately one-hour presentation by Brody on the subject of disclosure rule changes in the Internal Revenue Code followed by an approximately one-half hour period during which time Brody responded to written question submitted by the audience. Among the topics discussed during this latter period was whether the Union would be permitted to represent employees accused of unlawful disclosure; whether Brody's assertion that the Internal Revenue Service would represent an employee accused of violating the disclosure provisions appeared in any written document; whether employees would be permitted to use administrative time to defend themselves if accused of disclosure violations; whether employees would be investigated by the Inspection division for alleged violations of the disclosure provision; and what the ramifications would be where an employee filed a counter-claim against a taxpayer who had accused him of unauthorized disclosure. Other questions submitted by the employees primarily related to and expanded on these five areas of interest.

The Activity did not provide the Union with notification of the meeting. However, Michael Peacher, the Union's Executive Vice-President and a Revenue Agent, was in attendance having been instructed by his supervisor to attend the meeting as a Revenue Agent along with other Agents.

The third meeting involved in this case occurred on January 14, 1977. This meeting was conducted by three managerial employees. Attendance at the meeting of bargaining unit employees of the Special Enforcement Groups was compulsory. The general subject of the meeting was "fraud awareness" where the importance of employee awareness of possible fraudulent concealment of unreported income by taxpayers was stressed. Statistics on the numbers of fraud cases found in the Chicago District were compared with other Districts and it was indicated that fraud awareness was the greatest priority in the Chicago District. Employees were informed that their promotion evaluations contain comments as to fraud cases which they had worked on (which is reflected in employee evaluation forms), and in addition, the employees were told that when considering employees for promotion, the ranking panel was instructed to award extra points to those agents who had worked on fraud cases. Also, in response to a question concerning a "rumor" of employee rotation in the Audit Division, management would neither confirm nor deny any specific plans for rotation but did advise employees that rotation was a possibility. Approximately one quarter of this two hour meeting was devoted to questions and answers between bargaining unit employees and management representatives.

The Union was not notified of the meeting. In any event, one employee who attended the meeting was the Union Steward for the groups.

Conclusions

The Union contends that the three meetings described above were formal discussions within the meaning of Section 10(e) of the Order and as such, the Activity violated the Order by conducting the discussions without providing the Union with formal notification of the meetings. 2/

On a number of occasions the Federal Labor Relations Council (the Council) has addressed the question of the applicability of Section 10(e) when considering situations where an employer communicates with unit employees to the exclusion of the exclusive representative. While deciding

2/ The Union is not alleging that matters discussed in the meetings constituted changes in personnel policies, practices or other matters affecting general working conditions of unit employees.

a case involving various management information-gathering meetings conducted at a facility 3/, the Council held that a information-gathering meeting conducted to evaluate the effectiveness of an agencywide program did not violate the Order and went on to state:

"We must emphasize that our views, as expressed above, pertain only to information-gathering devices such as the meetings involved in this case. That is, they apply only in circumstances such as those mentioned above where management does not, in the course of information gathering: seek to make commitments or counterproposals regarding employee opinions or complaints solicited by means of such devices; indicate that the employees' comments on such matters might have an effect on the employees' status; deal with specific employee grievances or other matters cognizable under an existing agreement; or gather information regarding employee sentiments for the purpose of using it subsequently to persuade the union to abandon a position taken during negotiations regarding the personnel policies or practices concerned."

In a subsequent case dealing with an activity posting the contents of a letter it sent to a union president reflecting events which occurred at a meeting between the parties, the Council again spoke on the matter of permissible and prohibited communications and stated: 4/

"While the obligation to deal only with the exclusive representative over matters relating to the collective bargaining relationship is clear, this does not mean that all communication with unit employees over such matters is prohibited. Indeed, under certain circumstances agency management is obligated to engage in communications with bargaining unit employees regarding the collective bargaining relationship. For example,

3/ National Aeronautics and Space Administration, (NASA), Washington, D.C. and Lyndon B. Johnson Space Center (NASA), Houston, Texas, FLRC No. 74A-95 (September 26, 1975), Report No. 84.

4/ Department of the Navy, Naval Air Station, Fallon, Nevada, FLRC No. 74A-80 (October 24, 1975). Report No. 87.

section 1(a) of the Order requires that "The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section ..." [Emphasis supplied.] In determining whether a communication is violative of the Order, it must be judged independently and a determination made as to whether that communication constitutes, for example, an attempt by agency management to deal or negotiate directly with unit employees or to threaten or promise benefits to employees. In reaching this determination, both the content of the communication and the circumstances surrounding it must be considered. More specifically, all communications between agency management and unit employees over matters relating to the collective bargaining relationship are not violative. Rather communications which, for example, amount to an attempt to bypass the exclusive representative and bargain directly with employees, or which urge employees to put pressure on the representative to take a certain course of action, or which threaten or promise benefits to employees are violative of the Order. To the extent that communication is permissible, it is immaterial whether such communication was previously agreed upon by the exclusive representative and the agency or activity concerning the latter's right to engage in such communication."

I find that the three meetings involved in this proceeding were essentially instructional in nature. Thus, the Activity utilized the meetings to communicate to unit employees its interpretation and policy with regard to the disclosure provisions of the new Tax Reform Act and convey to employees the importance of fraud awareness in carrying out their duties. The meetings consisted of setting forth the Activity's position on these matters and respond to questions in order to assure that its policy was clear in the minds of the employees. The discussions were not an attempt to bypass the Union and negotiate or deal with unit employees in order to obtain their agreement to change working conditions. The Activity did not solicit or entertain counterproposals or recommendations to change its policy nor did they enter into discussions with unit employees with a view to changing

its position on these matters. 5/ Therefore, I find that the give and take which is normally associated with bargaining was not a part of the discussions involved herein.

Accordingly, in the circumstances of this case I conclude that the discussions with unit employees which occurred on January 13, 14 and 18, 1977 did not constitute "formal discussions" within the meaning of Section 10(e) of the Order. 6/

Assuming these meetings were found to be Section 10(e) discussions, I nevertheless conclude that, with regard to the meetings of January 14 and 18, 1977, notification of such meetings to Union representatives as employees and not in their capacity as Union officials satisfied any notice requirement under the Order. Thus, it has been held that formal notification to a union is not necessary where a union has actual knowledge of a matter and therefore, is not precluded from carrying out its representational responsibilities. 7/ Since a Union representative was invited to and indeed attended each of these meetings, I conclude that in the circumstances herein, the notice requirements under the Order have been satisfied.

As to the meeting of January 13, 1977, Complainant has offered no evidence to establish that the Activity failed to notify or invite the Union to that session. In these circumstances, I conclude that Complainant has failed to carry its burden of proof to support the allegation that the Union was not afforded an opportunity to attend this meeting.

5/ See Internal Revenue Service, Ogden Service Center, A/SLMR No. 944.

6/ Cf. U.S. Customs Service, Region VIII, Treasury Department, San Francisco Department, A/SLMR No. 978 and Department Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 957.

7/ Cf. Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, 6 A/SLMR 238, A/SLMR No. 656 and United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, 3 A/SLMR 376, A/SLMR No. 289.

Recommendation

On the basis of the entire foregoing I hereby recommend that the complaint be dismissed in its entirety.


SALVATORE J. ARRIGO
Administrative Law Judge

Dated: 5 APR 1978
Washington, D.C.

SJA:mjm

September 12, 1978

A/SLMR No. 1121

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE NAVY,
NAVAL TRAINING CENTER,
SAN DIEGO, CALIFORNIA
A/SLMR No. 1121

This case involved an unfair labor practice complaint filed by Lawrence E. Isom (Complainant) alleging that the Respondent had violated Section 19(a)(1) and (3) of the Order by allowing David Canfield, who it is contended is a supervisor, to remain as president of International Association of Firefighters, Local F-33, AFL-CIO (Party-in-Interest), the exclusive representative of the unit of nonsupervisory employees at the Respondent in which Canfield is included, thereby placing Canfield in a conflict of interest situation. The Respondent and the Party-in-Interest, on the other hand, contended that Canfield is not a supervisor within the meaning of Section 2(c) of the Order.

The Administrative Law Judge found that there was insufficient evidence to establish that Canfield is, in fact, a supervisor and he recommended that the complaint be dismissed in its entirety. The Assistant Secretary adopted the findings, conclusion and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL TRAINING CENTER,
SAN DIEGO, CALIFORNIA

Respondent

and

Case No. 72-6949(CA)

LAWRENCE E. ISOM

Complainant

and

INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS, LOCAL F-33, AFL-CIO

Party-in-Interest

DECISION AND ORDER

On June 27, 1978, Administrative Law Judge Henry B. Lasky issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Respondent filed an answering brief to the Complainant's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and supporting brief and the Respondent's answering brief, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions 2/ and recommendations.

1/ On page 3 of his Recommended Decision and Order the Administrative Law Judge inadvertently quoted Section 6 "Informal Step," of Article XVII of the negotiated agreement between the Respondent and the Party-in-Interest, as containing the word "formally" in the first sentence instead of the word "informally." This inadvertent error is hereby corrected.

2/ In reaching my decision herein, I find it unnecessary to pass upon or adopt the Administrative Law Judge's conclusion on page 3 of his Recommended Decision and Order that the "...Complainant defies credulity with his denial that this proceeding was brought because of his inability to unseat David Canfield as president of the Union [Party-in-Interest] in an election."

filing of a complaint on August 2, 1977, by Lawrence E. Isom, individually (hereinafter called the Complainant) which alleged that the Naval Training Center, San Diego, California, of the Department of the Navy (hereinafter called the Respondent) violated sections 19(a)(1) and (3) of the Order when Respondent's alleged agent and representative David Canfield, shift supervisor, GS-7, was elected president of Local F-33 of the International Association of Firefighters (hereinafter called the Union) on or about April 14, 1977. Respondent denied that they violated the Order, and affirmatively alleged that Complainant lacked standing to bring this proceeding as he is not an employee of the Respondent.

At the hearing both parties were represented and the Union appeared and was represented as a party-in-interest. All parties were afforded full opportunity to be heard, to present evidence, and to examine and cross-examine the witnesses. Post-hearing briefs were allowed to be filed with a mail posting of no later than June 12, 1978, and the Complainant and Union filed briefs with the undersigned within the time required, which have been duly considered.

Upon the entire record herein, from my observation of the witnesses, and their demeanor, and from all the evidence presented at the hearing, I make the following findings, conclusions and recommendations.

Findings of Fact

The individual Complainant is a GS-5 firefighter employed by the North Island Naval Air Station for approximately two years. He is not now nor has he ever been an employee of the Naval Training Center in San Diego, California. It is contended that David Canfield, an employee of the Respondent, is a supervisor within the meaning of section 2(c) of the Order and Respondents' recognition of David Canfield as president of Local F-33 of the Union constitutes a violation of sections 19(a)(1) and (3) of the Order.

Since Complainant was never employed by Respondent, his testimony regarding David Canfield's duties as an alleged supervisor and the procedures and practices of the Naval Training Center are based entirely on alleged conversations of Complainant with friends and with the fire chief of Respondent. Complainant's allegations are substantially based on his experience at the North Island Naval Air Station which employs 105 fire fighters and has a chief, assistant chief (GS-10), crash captain (GS-8),

and a supervisor (GS-6). The Respondent, in contrast, employs a total of 15, including a chief, two captains (GS-7), driver (GS-5) and fire fighters (GS-4).

David Canfield is one of the two captains (GS-7), at the Respondents' facility and is president of Local F-33 of the Union. The Respondents, the Union and Canfield contend that Canfield is not a "supervisor" under section 2(c) of the Order.

At all times material herein, Local F-33 of the International Association of Fire Fighters was the collective bargaining representative of all employees in the unit except, among others, "supervisors." Local F-33 of the International Association of Fire Fighters and the Naval Administrative Command were parties to the collective bargaining agreement.

Complainant ran for election as president of Local F-33 and was defeated for such office by David Canfield prior to his filing the complaint herein for unfair labor practices. Complainant acknowledges that although he never saw David Canfield in a conflict of interest situation, he wants him removed as president of the Union. However, Complainant defies credulity with his denial that this proceeding was brought because of his inability to unseat David Canfield as president of the Union in an election.

Complainant testified that David Canfield has the authority to transfer, recall, assign, direct, and adjust grievances and as a consequence is a "supervisor" as defined by the Order. A position description and promotional announcement were introduced in support of such contentions. A copy of the agreement between the Union and the Respondent containing Article XVII, section 6 was introduced which provides in part:

"An employee shall first take up his grievance formally with his immediate supervisor. The immediate supervisor will meet with the employee in an attempt to resolve the grievance. The employee may, upon request be represented by one union representative who shall be the appropriate steward. The supervisor must give his answer within five (5) working days. The union and the employer anticipate that most employee grievances will be settled at this informal level."

Complainant asserts that David Canfield is the immediate supervisor referred to in Article XVII,

section 6 and therefore has authority to adjust grievances. It should be noted that the Complainant admits to being unaware of whether David Canfield exercises independent judgment in performing any of the alleged supervisory functions.

David Canfield testified and denied having any of the indicia of "supervisor" as defined by the Order with the exception of routine recall, direction or assignment pursuant to prescribed rules and regulations. He maintains that the performance of these functions do not involve the exercise of independent judgment. For example, the prescribed rules require four fire fighters on a truck, and consequently if an employee calls in sick, Captain Canfield is required to recall a man to work according to the rules in order to satisfy the requirements of the four fire fighters on the truck. There is no independent judgment involved. Canfield denied, emphatically, adjusting grievances pursuant to the agreement between the Union and the Activity.

Captain Canfield functions as a "team leader" rather than a "supervisor". He performs the same functions as the fire fighters, shares quarters with the fire fighters, does not have a separate office and his position is essentially due to his 22 years of experience as a fire fighter and his AS degree in fire fighting. He is comparable to a lead man in private industry. He does not participate in management of the department, does not meet with the Security Department on matters relating to either management of the fire fighters or on matters regarding personnel.

Common petty annoyances or "gripes" arising among the fire fighters are admittedly resolved by Captain Canfield but he does not adjust grievances within the meaning of the aforesaid quoted agreement. The adjustment of grievances is the function of the fire chief.

At times when the chief is not present Captain Canfield carries out the routine functions, pursuant to prescribed rules and regulations of the fire chief and does not exercise any independent judgment.

The testimony of David Canfield was substantially corroborated by the fire chief who considers Captain Canfield as a "work leader" within the chief's style of management of the department. The functions performed by Captain Canfield with reference to manning, assignment, discipline and direction are performed pursuant to preset instructions of the chief and do not involve independent

judgment. The routinized instructions referred to are communicated by the chief pursuant to his guidelines, rules, regulations, or standard manuals. The chief acknowledged that Captain Canfield will perform the functions of the chief at a fire scene until the chief arrives. There is a conflict of testimony as to whether Captain Canfield adjusts grievances or has authority to adjust grievances pursuant to Article XVII section 6 of the agreement.

Representatives of the Activity and the Union testified that Captain Canfield does not perform the duties of a "supervisor" within the meaning of section 2(c) of the Order.

Discussion and Conclusions

The Complainant herein has standing to bring this proceeding pursuant to 29 C.F.R. § 203.1. The aforesaid regulation provides that a complaint that any activity, agency, or labor organization has engaged in any act prohibited under section 19 of the Order or has failed to take any action required by the Order, may be filed by an employee, an activity, agency, or a labor organization. The fact Complainant herein is not and never has been an employee of the Respondent is not fatal. Complainant is a federal employee and as a member of Local F-33 there is sufficient nexus between the alleged wrong and the Complainant. It has been held that the regulations did not contemplate proceedings such as this being instituted by someone with at most an academic interest, or perhaps even a mischievous interest, but there shall be some nexus between the alleged wrong and the Complainant. Internal Revenue Service, Chicago District, A/SLMR No. 279 (1973). As a federal employee and a member of the Union local, Complainant has sufficient "standing". To hold otherwise would be a denial of a union member's right to a hearing on the allegation that his union is controlled by management.

The thrust of the complaint here is that if David Canfield is in fact a "supervisor" within the meaning of the Order and is serving as president of the union local, it constitutes a violation of section 19(a)(1) which holds that agency management shall not interfere with, restrain, or coerce an employee in the exercise of the rights assured by the Order and section 19(a)(3) which provides that agency management shall not control a labor organization.

Section 2(c) defines "supervisor" as follows:

"'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or adjust their grievances, or effectively to recommend such action if in connection with the foregoing, the exercise of authority is not merely a routine or clerical nature but requires the use of independent judgment."

The purposes and intent of the Order as amended, are clearly stated in the Report and Recommendations of the Federal Labor Relations Council on the amendment of Executive Order 11491, as amended, January 1975.

"The Counsel agrees with the view expressed in the review that only genuine supervisory positions should be excluded from bargaining units. The Counsel wishes to note that the definition in the Order was designed to do this and contains a number of qualifications to this end. For example - 'in the interest of an agency', 'responsibly to direct [employees]', 'effectively to recommend', and 'exercise of authority ... not of a merely routine or clerical nature, but [requiring] the use of independent judgment' - are limitations which were designed to assure that persons determined to be supervisors would possess actual authority, as distinct from work leaders, and would be found to be in bonafide conflict of interest situations if not excluded from bargaining units. The Counsel believes that the continued careful application by the Assistant Secretary of these qualifications and the making of supervisory determinations will aid in identifying genuine supervisory positions."

It should be noted that originally the Order contained, as an indicia of supervisory status, the evaluation of the performance of other employees. Because of that included criterion persons who performed an evaluation function which had only a minimum effect on the

employees being evaluated and had no other supervisory authority could be determined to be supervisors within the meaning of the Order. The Council did not believe that such persons should be deemed supervisors and as a consequence the criterion of the evaluating performance was deleted from the definition of "supervisor".

In addition, the Federal Labor Relations Council considering this amendment, acknowledged that it considered proposals that the definition "supervisor" in the Order be made uniform with the definition of the term used for other purposes such as position classifications. However, the Council rejected this proposal and concluded otherwise by stating that any advantage to be gained through uniformity were outweighed by the importance of having expert determinations made for the unique and special purposes of the Labor Relations Program. It is therefore clear, that the definition of the word "supervisor" as used in the Order is not synonymous or uniform with the term used for other purposes such as in position descriptions.

In view of the purposes and intent of the Federal Labor Relations Council, the evidence presented does not establish that Captain Canfield is a "supervisor" within the meaning of section 2(c) of the Order, because the record as a whole reflects that the functions enumerated in section 2(c) are either not performed, or if performed, are in the nature of a more experienced employee assisting less experienced employees, and the functions so performed are routine in nature and do not require the exercise of independent judgment. Arizona National Guard, Air National Guard, Sky Harbor Airport, FLRC No. 74A-78 (1975).

The leading cases on the subject indicate that the functions enumerated by section 2(c) of the Order are in the disjunctive and therefore the performance of any function in the manner provided will be sufficient for the determination of supervisory status. See U. S. Naval Weapons Center, China Lake, California, A/SLMR No. 128, FLRC No. 72A-11 (1973); Mare Island Naval Shipyard, Vallejo, California, A/SLMR No. 129, FLRC No. 72A-12 (1973). There is the qualification, however, that the supervisory functions must be performed in a manner requiring independent judgment. Subsequent to these decisions, the January 1975 Report and Recommendations of the Council clarified the intent, purpose, and meaning of section 2(c) of the Order. It is a well established rule of statutory construction that where a literal reading of words produces a result plainly at variance with the

purposes sought to be accomplished by the statute, such purposes rather than the literal words are controlling. Department of the Air Force, McConnell Air Force Base, Kansas, A/SLMR No. 134, FLRC No. 72A-15 (1973).

In the case at bar, Captain Canfield did not have authority to hire, transfer, suspend, lay off, promote, discharge, or reward or discipline. Any exercise of the authority to recall, assign, direct or adjust grievances has been done on a routine basis according to prescribed rules and regulations and does not require the exercise of independent judgment. Federal Aviation Administration, National Capital Airports, A/SLMR No. 405 (1974).

The evidence establishes that Captain Canfield possesses more seniority and job experience than the other fire fighters but he performs essentially the same tasks as other fire fighters even though due to his experience, he is called upon to assist and direct the other fire fighters in the performance of their duties. Such is insufficient by itself to render him a supervisor within the meaning of section 2(c) of the Order. U. S. Army Waterways, Experiment Station, Vicksburg, Mississippi, A/SLMR No. 497 (1975); Federal Deposit Insurance Corporation, A/SLMR No. 459, FLRC No. 75A-39 (1975). The instances of Captain Canfield performing the function of the fire chief until the actual fire chief arrives, suggests that such function is based on Captain Canfield's experience, is routine, and is performed in his capacity as a "work leader" as contemplated by the Council.

Although the evidence is somewhat murky as to whether Captain Canfield adjusts grievances within section 2(c) of the Order and pursuant to Article XVII section 6 of the agreement, I do not find such evidence is a sufficient basis for supervisory determination. Captain Canfield acknowledges that he may adjust "gripes" which he defines as petty annoyances between the fire fighters while referring all grievances to the fire chief. Grievances are understood to be matters related to workers' rights and working conditions. The evidence in this regard is therefore insufficient to establish supervisory status as the processing of such "gripes" are only of petty routine matters and the adjustment of grievances as contemplated by section 2(c) of the Order are handled by the fire chief. See Mare Island Naval Shipyard, Vallejo, California, FLRC No. 72A-12 (1973). Any departure from the above routine procedures are isolated situations of infrequent occurrence and the Council has stated that the mere intermittent and infrequent possession or assignment of supervisory functions is not a sufficient basis for a

supervisory determination. (See Report and Recommendations of Federal Labor Relations Council, January 1975).

Complainant, in his brief, attaches great importance to N.L.R.B. cases, but overlooks the qualifications of the term "supervisor" in the private sector. The section defining "supervisor" in the Labor-Management Relations Act was intended to apply to those having true managerial power with genuine management prerogatives as distinguished from straw bosses, lead man, and other minor supervisory employees. Ross Porta-Plant Inc. v. N.L.R.B., C.A. Texas 1968, 404 F. 2d 1180; U. S. Gypsum Co (1957) 118 N.L.R.B. 20. The Federal Labor Relations Council in its January 1975 report, as aforesaid, expressed the same intention for the public sector when it indicated "only genuine supervisory positions should be excluded from bargaining units."

In order to establish that a particular employee is a "supervisor", there must be evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority and internal memoranda and notices which constitute nothing more than naked designations of "paper power" are not sufficient to establish supervisory status. Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. N.L.R.B., 1971, 445 F.2d 237 certiorari denied 92 S. Ct. 713.

Similarly, the position description, the promotion notice and the agreement between the Union and the Activity, introduced into evidence by the Complainant are nothing more than theoretical paper power attributed to Captain Canfield and are insufficient to establish supervisory status within the meaning of the Order.

In the private sector, in the field of labor relations, a supervisor must be part of management, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO v. N.L.R.B. 1961, 298 F.2d 297, certiorari denied 82 S. Ct. 875. The same is true in the public sector, and it should be noted that Captain Canfield does not participate in management of the department in which he is a part, and does not meet with the security department regarding matters relating to management or with reference to personal matters. The evidence does not establish that he acts "in the interest of an agency" as required by section 2(c) of the Order.

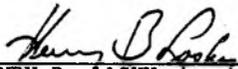
Based on the foregoing there is insufficient evidence in the record under 29 C.F.R. § 203.15 to establish

that Captain Canfield is a supervisor, possessing actual authority as distinct from a work leader, who is in a bonafide conflict of interest situation if he were not excluded from the bargaining unit.

The record does not contain evidence that Respondent violated section 19(a)(1) and (3) of the Order.

Recommendation

I recommend that the complaint herein be dismissed in its entirety.


HENRY B. LASKY
Administrative Law Judge

Date: June 27, 1978
San Francisco, California

HBL:tl

September 12, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE AIR FORCE,
McCLELLAN AIR FORCE BASE
A/SLMR No. 1122

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1857, AFL-CIO (Complainant) alleging, essentially, that the Respondent violated Section 19(a)(1) and (3) of the Order when Lloyd Hoskins, an "alternate supervisor," collected signatures on a petition directed to the Complainant requesting removal of the Complainant's steward. The complaint further alleged a violation of Section 19(a)(1) of the Order by the Respondent when Hoskins urged members to resign, and non-members to refrain from joining, the Complainant.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In reaching this result, he noted that the instant dispute centers on whether Hoskins was a supervisor within the meaning of Section 2(c) of the Order at the time the aforementioned petition was circulated. He found that Hoskins was not, in fact, a supervisor within the meaning of Section 2(c) of the Order at the time of his circulating the petition directed against the Complainant's steward. Furthermore, he found no evidence to support the Complainant's contention that the Respondent permitted Hoskins to circulate the petition.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
McCLELLAN AIR FORCE BASE

Respondent

and

Case No. 70-6098(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1857, AFL-CIO

Complainant

DECISION AND ORDER

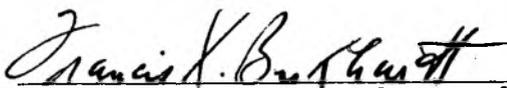
On July 31, 1978, Administrative Law Judge Henry B. Lasky issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-6098(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 12, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036
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San Francisco, California 94105

(415) 556-0555

_____)	
In the Matter of)	
DEPARTMENT OF THE AIR FORCE)	
McCLELLAN AIR FORCE BASE)	
Respondent)	
and)	
AMERICAN FEDERATION OF GOVERNMENT)	CASE NO. 70-6098(CA)
EMPLOYEES, LOCAL 1857, AFL-CIO)	
Complainant)	
_____)	

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McClellan Air Force
Base, California 95652
For the Respondent

J. M. Hopperstad, Esquire
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Citrus Heights, California 95610
For the Complainant

Before: HENRY B. LASKY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Pursuant to a Notice of Hearing on the complaint issued on May 23, 1978, by the Regional Administrator for Labor-Management Services Administration for the U. S. Department of Labor, San Francisco Region, a hearing was held on June 29, 1978, at McClellan Air Force Base, California.

This proceeding was initiated under Executive Order 11491, as amended (hereinafter called the Order) by the

filing of a complaint on February 1, 1978, by American Federation of Government Employees, Local 1857 (hereinafter called the Complainant) which alleged that the Department of the Air Force, McClellan Air Force Base, California (hereinafter called the Respondent) violated section 19(a)(1) and (3) of the Order when Respondent's employee Lloyd Hoskins, alternate supervisor, collected signatures on a petition directed to American Federation of Government Employees requesting removal of the AFGE Shop Steward. It further alleged violation of section 19(a)(1) of the Order, by Respondent, when Lloyd Hoskins circulated a petition which assertedly urged members to resign from and non-members to refrain from joining American Federation of Government Employees, Local 1857. Respondent denied that they violated the Order.

The issues presented for determination at the hearing are: (1) whether Lloyd Hoskins, who was acting as alternate supervisor during the period that he collected signatures on a petition directed to AFGE requesting removal of the AFGE Shop Steward, was a supervisor within the criteria established in Executive Order 11491, as amended, and whether his actions were in violation of section 19(a)(1) and (3) of the Order; and, (2) whether Lloyd Hoskins' conduct in circulating a petition which assertedly urged members to resign from and non-members to refrain from joining AFGE Local 1857 was in violation of section 19(a)(1) of the Order.

At the hearing both parties were represented and were afforded full opportunity to be heard, to present evidence, and to examine and cross-examine the witnesses. Post-hearing briefs were allowed to be filed with the Office of Administrative Law Judges in San Francisco no later than July 28, 1978, and the Complainant and Respondent filed such briefs with the undersigned within the time required, which have been duly considered.

Upon the entire record herein, from my observation of the witnesses, and their demeanor, and from all the evidence presented at the hearing, I make the following findings, conclusions, and recommendations.

Findings of Fact

Lloyd P. Hoskins is employed as a painter, WG-9, in the aircraft paint shop at McClellan Air Force Base, California. There are approximately 20 employees in the paint shop who are all at the level of WG-9 with the exception of two employees in the category of WG-7. Karen Lansbury is also employed as a painter, WG-9, at the

same shop and Ms. Lansbury was the Union Steward on or about November 30, 1977.

At all times material herein, Local 1857 of the American Federation of Government Employees was the exclusive bargaining representative of all employees in the unit.

Wilson L. Crum is the supervisor, bearing the title of Aircraft Painter Foreman, of the paint shop employing Mr. Hoskins and Ms. Lansbury. Foreman Crum testified that on November 30, 1977 and December 1, 1977, Mr. Hoskins was his designated alternate supervisor with the function of keeping the workflow going and he considered Mr. Hoskins more of a work leader rather than a true supervisor. The functioning of Mr. Hoskins as alternate supervisor occurred during absences of Mr. Crum and the evidence revealed that on November 30, 1977, Mr. Crum was in fact absent for the purposes of attending a school but he could not recall whether he was present or absent on December 1, 1977. Hoskins ceased being alternate supervisor approximately two and one-half months prior to the date of the hearing on June 29, 1978. According to Mr. Crum, Hoskins, in order to keep the workflow going, has the authority to assign and direct unit employees to particular jobs or to set aside regular work in order to accomplish rush jobs; however, such authority to assign and direct are routine in nature and the frequency of rush jobs in the paint shop are such as to be routine.

There is no apparent dispute that Mr. Crum is the supervisor within the meaning of section 2(c) of the Order. However, the evidence is clear that Mr. Hoskins, as the designated alternate supervisor in the absence of Mr. Crum, did not have the authority nor could he effectively recommend in the interest of the agency, to hire, transfer, suspend, layoff, recall, promote, discharge, reward, or discipline other employees, or adjust their grievances. Mr. Hoskins' authority to assign or direct other employees to painting assignments was of a routine nature not requiring the use of independent judgment.

Admittedly, Mr. Hoskins on November 30, 1977 and December 1, 1977, collected signatures on a petition dated November 30, 1977, addressed to the president of the Union requesting the removal of the Union Steward, Ms. Karen Lansbury. The petition signed by 33 persons included the signature of Lloyd P. Hoskins and expressed the intention that the signers of the petition who were Union members intended to resign from the Union if Ms. Karen Lansbury was not removed as the Union Steward, and further expressed the intention that those signing

who were non-Union members would not join the Union so long as Ms. Karen Lansbury remained the Union Steward.

Mr. Hoskins, at the time he circulated the petition, took one hour annual leave and also admitted circulating the document while on lunch time or break time. His explanation for such activity was that he and other employees in the paint shop were upset with Ms. Lansbury as a fellow employee, and when he passed the petition he acted as a fellow employee and not in the interest of management. It should be noted that the petition of November 30, 1977, addressed to the Union set forth a number of reasons for the petition including the allegation that Ms. Lansbury keeps the paint shop in a constant state of turmoil, harasses other employees, is away from her job an excessive amount of time in the name of Union business and as a result of her activities the morale of the paint shop is quite low.

With reference to his status as alternate supervisor, Mr. Hoskins testified that other employees were aware and he advised them that he was alternate supervisor only and not a regular supervisor. He acknowledged he had authority to sign referral slips for employees who desired to go to the Union or dispensary but that such procedure was routine in nature and there was never an instance of anyone ever being denied a requested opportunity to go to the Union or to the dispensary. He referred to his position as "alternate supervisor" as one that had no authority as a supervisor and that he requested people to do work, in the absence of Mr. Crum, and that if any requests with reference to his assignments or directions were refused he would take the matter up with the regular supervisor. Apparently the dispute between Ms. Lansbury and Mr. Hoskins was not an isolated incident for there was a prior incident in which he had asked Ms. Lansbury to perform a certain job and she refused because he did not have the authority to make such direction or assignment. Although the evidence is somewhat murky in this regard, it appears that Ms. Lansbury, with the support of the Union, was sustained with reference to this prior incident.

Ms. Lansbury testified that Hoskins has all of the indicia of a supervisor enumerated in section 2(c) of the Order and the basis of her testimony was since Foreman Crum has such authority, Hoskins as his alternate had derivative authority as supervisor within the meaning of the Order. There is no evidence to support this conclusion. Ms. Lansbury acknowledged that she was never aware of Mr. Hoskins performing any of the indicia of authority

under 2(c) of the Order with the exception of direction and assignment of jobs to other employees. Significantly, unlike Foreman Crum, Mr. Hoskins worked and performed the same job as all other employees in the paint shop even during the absence of Mr. Crum.

Discussion and Conclusions

The thrust of the complaint here is that if Lloyd Hoskins was in fact a "supervisor" within the meaning of the Order, then his collecting signatures on the petition directed to AGFE requesting removal of the AFGE Shop Steward constituted a violation of section 19(a)(1) and (3) of the Order by Respondent and that such circulation of the petition urging members to resign from and non-members to refrain from joining the Union was in violation of section 19(a)(1) of the Order by Respondent. Complainant further argues that even if Mr. Hoskins was not a supervisor, Respondent was nevertheless in violation of the aforesaid sections of the Order for the acts admittedly committed by Mr. Hoskins because the Respondent permitted his circulating the petition.

Complainant is seeking as a remedy, for the alleged unfair labor practices, the removal of Mr. Hoskins from his place of employment and that he be relocated by Respondent to someplace where he would be without authority to supervise other employees. The remedy sought herein strongly suggests that this proceeding is a manifestation of a continuing animosity between the Union Steward and Mr. Hoskins rather than an effort to stop an unfair labor practice of Respondent.

Significantly, in a letter dated April 10, 1978, the Complainant herein acknowledged that an "alternate supervisor," is an employee, not a "supervisor," who is selected for the purpose of insuring continuity of function. (Assistant Secretary Exhibit 1E, attachment 1.) Such admission, in conjunction with the requested remedy, tarnishes the motives of Complainant in this proceeding.

The contention of Complainant that Respondent was in violation of the Order because of its alleged permitting of Mr. Hoskins to circulate the petition in question is without merit as there is no evidence in support of such allegation.

Certainly if Mr. Hoskins was in fact a "supervisor" within the meaning of the Order then his activities in circulating the petition requesting the removal of the Shop Steward and urging members to resign from and non-members to refrain from joining Local 1857 constituted a

violation of section 19(a)(1) and (3) of the Order. The contents of the petition were such that the circulation by agency management could constitute a violation of the prohibition against agency management interfering, restraining or coercing employees in their rights assured by the Order and would be an attempt to control a labor organization. However, Respondent did not commit such violations because Mr. Hoskins was not a part of agency management as he was not a supervisor within the meaning of the Order. Essentially the activities of Mr. Hoskins which are in question amount to an internal Union dispute for which the Respondent cannot be held accountable.

Section 2(c) defines "supervisor" as follows:

'Supervisor' means an employee having authority in the interest of an agency, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

The purposes and intent of the Order as amended, are clearly stated in the Report and Recommendations of the Federal Labor Relations Council on the amendment of Executive Order 11491, as amended, January 1975.

The Council agrees with the view expressed in the review that only genuine supervisory positions should be excluded from bargaining units. The Council wishes to note that the definition in the Order was designed to do this and contains a number of qualifications to this end. For example-'in the interest of an agency,' 'responsibly to direct [employees],' 'effectively to recommend,' and 'exercise of authority ... not of a merely routine or clerical nature, but [requiring] the use of independent judgment' - are limitations which were designed to assure that persons determined to be supervisors would possess actual authority as distinct from work leaders, and would be found to be in bonafide conflict of interest situations if not excluded from bargaining units. The Council believes that the continued careful application by the Assistant

Secretary of these qualifications and the making of supervisory determinations will aid in identifying genuine supervisory positions.

In view of the purposes and intent of the Federal Labor Relations Council, the evidence presented does not establish that Mr. Hoskins was a "supervisor" within the meaning of section 2(c) of the Order, because the record as a whole reflects that the functions enumerated in section 2(c) are either not performed, or if performed, were in the nature of a more experienced employee assisting less experienced employees and the functions so performed were routine in nature and did not require the exercise of independent judgment. Arizona National Guard, Air National Guard, Sky Harbor Airport, FLRC No. 74A-78 (1975); Department of Defense, National Guard Bureau, Texas Adjutant General's Dept., Austin, Texas, A/SLMR No. 524.

In the case at bar Mr. Hoskins when acting as "alternate supervisor" gave routine assignments and directions to fellow employees more as a work leader in order to keep the workflow going in the absence of the regular supervisor. Complainant has admitted this crucial fact.

Even in the private sector, the section defining "supervisor" in the Labor-Management Relations Act was intended to apply to those having true managerial power with genuine management prerogatives as distinguished from straw bosses, leadmen, and other minor supervisory employees. Ross Porta-Plant Inc. v. NLRB, C. A. Texas, 1968, 404 F.2d 1180; U. S. Gypsum Co. (1957), 118 NLRB 20. The Federal Labor Relations Council in its January 1975 report, as aforesaid, expressed the same intention for the public sector when it indicated "only genuine supervisory positions should be excluded from bargaining units."

There is a total lack of evidence that Mr. Hoskins participated in the management of the department of which he was a part. As alternate supervisor he did not have the indicia of authority under 2(c) of the Order nor was he even known to have attempted to exercise such authority, even by Ms. Lansbury, but to the contrary, he performed the same work as his fellow employees. I therefore find that Mr. Hoskins was not a supervisor within the meaning of section 2(c) of the Order at the time of his circulating the petition directed against the Union Steward and therefore the Respondent bears no responsibility for Mr. Hoskins' actions on November 30 and December 1, 1977, and was not in violation of the Order as charged.

Recommendation

September 13, 1978

In the absence of evidence that Respondent violated section 19(a)(1) and (3) of the Order, I recommend that the complaint herein be dismissed in its entirety.


HENRY B. LASKY
Administrative Law Judge

Dated: July 31, 1978
San Francisco, California

HBL:vag

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES AIR FORCE
COMMISSARY COMMAND,
BASE COMMISSARY,
BARKSDALE AIR FORCE BASE,
LOUISIANA
A/SLMR No. 1123

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2000, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) of the Order by virtue of certain coercive and threatening remarks made to a union steward by the Respondent's Commissary Manager during a meeting concerning the steward's conduct of union business during duty hours.

The Administrative Law Judge found that the Respondent did not violate Section 19(a)(1) of the Order and recommended that the complaint be dismissed. In this regard, he found that the remarks made by the Commissary Manager dealt only with the Manager's demand that the steward strictly adhere to the requirements of the parties' negotiated agreement by obtaining permission to represent an employee from both the steward's own supervisor and the employee's supervisor. In connection with the Complainant's allegation that the Commissary Manager told the union steward that "breaktime" was official time and that she could not conduct union business during such time, the Administrative Law Judge, on the basis of credited testimony, concluded no such statement had been made.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

IT IS HEREBY ORDERED that the complaint in Case No. 64-3692(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 13, 1978

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES AIR FORCE
COMMISSARY COMMAND,
BASE COMMISSARY,
BARKSDALE AIR FORCE BASE,
LOUISIANA


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

Respondent

and

Case No. 64-3692(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2000, AFL-CIO

Complainant

DECISION AND ORDER

On July 27, 1978, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the Section 19(a)(1) allegation in the instant complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation. 1/

1/ In the first paragraph on page 3 of his Recommended Decision and Order, the Administrative Law Judge inadvertently cited a date as "March 19, 1978," instead of "March 19, 1977." This inadvertent error is hereby corrected.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



In the Matter of

UNITED STATES AIR FORCE
COMMISSARY COMMAND
BASE COMMISSARY
BARKSDALE AIR FORCE BASE,
LOUISIANA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2000, AFL-CIO
Complainant

Case No. 64-3692(CA)

MR. CARL W. HOLT
National Representative, American
Federation of Government Employees
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MS. OPAL D. ADAMS
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Shreveport, Louisiana 71105
For the Complainant

CAPTAIN RICHARD SCHMIDT
2nd Combat Support Group
Judge Advocates Office
Barksdale Air Force Base
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For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding under Executive Order 11491, as amended (hereinafter also referred to as the "Order"), was initiated by a charge filed on April 5, 1977, and a Complaint, dated June 10, 1977, filed on June 17, 1977, which alleged violations

of Sections 19(a)(1), (2), (6) and Section 10(e) of the Order (ALJ Exh. 1). By letter dated December 29, 1977, the Acting Regional Administrator dismissed those aspects of the Complaint which alleged violations of Sections 19(a)(2) and (6) and Section 10(e) of the Order (ALJ Exh. 3), and, no request for review having been filed, on February 17, 1978, the Regional Administrator issued a Notice of Hearing on the 19(a)(1) allegation of the Complaint (ALJ Exhs. 2 and 4), pursuant to which a hearing was duly held in Shreveport, Louisiana, on April 13, 1978, before the undersigned.

All parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to present evidence and testimony on the issues involved. At the hearing, April 28, 1978, was fixed as the date for mailing briefs. The transcript and Exhibits were not received until May 4, 1978; but neither party requested an extension of time to file briefs and neither party filed a post-hearing brief. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I hereby make the following findings, conclusions and recommendation:

FINDINGS OF FACT

1. Marguerite P. Garrison, cashier and steward for Local 2000, on March 18, 1977, while on duty at her register was approached by Mr. John Moore who asked that Ms. Garrison, as union steward, meet with his (Moore's) supervisor about some difficulty Mr. Moore had within his section (warehouse). Ms. Garrison testified that she asked Mr. Moore if he had talked to his supervisor and whether Mr. Moore's supervisor knew he was going to talk to her (Ms. Garrison); that Mr. Moore told her "yes"; that she (Ms. Garrison) told Mr. Moore that she had a break coming up and would be off the register shortly and would get back to him after she had got permission to talk to him and to his supervisor. Ms. Garrison testified that when she signed out for her break at about 4:00 p.m., she went to the office of her immediate supervisor, Mrs. Short, and found that Mrs. Short had left for the day; that she then returned to the floor and contacted Ms. Ruble, who acted as floor supervisor in Mrs. Short's absence, and asked permission to meet with Mr. Moore and Mr. Moore's supervisor; that Ms. Ruble contacted Mr. Richard D. Jones, Commissary Manager, on the intercom and informed Ms. Garrison that she would have to contact Mr. Watson, Mr. Moore's supervisor, even though Mr. Moore had told Ms. Garrison he had already talked to Mr. Watson; that Ms. Ruble obtained Mr. Watson's telephone number; that she (Ms. Garrison) called Mr. Watson; and that she went to the warehouse and met with Messrs. Watson and Moore.

2. On March 19, 1978, when Ms. Garison reported for duty, Mr. Jones said he would like to talk to her in his office; that she asked Mr. Jones to shut the door, which he did; and a conversation then ensued in Mr. Jones' office during which Mrs. Short, who shared the office, was also present.

3. Ms. Garison testified that Mr. Jones told her that break time was official time and that she could not conduct union activities on break time; however, Ms. Garison admitted that: a) Mr. Jones told her she was having too many phone calls; and b) Mr. Jones

"stated in the meeting that -- the same thing that had been put forth in the letter [July 8, 1977, memorandum]" (Tr. 83).

4. When Mr. Jones was informed that an unfair labor practice charge had been filed, he prepared a memorandum, dated July 8, 1977, of the March 19, 1977, meeting. The memorandum stated, in part, as follows:

"1. ... I explained to Mrs. Garison that she was violating the base memorandum agreement by conducting a lot of her union duties during duty hours without first receiving permission from her supervisor, or the supervisor of the person she was representing.

"2. I also told Mrs. Garison that she was having to neglect our patrons on too many occasions by receiving too many phone calls during the day and visiting with other cashiers and talking to people approaching her with complaints when she was supposed to be operating a cash register.

"3. I explained that I appreciated and respected her extra duty as a union steward and wanted to work with her in any way I could to resolve complaints, but there was (sic) certain rules, and regulations that each of us would have to follow.

"4. I told Mrs. Garison that I could no longer condone infractions of the above items discussed." (Comp. Exh. 1)

5. Mr. Jones testified that on March 18, 1977, he had observed Mr. Moore talking to Ms. Garison at her register; that she had stopped operating her register and was reading notes handed to her by Mr. Moore; that some time prior to March 18, 1977, Mr. Moore had gone to another cashier and had asked that she get Ms. Garison off the register but he was not sure whether Ms. Garison had gone on that occasion; that he had observed on other occasions prior to March 18, 1977, that Ms. Garison had left her register and was seen talking to one or more cashiers while neglecting customers and that he had observed various incidents when Ms. Garison had left her register to take telephone calls. Mr. Jones further testified that because he had personally observed these incidents he called Ms. Garison into his office on March 19, 1977, and he testified that he told Ms. Garison she was conducting too much union business on government time without approval of supervisors; was receiving too many phone calls and leaving patrons standing in line while she was on the phone; that he would not condone her conducting union business on government time without permission from supervisors. Mr. Jones further testified that he told Ms. Garison that she must comply with the Memorandum Agreement (Jt. Exh. 1). Mr. Jones denied that he told Ms. Garison that she was not to do any union business at the Commissary; stated that he never told Ms. Garison he didn't want her to be the union steward; and stated that all he told her was that she must follow the written contract between Barksdale and the Union. Indeed, Mr. Jones testified that he told Ms. Garison that he was for her being union steward, and he would help her in any way he could, but that he would not condone her conducting union business on government time without permission from supervisors. Mr. Jones denied that he told Ms. Garison that she could not engage in union business on her break time.

6. Mrs. Short testified that Mr. Jones on March 19, 1977, told Ms. Garison that she was getting too many phone calls, that she could not conduct union business on government time without the approval of both supervisors; that he did respect her office as a union steward but there were rules to be followed. Mrs. Short testified that "breaks was not mentioned" in the conversation of March 19, 1977.

7. Mr. Jones testified that he did not raise his voice in the conversation with Ms. Garison on March 19, 1977; Mrs. Short agreed; Mr. Robertson, who was in the outer office, testified that he did not overhear the conversation in Mr. Jones's office on March 19, 1977; Mrs. Greta Witt testified

that she was not able to hear the conversation between Mr. Jones and Ms. Garrison on March 19, 1977; and Ms. Helen Lewis testified that she recalled seeing Ms. Garrison in Mr. Jones' office but heard no conversation from the office.

8. Article V, Section 2, of the Memorandum of Agreement between Barksdale Air Force Base and Local 2000 provides in part, as follows:

"... Union stewards will request permission from their immediate supervisor when the stewards wish to leave their assigned duties for the purpose of performing duties listed in Section 3 of this Article, without loss of pay or leave. Permission will be granted in the absence of compelling circumstances preventing it. If circumstances prevent, the steward will be notified and will be told the earliest possible absence, not to exceed reasonable time limits. The steward will secure permission of the employee's supervisor in advance to arrange an appointment within a reasonable length of time. The steward and/or the employee will report to his respective supervisor upon returning to assigned duties." (Jt. Exh. 1).

Article VI, Section 3, which concerns the use of telephones by stewards, concludes with this sentence:

"... Steward will obtain permission from their supervisors before leaving their official duties for this purpose." (Jt. Exh. 1).

CONCLUSIONS

The Complaint asserted that:

"On or about 19 March 1977, Mr. Richard Jones, Commissary Store Manager, threatened, intimidated, restrained, and failed to recognize the duty (sic) appointed Union Steward, Mrs. Marguerite Garrison, by orally threatening her in his office in such manner as to allow her coworkers and members of the bargaining unit to harken to such threats." (ALJ Exh. 1).

The record fails to show that Mr. Jones on March 19, 1977, interfered with, restrained, or coerced Ms. Garrison in the exercise of any right assured by the Order. To be sure, Mr. Jones told Ms. Garrison that she could not conduct union business on government time without the approval of her supervisor and any employee's supervisor; but this is precisely what is provided for in the Memorandum Agreement of the parties and Mr. Jones' insistence that Ms. Garrison adhere to the terms of the collective bargaining agreement was not a violation of Section 19(a)(1) of the Order, where, as here, the record neither shows nor even suggests, that Ms. Garrison was ever denied permission by supervision pursuant to said agreement. It is also true that Mr. Jones told Ms. Garrison that she was receiving too many telephone calls and leaving patrons standing in line while she was on the telephone. Again, this was fully consistent with the Memorandum Agreement. Indeed, the Agreement would permit Respondent to insist on a steward obtaining permission from his or her supervisor before leaving their official duties to use a telephone, whereas, Mr. Jones simply told Ms. Garrison she was receiving too many telephone calls.

There is no basis whatever on the record for the allegation that Mr. Jones failed to recognize the duly appointed Union Steward. To the contrary, the record shows affirmatively that Mr. Jones told her that he respected her as being a union steward and would help her in any way he could, but that he would not condone her conducting union business on government time without permission from supervisors. I fully credit Mr. Jones' denial that he made any statement to Ms. Garrison that she could not conduct Union business on her break time, which was corroborated by the equally credible testimony of Mrs. Short. Ms. Garrison's testimony as to such statement was not convincing, especially as Ms. Garrison thereafter admitted that Mr. Jones

"stated in the meeting that -- the same things that had been put forth in the letter [Memorandum of July 8, 1977, Comp. Exh. 1]."

It is probable that Ms. Garrison inferred a limitation on her use of her break time from the fact that Mr. Jones told her she could not conduct union business on government time without the approval of both supervisors, i.e., that she must "secure permission of the employee's supervisor" (Jt. Exh. 1, Article V, Section 2). In any event, Mr. Jones' denial that he told Ms. Garrison she could not conduct union business on her break time, which was fully corroborated by the testimony of Mrs. Short, is credited and Ms. Garrison's testimony to the contrary is not credited.

September 13, 1978

Finally, the record shows that the conversation between Ms. Garison and Mr. Jones was not overheard by employees present in the outer office.

The evidence thus falls short of sustaining the allegations of the Complaint by the burden of proof required by Section 203.15 of the Regulations. Indeed, the preponderance of the evidence is decidedly to the contrary.

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Section 19(a)(1) of Executive Order 11491, as amended, I recommend that the Complaint herein be dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: July 27, 1978
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

SOCIAL SECURITY ADMINISTRATION,
CINCINNATI DOWNTOWN DISTRICT OFFICE,
CINCINNATI, OHIO
A/SLMR No. 1124

This case involved an unfair labor practice complaint filed by National Federation of Federal Employees, Local 75 (NFFE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally implementing a change in office food and drink policy without first entering into negotiations with the NFFE, and by effecting a rotation of employee work assignments without first entering into bargaining on impact with the NFFE to determine the best method by which such rotation should have been implemented.

The Administrative Law Judge determined that the Respondent did not violate Section 19(a)(1) and (6) of the Order and recommended that the complaint be dismissed in its entirety. In this regard, he found, citing NASA, Kennedy Space Center, Kennedy Space Center, Florida, 2 A/SLMR 567, A/SLMR No. 223, (1972), that the Respondent had satisfied its obligation to negotiate with the NFFE to the extent required in each of the two situations involved herein.

The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
CINCINNATI DOWNTOWN DISTRICT OFFICE,
CINCINNATI, OHIO

Respondent

and

Case No. 53-10361(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 75,
CINCINNATI, OHIO

Complainant

DECISION AND ORDER

On July 28, 1978, Administrative Law Judge Louis Scalzo issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, both the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision, and the entire record in the subject case, including the exceptions and supporting briefs filed by the Respondent and the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 53-10361(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 13, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



In the Matter of :

SOCIAL SECURITY ADMINISTRATION :
CINCINNATI DOWNTOWN DISTRICT OFFICE :
CINCINNATI, OHIO :

Respondent

and

Case No. 53-10361(CA)

NATIONAL FEDERATION OF FEDERAL :
EMPLOYEES, LOCAL 75 :
CINCINNATI, OHIO :

Complainant

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For the Complainant

Before: LOUIS SCALZO
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

This case arises under Executive Order 11491 as amended (hereinafter referred to as the Order). It was initiated by the filing of an unfair labor practice complaint on February 17, 1978 by Local 75, National Federation of Federal Employees (hereinafter referred to as the Complainant or Union), against the Cincinnati Downtown District Office,

Social Security Administration (hereinafter referred to as the Respondent, management or the District Office) charging the Respondent with violations of Sections 19(a)(1) and (6) of the Order. 1/ The Complainant alleged that Mr. John T. Maidlow, District Manager of the District Office, unilaterally implemented a change in office food and drink policy on October 17, 1977, without first entering into negotiations with the Union, and further that on December 5, 1977, Mr. Maidlow effected a rotation of employee work assignments without first entering into impact bargaining with the Union to determine the best method by which such rotation should have been implemented.

The bargaining unit represented by the Union on the dates of the alleged unfair labor practices consisted of all non-supervisory full time employees in the Social Security Administration's Cincinnati Downtown District Office, Cincinnati North District Office, and the Peebles Corner Branch Office. These components were a segment of the Cincinnati Area, a larger organizational entity consisting of eighteen offices. In turn, the Cincinnati Area was a segment of the Social Security Administration's Chicago Region.

Findings of Fact

1. Food and Drink Policy Developed

On September 19, 1977 Mrs. Elizabeth Armstrong, Respondent's Assistant District Manager, met with Mrs. Catherine Campbell, the Complainant's Chief Union Representative in the District Office, and requested the views of the Union regarding formulation of a written food and drink policy. Mrs. Armstrong explained that District Office management felt that a change was necessary. 2/

1/ Both the Complaint and Notice of Hearing on Complaint reflect typographical errors in the designation of the subsections of Section 19(a) allegedly violated. At the hearing the parties stipulated that Sections 19(a)(1) and (6) should have been specified.

2/ The record reflected that the District Office had no clear policy relating to employee consumption of food and drink at work stations during business hours, and that employees were allowed to use their own judgment regarding the subject. However, it appeared that employees were not expected to consume food or drink while meeting the public. Employees were keeping food at their desks and were allowed to drink liquids during working hours.

During this meeting, which lasted fifteen to twenty minutes, the discussion related to whether food and drink should be allowed in the District Office during the work day. Mrs. Campbell left the meeting with the understanding that she would obtain the views of bargaining unit members in the District Office, and then, as the Union's Representative, would present the Union position to Mrs. Armstrong. Mrs. Campbell met with concerned employees and discussed the subject, and also solicited the views of employees by memorandum. Thereafter, the Union adopted the position that there was no need for a formal food and drink policy. However, the Union was willing to concede that if management really wanted a written policy, then the Union would agree to such, but would be in favor of a liberal policy providing for the allowance of food until the public entered, and on overtime, and one providing for the consumption of liquids all day. (Tr. 68).

On September 28, 1977, Mrs. Campbell conveyed the Union position to Mrs. Armstrong. They discussed the views of the Union and those of management on this date. Mrs. Armstrong advised that management would consider the matter further before deciding whether a written policy would be necessary.

On October 14, 1977, Mrs. Armstrong met again with Mrs. Campbell and delivered to her a memorandum dated October 17, 1977, setting forth a formal food and drink policy. (Joint Exhibit 1). In discussing the memorandum on October 14th, Mrs. Armstrong agreed to change the policy to accord with a suggestion made by Mrs. Campbell. 3/ Mrs. Armstrong arranged for the memorandum to be retyped to reflect the change proposed by Mrs. Campbell. The retyped version was then shown to Mrs. Campbell and she agreed that the change reflected her suggestion. Mrs. Campbell understood that the memorandum would be issued as modified. The memorandum as corrected was distributed on October 17, 1977. (Joint Exhibit 2). At no time prior to issuance of the policy on October 17, 1977 did Mrs. Campbell interpose a request to negotiate the food and drink policy issue.

On October 30, 1977 Mrs. Campbell discussed the food and drink policy with Mr. Charles Smith, President of the Local, upon Mr. Smith's return from a vacation. They considered possible procedures to employ to stop implementation

3/ As proposed the policy prohibited the consumption of beverages after 8:45 a.m. The change permitted such consumption until the District Office opened to the public in the morning.

of the policy. Mrs. Campbell's testimony established that the Union was aware that employees were not happy with the policy formulated.

2. Unit Rotation Effected

The record disclosed that claims representatives performing in the District Office were required to rotate their job assignments at regular intervals in order to broaden their professional capabilities. Article 15, Section 15.14 of the collective bargaining agreement governing the labor relations of the parties provides the following relative to the subject:

... The Employer will consult with the Union prior to making any changes in permanent workload assignments.

Technical employees assigned to a specialized unit will be rotated out of that program specialization every nine (9) months unless a longer period of time is agreed to by the individual employee, or unless the rotation is not feasible due to existing guidelines.

No interviewing employees with less than one (1) year experience in their position will be assigned to specialized program areas for more than four (4) months, whenever possible. (Joint Exhibit 8).

On November 8, 1977, Mrs. Campbell raised the question of an anticipated rotation with Mr. Maidlow, the District Manager, at a monthly consultation meeting. ^{4/} Mrs. Campbell requested management's plans in this regard, and Mr. Maidlow replied that the Union would be consulted prior to implementation of the rotation. Mrs. Campbell then requested and received permission to submit suggestions in writing concerning the rotation of claims representatives. Mr. Maidlow agreed to the procedure, and Mrs. Campbell contacted each affected employee, prepared a list of their preferences, and delivered the list to Mr. Maidlow on November 10, 1977. She also provided him with written suggestions as to how the

^{4/} Such meetings were held in accordance with Article 5, Section 5.2(b) of the collective bargaining agreement. (Joint Exhibit 8).

rotation should be accomplished. ^{5/}

The list provided Mr. Maidlow was given to Mrs. Armstrong, his assistant, with instructions to discuss the list further with the Union. On November 11, 1977, Mrs. Armstrong met with Mrs. Campbell and reviewed the list, and explained that of the eleven proposed rotations, management did not agree with four. The reasoning related to each was discussed with Mrs. Campbell ^{6/}

On November 11th management explained in detail their differences regarding the preferences reflected on the list supplied by Mrs. Campbell. All other preferences were granted. Mrs. Campbell was also informed that the District Office would no longer have a "System One Unit" which employees could be assigned to under the rotation policy. ^{7/} The "System One Unit" was not discussed further at that time, and it was brought out that no employee had expressed a preference for the unit.

Management began to finalize plans for the rotation after the November 11, 1977 discussion. On November 18, 1977 those affected by the rotation plan were notified of the decision discussed in detail on November 11, 1977. Up

^{5/} The record is unclear as to the exact methodology used during prior rotations. However, it appeared that at least in some earlier rotations, management formulated complete rotation plans, gave these to the Union to permit prior discussion with affected employees, and thereafter bargained concerning the implementation of the rotation assignments. In other cases volunteers were first requested by management. The rotation in question here involved initial consideration of assignments proposed by the Union in the first instance.

^{6/} One employee was new on the job, and his rotation preference was considered inadvisable because the work selected was technically the most complex. A second employee was being transferred and could not be rotated. A third employee who had made a preference for reassignment was considered essential to his current job due to a backlog and had agreed to stay on despite his preference for another unit. A fourth employee's preference was considered unacceptable because of insufficient experience.

^{7/} The unit, consisting of two employees who also had responsibilities in another unit, was responsible for computer coding, correcting and editing. The work of the unit was distributed among employees in two other units.

to this date the Union had not interposed any request to negotiate formally concerning any aspect of the unit rotation, and management declined a request made by Mrs. Campbell on this date, for additional time to discuss rotation assignments with employees before announcement of the assignments.

The rotation of employees was not implemented until December 5, 1977. 8/

3. Formal Request to Negotiate Concerning Food and Drink Policy and Unit Rotation Issue; Subsequent Meetings

By letter dated November 21, 1977, addressed to Mr. Maidlow by Mrs. Campbell, the Union filed a formal request to enter into negotiations concerning the office food and drink policy and the unit rotation issue. (Joint Exhibit 3). The request was based on Section 11(a) of the Order and the collective bargaining agreement in effect between the parties. The question of formal negotiations was not raised prior to receipt of the November 21, 1977 letter by management.

By letter dated November 22, 1977, Mr. Maidlow advised Mrs. Campbell that management had consulted with the Union on both subjects, but that he and Mrs. Armstrong would be willing to meet with her and Mr. Smith again. At a meeting held on November 29, 1977, attended by the four, the two management representatives expressed a desire to "consult" concerning the two subjects and sought the Union's views. The position of the Union concerning unit rotation was specifically requested, and management inquired concerning the nature of any problems encountered with regard to the food and drink policy implemented. On the other hand, the Union representatives insisted upon formal negotiations designed to produce an agreement, and refused to discuss the specifics of their position on either issue.

The parties met subsequently on two other occasions after the November 29, 1977 meeting but were unable to agree on procedure. Management offered to "consult" under the terms of the collective agreement and the Union refused insisting on what they perceived as a requirement to

8/ This fact is alleged in the Complaint and on page 2 of an attachment to the Complaint. (Assistant Secretary Exhibit 1).

"negotiate." (Joint Exhibits 5 and 6). By letter dated December 6, 1977, the Respondent was charged with violations of Sections 19(a)(1) and 19(a)(6) of the Order. 9/

4. Contentions of the Parties

As noted the Complaint alleges that Mr. Maidlow unilaterally implemented a change in District Office food and drink policy on October 17, 1977 without first entering into negotiations with Complainant, and further that Mr. Maidlow effected a rotation of employee work assignments without first entering into impact bargaining concerning the change in work assignments. In this regard counsel argues that the Union was not provided sufficient advance notice of the changes to afford a reasonable opportunity to consider and analyze, and that management did not enter into good faith bargaining on either of these issues.

The Respondent argues in defense that Mr. Maidlow, as Manager of the District Office, owed no obligation to bargain with the Union; that under the terms of the collective bargaining agreement, and in accordance with the bargaining relationship established between the parties, Respondent was only obligated to bargain with the Area Director; and further that the Complaint must be dismissed because it incorrectly identifies Mr. Maidlow as the individual who failed to enter into negotiations with the Union.

The Respondent also argues that the collective bargaining agreement only required management at the District Office level to "consult" with the Union on the two issues involved herein, and that there could have been no obligation on Mr. Maidlow's part to "negotiate" with the Union; that the Assistant Secretary should not consider this unfair labor practice complaint because it involves essentially differing

9/ After the filing of the charge letter and Complaint, the Respondent endeavored to invoke the grievance procedure in the collective bargaining agreement in an effort to resolve what it perceived as an issue involving interpretation and application of the provisions of the collective bargaining agreement. (Respondent's Exhibit 4, Complainant's Exhibit 1, and Respondent Exhibits 3 and 5).

interpretations of the collective bargaining agreement as distinguished from alleged actions which would constitute clear unilateral breaches of the agreement; that if there was in fact an obligation to bargain concerning the issues, such obligation was met by management; and lastly that the formulation of a formal food and drink policy was not such a change in personnel practice as to give rise to the obligation to bargain, but was merely a reaffirmation of an existing practice.

Conclusions of Law

The contention that the Respondent is not obligated to bargain with the Union herein poses a threshold issue which should be addressed at the outset. In effect, Respondent is contending that the Union has no standing to require District Office management to negotiate over local matters. However, authorities cited by Respondent to support this argument are inapposite. The tenor of the collective bargaining agreement indicates clearly that the Union was granted the right to deal with District Office management concerning matters affecting working conditions appropriate for discussion at the District Office level. The following elements reflected in the collective bargaining agreement clearly indicate the rightness of this conclusion:

1. The Preamble of the agreement indicates that the term "Employer" is a term which embraces the Cincinnati Downtown District Office as a separate entity, and specifically provides "means for negotiations, consultation, discussions and adjustment of matters of mutual interest at the (District Office). ..." (Joint Exhibit 8 at 2).

2. The description of the bargaining unit is not tied exclusively to the Cincinnati Area of the Social Security Administration, but instead identifies separate entities as units comprising the bargaining unit, including the Cincinnati Downtown District Office. (Joint Exhibit 8 at 3).

3. The term "Employer" refers separately to the Department of Health, Education and Welfare, the Social Security Administration, the Cincinnati Downtown District Office, the Cincinnati North District Office, and

branch offices relating to the two mentioned District Offices. (Joint Exhibit 8 at 5).

4. The term "Management" is defined in very general terms as "those employees of SSA with supervisory responsibility or who by virtue of their position make or effectively influence the making of management decisions significantly affecting the policies, programs, or personnel of the Cincinnati Metropolitan District or Branch Offices." (Joint Exhibit 8 at 5).

5. Throughout the collective bargaining agreement the terms "Employer" and "Management" are used in a manner indicative of an intent to refer separately to each Cincinnati Area District Office and each Branch Office therein, and obligations are imposed upon, or granted to each, as being entities embraced within the definition of these two terms.

6. The agreement contemplates negotiations and consultations with the Employer regarding conditions of employment which are within the discretion of the Employer. ..." (Joint Exhibit 8 at 8, emphasis added).^{10/}

The segments of the agreement cited are merely illustrative of a clear intent to impose a District Office bargaining responsibility. It should be noted also that Respondent alone dealt with the Union in connection with the issues involved here, that notification of changes made emanated from the District level of management, and further that labor-management relations between the parties to the agreement had been conducted at the District Office level for the most part. It must therefore be concluded that the Respondent was appropriately charged in this case.

^{10/} The phrase "within the discretion of the Employer" would necessarily include management decisions at the District Office level as well as other levels contemplated within the meaning of the term "Employer."

Respondent argues that the collective bargaining agreement imposes the obligation to negotiate only in situations wherein amendment of the collective bargaining agreement is sought by the union. It is argued further that proposed management changes in traditional practices, such as the food and drink policy or permanent workload assignments, such as unit rotations, create an obligation to consult with the Union; but do not impose the obligation to negotiate. (Joint Exhibit 8, Article 5, Section 5.3, and Article 15, Section 15.14).

In considering this question it must be observed that the January 1975 Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491 as Amended equates the obligation to "consult" with the obligation to "negotiate." At pages 41-42 of the Report, the Council states:

Finally, we believe that the confusion that has developed over the apparent interchangeable use of the terms "consult," "meet and confer," and "negotiate" with respect to relationships between agencies and labor organizations in the Order should be eliminated. The parties to exclusive recognition have an obligation to "negotiate" rather than to "consult" on negotiable issues unless they mutually have agreed to limit this obligation in any way. In the Federal labor management relations program, "consultation" is required only as it pertains to the duty owed by agencies to labor organizations which have been accorded national consultation rights under Section 9 of the Order. ... (Emphasis added).

At an earlier point on page 41 of the Report the following is reflected about the obligation to negotiate:

However, the question is raised as to whether the Order requires, in addition, that a party must meet its obligation to negotiate prior to making changes in established personnel policies and practices and matters affecting working conditions during the term of an agreement.

The Assistant Secretary, when faced with this issue in a case concluded that the Order does require adequate notice and an opportunity to negotiate prior to changing established personnel policies and practices and matters affecting working conditions during the term of an existing agreement unless the issues thus raised are controlled by current contractual commitments, or a clear and unmistakable waiver is present. We believe that the Assistant Secretary's conclusion on this matter is correct and, therefore, no change in the Order is warranted in this regard. (Emphasis added).

A careful reading of the collective bargaining agreement in the light of the quoted statements from the Federal Labor Relations Council Report leads to the conclusion that the agreement does not limit negotiations to topics involved in the amendment process. At this point reference is again made to the Preamble of the collective bargaining agreement which indicates that the agreement provides "means for negotiations, consultation, discussions and adjustment of matters of mutual interest. ..." (Joint Exhibit 8 at 2, emphasis added).

Article 2 of the agreement defines the term "consultation" as merely an initial problem solving step contemplated by the parties. The definition provides:

b. Consultation: Consultation is communication and exchange of views. It shall occur as the need arises and before formulation and implementation of any policy or act affecting personnel policies and practices and other matters affecting working conditions. It shall be conducted in an atmosphere that will foster mutual respect. It is considered a part of the initial step used by either party to resolve a problem concerning the working environment. (Emphasis added).

Article 2 of the agreement also describes the terms "impasse" and "negotiation" in broad general terms indicative of an absence of intent to constrict the negotiation process to a limited subject area involving the amendment of the collective bargaining agreement. These definitions are as follows:

(d) Impasse: The inability of Employer and Union representatives to arrive at a mutually agreeable decision concerning negotiable matters through the negotiation process. (Emphasis added).

(e) Negotiation: Bargaining by representatives of the Employer and the Union on appropriate issues relating to terms of employment, working conditions which affect morale, and personnel policies and practices with a view of arriving at a formal written agreement.

A further indication of the intent to relate the duty to negotiate to the Order rather than a restricted contractual concept is provided in Article 5, Section 5.1 of the agreement. Section 5.1 provides:

5.1 Negotiation: Matters appropriate for negotiation and consultation between the parties are personnel policies and practices and other matters relating to the conditions of employment of employees in the unit that are within the Employer's jurisdiction. ... (Emphasis added).

District and branch managers are required to consult monthly with the Union on matters of appropriate concern to their respective levels. (Joint Exhibit 8, Article 5, Section 5.2(b)). In the light of the definition of the term "consultation," it is logical to conclude that the use of the word "consult" in the collective bargaining agreement was designed to require the parties to begin their relationship with the "initial step" of "communication and exchange of views," rather than formal negotiations. In fact, the agreement contemplates resolution of problems in the informal atmosphere suggested by the term "consultation." Resort to more formal negotiation procedures is contemplated only after this "initial step" is taken and only after it is determined that further negotiations are otherwise appropriate. A careful reading of the cited provisions of the collective bargaining agreement leaves a clear impression that use of the term "consult" in the agreement was not designed to limit rights granted to the Union under the Order. 11/ As noted, the Federal Relations Council has stated that such a restriction may occur only in cases where issues raised are "controlled

11/ See also Joint Exhibit 8, Article 4, Section 4.1.

by current contractual commitments, or a clear and unmistakable waiver is present." No evidence of either was presented here. The terms "consult" or "consultation" found in the agreement may not, in the light of authority mentioned, be construed as a limitation upon the Respondent's obligation to negotiate. NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR 223.

It must be noted at this point that there is no merit to Respondent's contention that the matters presented herein involve only essentially differing interpretations of the collective bargaining agreement. The gravamen of the complaint does not involve merely a matter of contract interpretation. On the contrary, the allegations of the complaint raise issues involving rights accorded by the Order, and not rights established by the terms of the collective bargaining agreement. Since the complaint is grounded on allegations that rights established by the Order were denied to the Complainant, the issues raised were properly made the subject of an unfair labor practice charge. Department of the Treasury Internal Revenue Service, Fresno Service Center, A/SLMR No. 983; Norfolk Navy Shipyard, A/SLMR No. 708.

Preliminarily it is observed that there is no issue between the parties concerning the negotiability of the food and drink policy issue under the provisions of Section 11(a) of the Order. Also, it is quite clear that the implementation of a food and drink policy by memorandum was truly a change in an existing personnel practice and not just a reaffirmation of an existing practice. This conclusion is evidenced by the fact that up to the time of issuance of the policy, employees were, in large measure, permitted to use their own judgment in such matters, were previously allowed to keep food at their desks, and were not restricted if not dealing with the public. In fact, Mrs. Armstrong, the Assistant District Manager, admitted that a strict food and drink policy had fallen into disuse as a result of the use of overtime. 12/

However, despite all of the foregoing, the record discloses that the Union was provided sufficient notification of a proposed change in the food and drink policy to allow the Union opportunity to negotiate, and further that

12/ Evidence introduced did establish a limited prior restriction involving employees leaving the work area after 8:00 a.m. for the purpose of obtaining coffee and then returning to the work area with coffee.

management did in fact negotiate with the Union concerning the change. The Union first heard of the proposed change on September 19, 1977, when the views of the Union were solicited. These views were supplied to management and discussed with management on September 28, 1977. On October 14, 1977, management met with the Union and made available management's version of the proposed change. A modification was suggested by the Union on this date and management agreed. The parties agreed to the proposed food and drink policy on October 14, 1977, and on October 17, 1977, it was implemented. The pattern of dealings outlined reflects that on October 14, 1977, the Union made no request for further negotiation, and that the parties after unlimited discussion, reached agreement concerning the proposed change. A review of the evidence relating to the conduct of the parties convinces that whatever Respondent may have said concerning the negotiability of the proposed food and drink policy, and however, the parties characterized their own conduct, what actually took place did in fact satisfy Respondent's obligation to negotiate. NASA, Kennedy Space Center, Kennedy Space Center, Florida, supra United States Department of the Treasury, Internal Revenue Service, Chicago District, A/SLMR No. 711, petition for review denied, FLRC No. 76-126 (February 15, 1977), Report No. 122; Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 251, Decision of Administrative Law Judge Goldberg at p.10).

Turning to the unit rotation effectuated by Respondent, it is noted that this issue involves only the questions of whether the Union was provided with sufficient advance notice of the proposed unit rotation, and whether the Union was provided sufficient opportunity to enter into impact bargaining on the proposed change.

The record reflects that Mrs. Campbell invited Mr. Maidlow's attention to the need for changes in unit assignments on November 8, 1977. On November 10, 1977 proposed assignments were submitted to management by the Union. ^{13/} In addition the Union made other suggestions concerning the proposed rotation. This procedure, requested by the Union, varied somewhat from prior practice in that Respondent allowed the union to propose a list of preferred rotation assignments in the first instance instead of waiting

^{13/} The Complaint alleged that management chose not to request volunteers for unit rotation. However, the list supplied by Mrs. Campbell was in fact a list of volunteers prepared by the Union.

for the Respondent to develop a list of proposed assignments. ^{14/} In addition, the list of Union preferred assignments was discussed on November 11, 1977 by Mrs. Campbell and Mrs. Armstrong. At this meeting the position of management concerning the Union's list and method of implementing the unit rotation was made known to Mrs. Campbell. Finalization of the unit rotation commenced after the November 11th meeting, and on November 18, 1977, the unit rotation assignments discussed with the Union on November 11, 1977, were finalized. At no time during the November 11-17, 1977 period did the Union request further consideration of the issue. At the November 11, 1977 meeting, and thereafter through November 17, 1977, the Union interposed no objection to the position articulated by management regarding the means of implementing the unit rotation, and management provided unlimited discussion, and/or opportunity for discussion, of any differences which might have existed with respect to the position of management regarding the unit rotation.

Before concluding discussion of this point it must be observed that the unit rotation was not actually implemented until December 5, 1977, and that the Union was provided further opportunities to negotiate concerning the impact of unit rotation after the November 17, 1977 meeting, and before the December 5th implementation. Although the position of the Union was solicited at these later points, and although opportunity for discussion of differences was presented, the Union did not take advantage of either.

Under the particular circumstances presented it must be concluded that the Respondent fulfilled its obligation to bargain on the impact and implementation of its decision regarding the unit rotation before announcement of the decision on November 18, 1977, and before the Complainant requested bargaining on the impact and implementation of the decision. Social Security Administration Branch Office, Angleton, Texas, A/SLMR No. 982. Here again, reference must be made to Respondent's actual conduct with respect to the unit rotation effectuated, and not to the perceptions of the parties with respect to such conduct. What actually did take place between the parties in this regard satisfied the Respondent's obligation to negotiate concerning the impact of the unit rotation on the bargaining unit. NASA, Kennedy Space Center, Kennedy Space Center, Florida, supra; United States Department of the Treasury, Internal Revenue Service, Chicago District, supra; Office of Economic Opportunity, Region V, Chicago, Illinois, supra.

^{14/} The record does not indicate the nature of prior practice with particularity.

September 21, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

At the hearing the Complainant interposed the argument that Respondent's implementation of the unit rotation involved the abolition of the "System One Unit" to which bargaining unit employees had previously been assigned in prior rotations, and that the Union did not become aware of this change until the November 18, 1977 meeting between Mrs. Campbell and Mrs. Armstrong. The record clearly established that this change was brought to the attention of the Union on November 11, 1977 by Mrs. Armstrong during her meeting with Mrs. Campbell. Moreover, the Union did not seek to rotate any employees into the unit abolished, and did not request negotiations concerning this issue although provided with opportunity to do so. More importantly, the Complaint herein challenges the unit rotation on the ground that management did not enter into impact bargaining to determine the best method by which unit rotation could be realized, and that management chose not to request volunteers for unit rotation. Neither the pre-Complaint charge nor the Complaint refer to the abolition of the "System One Unit" in specific terms. However, in light of the conclusion that Respondent fulfilled its obligation to bargain concerning this issue, it is unnecessary to decide whether consideration of the issue is barred by the provisions of 29 CFR § 203.3(a)(3).

RECOMMENDATION

Having found that Respondents have not engaged in conduct prohibited by Sections 19(a)(1) and (6) of the Order, it is hereby recommended that the Complaint herein be dismissed in its entirety.

LOUIS SCALZO
Administrative Law Judge

Dated: July 28, 1978
Washington, D.C.

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE
AND BROOKHAVEN SERVICE CENTER
A/SLMR No. 1125

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and NTEU Chapter 099 (Complainants) alleging that the Respondents had violated Section 19(a)(1) and (6) of the Order based on the conduct of the Acting Chief, Receipt and Control Branch, Brookhaven Service Center, in making a statement to an employee grievant and her representatives during a grievance meeting that the Complainants would not be given certain information with regard to the employee's qualifications for a job for which she had applied unless the grievance was dropped.

The Administrative Law Judge found that the Acting Branch Chief did not make the statements attributed to him in the complaint and recommended that the complaint be dismissed in its entirety. The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE
AND BROOKHAVEN SERVICE CENTER

Respondents

and

Case No. 30-08141(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 099

Complainants

DECISION AND ORDER

On August 11, 1978, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainants filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order, and the Respondents filed an answering brief with respect to the Complainants' exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainants' exceptions and supporting brief and Respondents' answering brief, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions 2/ and recommendations.

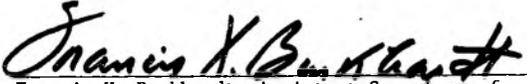
1/ The Complainants excepted to certain credibility findings made by the Administrative Law Judge. In Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, 2 A/SLMR 377, A/SLMR No. 180 (1972), the Assistant Secretary held that as a matter of policy he would not overrule an Administrative Law Judge's resolution with respect to credibility unless the preponderance of all the relevant evidence established that such resolution clearly was incorrect. Based on a review of the record herein, I find no basis for reversing the Administrative Law Judge's credibility findings.

2/ During the hearing, the Complainants made a motion requesting official time for the appearance of Ken Hart, President of Complainant NTEU Chapter 099, as an "aid" to the Complainants' counsel at the hearing.

(Continued)

IT IS HEREBY ORDERED that the complaint in Case No. 30-08141(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 21, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

2/ The Administrative Law Judge granted the motion. However, on page 9 of his Recommended Decision and Order, upon the Respondents' motion for reconsideration, the Administrative Law Judge rescinded his ruling made at the hearing, predicating his action upon the Assistant Secretary's decisions in Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 979 (1978), and Department of Health, Education and Welfare, Social Security Administration, Quality Assurance Field Staff, Northeastern Program Service Center, Flushing, New York, A/SLMR No. 1036 (1978), in which it was indicated that agencies are not obligated to make available on official time employees who act solely as union representatives. The Complainants excepted to this ruling, and renewed their request for official time for Mr. Hart. In agreement with the Administrative Law Judge, the Complainants' request is denied.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



..... :

In the Matter of :

Department of Treasury :

Internal Revenue Service (IRS) and :

Brookhaven Service Center (IRS) :

Respondents : Case No. 30-08141 (CA)

and :

National Treasury Employees Union :

and NTEU Chapter 099 :

Complainants :

..... :

Specifically, it was alleged "...the conduct of Mr. King Harvey, Chief, Receipt and Control Branch at the grievance meeting of Ms. Donna Belmonti on April 19, 1977 violated the Order. In her grievance Ms. Belmonti contested a performance evaluation she received concerning a promotional opportunity. Branch Chief Harvey advised the grievant that the number of points she received for 'pertinency of experience and training' was the result of a judgment made in the Personnel Branch, not Receipt and Control. Branch Chief Harvey then stated that he would investigate the matter further and supply requested information only if the grievance was dropped." ^{1/} The promotion sought was for a Senior Lead Clerk position.

Upon the basis of the entire record, including the evidence adduced, the brief submitted by the parties and my observation of the witnesses and their credibility, I make the following findings, conclusions and recommendation.

Findings of Fact

ROBERT HERMANN, ESQUIRE
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For the Respondents

RICHARD BLAZAR, ESQUIRE
National Treasury Employees Union
1730 K Street, N.W., Suite 1101
Washington, D.C. 20006
For the Complainants

Before: RHEA M. BURROW
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is an Unfair Labor Practice proceeding in which a formal hearing of record was held on May 18, 1978, in Holtsville, New York pursuant to Executive Order 11491, as amended, (hereinafter referred to as the Order).

In the complaint dated October 3, 1977, the Complainant alleged violations of Section 19(a)(1) and (6) of the Order.

1. National Treasury Employees Union hereinafter referred to as NTEU appeared herein as representative of its local NTEU Chapter 099 which holds and held exclusive jurisdiction at all times material herein exclusive representative status of certain employee type units at the Department of Treasury, Internal Revenue Office located at Brookhaven Service Center, Holtsville, New York. Donna Belmonti is and was a member of a unit represented by NTEU Chapter 099.

2. A grievance was filed by Donna Belmonti, an employee key punch operator on February 28, 1977 alleging that she had not been given proper consideration for experience points due her by reason of her employment with the IRS Brookhaven Service Center. She was seeking a promotion pursuant to an announcement that there was a vacancy for the position of Senior Lead Clerk. The grievance was processed through her supervisor to Section Chief Timothy Costello who denied it at the second step on March 10, 1977. It was noted by Costello in a memorandum to Lenore Levinson, NTEU representative, on March 10, 1977 that Donna Belmonti had made the best qualified list; that pertinency of experience was given by the Personnel Department; and, that

^{1/} In the May 19, 1977 charge letter, Complainant alleged that Mr. Harvey stated "that he would investigate the matter further only if the grievance was dropped."

all regulations regarding certification had been followed.

3. The denial of the grievance was appealed to the third step pursuant to Article 33, section 6 of the negotiated agreement. The Acting Chief of Receipt and Control Branch, King Harvey was the official responsible for handling the grievance at the third step.

4. There were two meetings held at the third step of the grievance between King Harvey representing management and Donna Belmonti and her designated representative, Judy Oslager and the union steward, Lenore Levinson. The same aforesaid persons were present at each meeting. At each meeting King Harvey and Judy Oslager carried on the conversation with Belmonti and Levinson making few, if any, remarks.

(a) The first meeting was held on the morning of March 29, 1977 and the particular information indicated by Oslager that she desired was why Donna Belmonti had not received the maximum of 25 points that could be assigned on the basis of her experience and length of service. King Harvey responded that he did not have the information and did not see where his branch was involved in relation to the multi center agreement since he had no jurisdiction over giving points. In any event, he indicated he would get the information desired from Personnel and get back to them.

(b) After checking with Personnel on the matter a second meeting with the same persons was held on April 19, 1977. It was noted that Donna Belmonti and several of the other applicants had been assigned 20 points for experience. Harvey explained the basis as to how the points were assigned by Personnel. 2/ Harvey advised the union representatives and Belmonti that based on the information received he did not feel the Branch was in violation of the negotiated agreement and therefore, his response

2/ In short, five points were assigned for every six months an employee applicant worked in a specific unit doing a specific job that related to the Vacancy. According to testimony there were at least three other employee applicants in the same situation as Donna Belmonti and a change in scores would have inured to all and caused no (continued on next page)

in writing to the grievance at the third step would be that it is denied. A written denial was issued the same day.

(c) Thereafter during the course of the second meeting, Oslager attempted to persuade Harvey to waive the grievance to Personnel for decision at the third step but he declined to do so. He was then alleged to have further stated that he would investigate the matter further and supply the information only if the grievance was dropped. 3/

(d) The grievance was thereafter denied at the fourth step by one other than King Harvey and it was not appealed to the fifth step or otherwise arbitrated.

(e) The Complainant, NTEU Chapter 099, had previously been furnished the evaluative material and information it was seeking from Harvey before the second meeting on April 19, 1977.

(f) (1) I find that King Harvey had already advised Judy Oslager, Donna Belmonti and Lenore Levinson the disposition of Belmonti's grievance before the remarks attributed to him in the

2/ - continued

difference in evaluation results or selection of another person.

3/ On cross-examination Union steward Lenore Levinson testified:

"Q. When was it that Mrs. Harvey first made the statement that he would provide the information only if the Union dropped the grievance?

"A. He did it twice. I would say it was towards the middle of it and towards the end...

"Q. Mr. Harvey had already gotten some information for you from Personnel, right?

"A. He had indicated that if we weren't prepared to drop the grievance he was going to deny it because he did not feel his branch was in violation."

complaint are alleged to have been made. Thereafter, Harvey was under no obligation to investigate the matter further irrespective of whether Belmonti dropped her grievance.

(2) All business at the March 29 and April 19, 1977 meetings was transacted by Harvey with Union representative Oslager, in the presence of Belmonti and Union Steward Levinson. Belmonti testified that she did not say anything at the April 19, 1977 meeting nor was there any conversation directed to her. All matters discussed were between Harvey and Judy Oslager; there was no attempt by Harvey to encourage the grievant to bypass the union. The remarks were made in the context of resolving grievances at an early stage and were not disparaging to the Complainants.

(3) I find that the April 19, 1977 remarks attributed to Harvey in the complaint failed to depict the actual remarks and circumstances under which they were made and were taken out of context to the situation as it actually existed.

(g) Based on a credibility evaluation, I find the testimony of King Harvey to be that most accurate and worthy of belief in the matter. In this connection, the evidence clearly establishes, even by Complainant, that Harvey had stated early in the April 19, 1977 meeting that the Belmonti grievance was denied since his branch was not involved in assigning points for experience. Any further investigation by Harvey thereafter would have been personal and voluntary on his part irrespective of whether the grievance was dropped. He was under no obligation under the negotiated contract or the Order to take further action in the matter after denying the grievance at the third step and it is not disputed that he took no further action. 4/

4/ The time that the alleged remarks were made after denial of grievance is supported by Union Steward Levinson, the circumstances as to Harvey's action at and following the March 29, 1977 meeting to investigate why Belmonti was not assigned 25 points and to report his findings at a later meeting is undisputed; likewise, the evidence establishes Harvey denied the grievance at the third step before any remarks attributed to him in the complaint were made.

Discussion and Conclusions

The Complainants charge that the Respondent violated Section 19(a) (1) and (6) of the Order by its action in failing to provide the representative of the grievant information as to the number of points to which she was entitled for a Senior Lead Clerk Vacancy that had been announced only if the grievance was dropped.

Section 19(a) (1) and (6) of Executive Order 11491 provides that: "Agency management shall not - (1) interfere with, restrain, or coerce, an employee in the exercise of rights assured by this Order; or, ... (6) refuse to consult, confer, or negotiate with a labor organization as required by this Order."

There is no dispute that there was a meeting held on March 29, 1977 between Harvey and Union representative Oslager with grievant Belmonti and Union Steward Levinson also present. At that meeting Harvey explained that he did not see why his branch was involved since it did not assign points for experience to applicants seeking promotion to fill vacant jobs. Nevertheless, Harvey agreed to contact personnel and ascertain why Belmonti had been assigned 20 instead of 25 points on the basis of her experience and length of service. Harvey contacted personnel, secured the information and scheduled a second meeting.

The second meeting was held on April 19, 1977. Harvey reported that a number of the qualified applicants including Belmonti had enough years of service to qualify for the 25 points maximum but they had not been in a specific unit doing a specific job that would warrant credit for all periods. Even if credit were given, it would have to be allowed for all and would not alter or change the selection process. He again stated early in the meeting that his branch was in no way involved in assigning points for experience and Belmonti's grievance at the third step was denied.

Complainant Oslager was dissatisfied with Harvey's explanation and attempted to have him waive the grievance to Personnel. Harvey declined to do so. He was then requested to secure additional information from personnel and the remarks depicted in the complaint that he would "investigate the matter further and supply requested information only if the grievance was dropped," were attributed to him.

From the record it is clear that:

(1) Complainants ignored and failed to voluntarily reveal the circumstances relating to the first meeting between Harvey and Oslager, Belmonti and Levinson on March 29, 1977;

(2) that at the second meeting on April 19, 1977 Harvey met with Oslager, Belmonti, and Levinson as earlier promised and he explained the basis personnel utilized to assign points for experience and length of service; Harvey also denied Belmonti's third step grievance;

(3) Harvey fulfilled his voluntary undertaking to secure and report information regarding points assigned for length of service and experience applicable to Belmonti and others and denied Belmonti's third step grievance at the beginning of the April 19, 1977 meeting. He was not under any contractual or Executive Order obligation to secure and report on the matter but did complete his voluntary undertaking. Thereafter during the meeting, Complainants sought reconsideration and waiver to personnel, and, when he refused, alleged that he stated he would investigate the matter further and supply requested information only if the grievance was dropped.

Counsel for Complainants argue that Harvey's statement at the April 19, 1977 meeting is conduct that urges employees to by-pass the union and negotiated grievance procedures, and as such interferes with and restrains employees from exercising rights guaranteed by the Order.

I disagree. The facts in this case do not provide a reliable basis for such an assertion. In the first place, Harvey was under no obligation either before or after denying the third step grievance to investigate and provide the Union information available to them from personnel. The grievance had been appealed to his branch which had no involvement in assigning points for experience and his undertaking to secure for the union desired information was voluntary on his part. Second, Harvey's discourse at both the March 29 and April 19, 1977 meetings was with union representative Oslager in the presence of grievant Belmonti and Union Steward Levinson. Even Belmonti testified that she took no part in the conversations and the evidence does not directly or inferentially establish that Harvey urged

Belmonti or any other employee to bypass the union and the negotiated grievance procedure. Third, Harvey processed the grievance to the fourth step where it was subsequently denied without an appeal. The record does not establish that management in any way refused to consult, confer, or negotiate with the union. Fourth, Complainant's position in this matter was intransigent and it refused to exchange information or otherwise engage in good faith efforts to informally resolve any misunderstandings. For example, Complainants were securing from personnel the evaluative analysis and background information that it was asking Harvey to procure and did not advise him that they had this information at the time of the April 19, 1977 meeting. Further, when the grievance was denied Complainants were reluctant to accept the decision. They asked him to reconsider or waive the grievance to Personnel. Harvey declined. He was still unaware that the union had gotten the information it had requested him to obtain on the premise it would take their representative a long time to procure. The NTEU Chapter 099 tactics were not entirely above board from a cooperative labor relations viewpoint. But disregarding tactics and assuming the remarks attributed to Harvey in the complaint to be true, which I do not, when considered in relation to the time and circumstances, under which they were made, neither the grievant or any employee was urged to bypass the union nor was the union disparaged, or any employee interfered with, restrained,, or prevented from exercising rights guaranteed by the Order.

In summary, it is concluded that:

(a) Harvey did not make the statements attributed to him in the complaint particularly in the context depicted.

(b) The record does not establish that King Harvey, either by his conduct or statements to bargaining union members interfered with, restrained, or coerced Donna Belmonti or any bargaining unit employees in the exercise of their rights assured by the Order.

(c) The record does not establish that the Respondents refused to consult, confer or negotiate with the Complainant labor organizations as required by the Order.

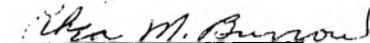
(d) The Complainants have not sustained their burden or proving by a preponderance of the evidence that the Respondents violated Section 19(a) (1) and (6) of the Order.

There were procedural motions by Respondent in the answer to complaint which were renewed at the May 18, 1978 hearing to dismiss the case against Complainant NTEU and Respondent Agency and Internal Revenue Service as separate party entities. The motion had not been referred to the Administrative Law Judge by the Regional Administrator. There was no proof offered in support of the motions. There does not appear to be a basis in the Order to draw artificial distinctions between levels of management to relieve them of responsibility for their acts. 5/ Under the circumstances I recommend denial of the above procedural motions to dismiss.

At the hearing on May 18, 1978, I granted Union Counsel's request that NTEU Chapter 099 President Ken Hart be permitted to serve as his advisor with authorized payment for attendance and usual emoluments. Based on Respondent's motion to reconsider my action of authorization predicated on the Assistant Secretary's decisions in Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 979 (1978) adopting the Administrative Law Judges determination and Department of Health, Education and Welfare, A/SLMR No. 1036 (1978), holding that "...it has been established that agencies are not obligated to make available an official time employees who act solely as union representatives...", I am reconsidering the motion. Since Hart appeared solely as union representative and not as a witness, he is not shown to be entitled to pay for attendance and emoluments requested. Therefore, I hereby rescind my action directing payment for attending the hearing in the matter with emoluments.

Recommendation

It is my recommendation based on the foregoing findings and conclusions that the complaint herein be dismissed in its entirety.


 RHEA M. BURROW
 Administrative Law Judge

Dated: August 11, 1978
 Washington, D.C.

5/ See FLRC No. 76A-37 p.5 or A/SLMR No. 608.

RMB:hjc

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF INTERIOR,
 BUREAU OF INDIAN AFFAIRS,
 PHOENIX AREA OFFICE,
 PHOENIX, ARIZONA
 A/SLMR No. 1126

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 520 (NFFE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by terminating the practice of transporting employees by government-owned vehicles between their homes and their place of work without affording the NFFE the opportunity to negotiate with regard to the decision itself, or its impact and implementation.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety as it was barred by Section 19(d) of the Order from consideration. In addition, he concluded that he would have found a violation of Section 19(a)(1) and (6) based on the Respondent's failure to bargain regarding the impact and implementation of the termination of van transportation had not further proceedings been barred by Section 19(d) of the Order. He also concluded that, under the circumstances, the grievance was still viable under the negotiated grievance procedure.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation that dismissal of the instant complaint was warranted based on Section 19(d) of the Order. In reaching his conclusion, he found it unnecessary to pass upon the Administrative Law Judge's conclusion with respect to the merits of the instant complaint or his conclusion regarding the viability of the grievance. Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF INTERIOR,
BUREAU OF INDIAN AFFAIRS,
PHOENIX AREA OFFICE,
PHOENIX, ARIZONA

Respondent

and

Case No. 72-7236(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 520

Complainant

DECISION AND ORDER

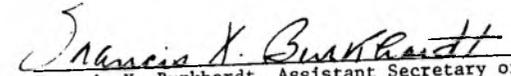
On June 30, 1978, Administrative Law Judge Steven E. Halpern issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting brief filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation that further proceedings on the instant complaint are unwarranted. Thus, the evidence establishes that the issues raised by the instant complaint were previously raised and considered at several steps of the parties' negotiated grievance procedure. Under these circumstances, I agree with the Administrative Law Judge's conclusion that Section 19(d) of the Order precludes consideration of the issues involved under the unfair labor practice procedures of the Executive Order. 1/

1/ Compare Federal Aviation Administration, Muskegon Air Traffic Control Tower, 5 A/SLMR 457, A/SLMR No. 534 (1975), where, because the merits of an untimely filed grievance were not considered under a negotiated grievance procedure, it was held that Section 19(d) did not preclude consideration of the issues involved under the unfair labor practice procedures of the Executive Order. In view of the above disposition, I find it unnecessary to pass on either the Administrative Law Judge's conclusion with respect to the merits of the instant complaint or his conclusion regarding the viability of the grievance.

IT IS HEREBY ORDERED that the complaint in Case No. 72-7236(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 22, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
 OFFICE OF ADMINISTRATIVE LAW JUDGES
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REPLY TO SAN FRANCISCO
 AREA CODE 415 556-0555

In the Matter of

DEPARTMENT OF INTERIOR
 BUREAU OF INDIAN AFFAIRS
 PHOENIX AREA OFFICE
 PHOENIX, ARIZONA

Respondent

and

NATIONAL FEDERATION OF FEDERAL
 EMPLOYEES - LOCAL 520

Complainant

CASE NO. 72-7236(CA)

Ray G. Meadows, Esquire
 P. O. Box 7007
 Phoenix, Arizona 85011
 For the Respondent

Robert J. Englehart, Esquire
 1016 16th Street, N. W.
 Washington, D. C. 20036
 For the Complainant

Before: STEVEN E. HALPERN
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding under Executive Order 11491, as amended was initiated by complaint filed November 7, 1977, with an amended complaint having been filed April 4, 1978. Notice of Hearing was initially issued on April 17, 1978, by the Regional Administrator, United States Department of Labor, Labor-Management Services Administration, San Francisco, Region; pursuant to a corrected notice the hearing was held at Phoenix, Arizona, on May 31, 1978. Thereafter, the parties filed briefs, upon the receipt of the last of which the record was duly closed on June 20, 1978.

In substance, Respondent is charged with having violated section 19(a)(1) and (6) of the Executive Order in that it brought about a change in working conditions by causing to be terminated the practice of transporting employees, by government owned vehicles, between their homes and their place of work, without affording Complainant the opportunity to negotiate with regard to the decision itself, or its implementation and the impact thereof on adversely affected employees.

The parties have been afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses, to make oral argument and to file briefs. Based upon the evidence of record, having observed the witnesses and assessed their credibility and having considered the arguments of the parties, I make the within findings, conclusions and recommendation.

Findings of Fact

1. Complainant, National Federation of Federal Employees, Local 520, has and at all times material hereto had exclusive recognition as representative of the bargaining unit at the Bureau of Indian Affairs, Papago Agency, Sells, Arizona, of which the employees hereinbelow referred to were members.
2. The Papago Agency is, in fact, an activity in the context of this proceeding and will be referred to herein simply as Papago.
3. Papago is subject to the direct supervision and control of Respondent Phoenix Area Office.
4. At all times material hereto there was in effect between Complainant Union and Papago as "employer" a collective bargaining agreement (Exhibit C-4) which provides in part as follows:

The parties to this agreement recognize and affirm that in the administration of all matters covered by the agreement, management officials and employees are governed by existing or future laws. (Article 3, section 1)

The employer agrees to consult with the union on proposed changes (in personnel policies and practices, or other matters affecting the general working conditions of employees in the units) at least ten (10) work days prior to the proposed effective date. The union

will furnish any proposals or views to the employer not less than six (6) work days after notification. (Article 4, section 2)

When the employer believes that a matter is non-negotiable, it will consult with the union. The employer will advise the union, in writing, regarding the non-negotiability of any matter. The union has the right to proceed to the head of the agency and the Federal Labor Relations Council in accordance with section 11(c) of Executive Order 11491, as amended and the regulations of the Council. (Article 6, section 2)

Those privileges of employees which by custom, known past practice and tradition have become an integral part of their working conditions, shall not be abridged as a result of not being enumerated in this agreement. The above privileges must be legal, subject to authorization, and known and informally accepted by the employer. (Emphasis supplied) (Article 6, section 4)

5. On February 25, 1977, the Secretary of the Interior issued a memorandum (Exhibit R-1), which amounted to a department-wide directive to "eliminate all cases in which an employee is driven between his home and work in a government motor vehicle".

6. On March 4, 1977, the Acting Commissioner of Indian Affairs instructed all area directors that "motor vehicle assignments and usage at all levels should be reviewed and brought into compliance with the Secretary's clear objectives".

7. By memorandum of March 15, 1977, the Director of Respondent Phoenix Area Office advised the Superintendent of Papago to conduct a review of the utilization of government vehicles at Papago and to file a report thereon. Attention was directed to 43 IAM 2.9.2 - the Indian Affairs Manual Governing "Use and Restrictions Placed on Operation of Motor Vehicles" which provides inter alia that "pursuant to provisions of law, government-owned motor-propelled vehicles shall be used for official purposes only. 'Official purposes' shall not include the transportation of officers and employees between their domiciles and places of employment"

8. The "provisions of law" referred to in 43 IAM 2.9.2 are set forth in the Federal Statutes at 31 U.S.C. § 638a in pertinent part as follows:

(c) Unless otherwise specifically provided, no appropriation available for any department shall be expended--

(2) for the maintenance, operation, and repair of any Government-owned passenger motor vehicle not used exclusively for official purposes; and 'official purposes' shall not include the transportation of officers and employees between their domiciles and places of employment, ... Any officer or employee of the Government who willfully uses or authorizes the use of any Government-owned passenger motor vehicle ... or of any passenger motor vehicle ... leased by the Government, for other than official purposes or otherwise violates the provisions of this paragraph shall be suspended from duty by the head of the department concerned, without compensation, for not less than one month, and shall be suspended for a longer period or summarily removed from office if circumstances warrant....

9. By memorandum of March 30, 1977, the Acting Superintendent of Papago reported to the Phoenix Area Director the existence of transportation services for its employees, by government vehicles, from Casa Grande, Arizona to Papago's Santa Rosa Boarding Day School 1/ (Exhibit R-4):

John Ross, Jr., Education Specialist, GS-11, drives a 12 passenger van between Casa Grande, Arizona, and Santa Rosa Boarding and Day School. He transports himself and 11 other employees because adequate housing for employees is not available on the school's campus. Mr. Ross parks the vehicle at his home because no other place is authorized, adequately protected, or has been otherwise designated for such purposes.

Gloria Green, Teacher (Library Usage), GS-9, drives a 12 passenger van between Casa Grande,

1/ The round trip distance is approximately 100 miles over roads difficult to traverse.

Arizona, and Santa Rosa Boarding and Day School. She transports herself and 11 other employees because adequate housing for employees is not available on the school's campus. Miss Green parks the vehicle at her home because no other place is authorized, adequately protected, or has been otherwise designated for such purposes.

All of the employees transported above, meet the respective drivers at a central location in Casa Grande. None of them take vehicles to their homes.

...

Authority for use of these vehicle (sic) came from the Agency Superintendent through the Education Program Administrator during the 1975-76 school year. This was done because it was our understanding that we either provided such transportation to the isolated duty station or pay mileage.

...

This situation has existed for more than a year. It resulted from the expansion of the Santa Rosa Boarding and Day School staff, plant, and student enrollment. Housing units built as compared to the number planned in the school's new construction, do not meet the overall needs of the staff.

...

We have additional housing units planned at the school, but have not received constructive monies for them. Construction of these units are included in Phase III plans. However, these numbers may also be inadequate.

10. It is thus clear that two of the employees utilized the government vehicles for transportation from their domiciles to the place of employment and the remaining employees utilized said vehicles for transportation between their domiciles and the place of employment.

11. By memorandum of April 11, 1977, from the Area Property and Supply Officer the Assistant Area Director was advised that the use of government vans to transport employees from Casa Grande to the Santa Rosa Boarding and Day

School constituted an illegal use of government vehicles (Exhibit R-6).

12. On Wednesday, April 12, 1977, Respondent's Acting Area Director issued a memorandum to the Superintendent of Papago in which was contained the following language (Exhibit R-7):

... you are directed to immediately cease in the transportation of the employees at Santa Rosa.... Please notify this office by telephone and follow up with a memorandum when use of the vehicle for employee transportation is terminated. (Emphasis supplied)

13. Said April 12 memorandum was received by the Papago Superintendent three days later on Friday, April 15, 1977.

In compliance with the memorandum a telephone call was placed on the day of its receipt from the Area Director's office to the Principal of the Santa Rosa School, in which advice apparently was given to discontinue the service forthwith. No provision was made to transport the affected employees back to Casa Grande at the completion of the school day.

The Principal of the Santa Rosa School hastily called a meeting of all affected employees advising them of the situation. The meeting took place in mid-afternoon; union officials, having learned of the situation, were in attendance at said meeting and thereafter prevailed upon the area office by telephone not to discontinue the service until the employees had been re-transported to Casa Grande at the end of that school day.

14. Complainant concedes that Papago was obliged to comply with the directive of its Area Office and in so doing performed a non-discretionary ministerial act; in any event, Papago has not been charged with an unfair labor practice.

15. No notice had been given to the union qua union prior to the discontinuance of the van service and, other than the aforementioned telephone conversation, no opportunity was afforded the union prior to the discontinuance to negotiate on any aspect of it; Area management has disclaimed any obligation to negotiate since.

16. By Monday, April 18, 1977, the next school day, all of the affected employees had entered into car pool

arrangements as a means of reaching the school; and, car pools continue to the present time.

17. On April 28, 1978, Complainant union filed a grievance (Exhibit R-8) based upon the discontinuance of the transportation. In response to the grievance, management took the position that it had no obligation to negotiate with Complainant on the cessation of an unlawful practice (Exhibit R-9). 2/

18. The parties hereto, fully recognizing that said grievance was filed under the negotiated grievance procedure established in the collective bargaining agreement between Complainant union and Papago (not a party to this proceeding), nevertheless agree that had that procedure run its full course, through arbitration, both parties to this proceeding would have been bound by the decision of the arbitrator (Tr. 24-28, 40). In this connection the following colloquy transpired (Tr. 26-7):

JUDGE HALPERN: All right.

Could the potential arbitrator's award in that grievance, had it gone to arbitration, have bound the Area?

MR. MEADOWS: Yes.

JUDGE HALPERN: It could?

MR. MEADOWS: We would have abided by the arbitrator's decision, assuming there was no exception to law involved.

JUDGE HALPERN: Well, that isn't really what I asked.

Suppose you had objected. Suppose the arbitrator had written a decision and that it was attempting to bind the Area. Could the Area have defended against that on the ground that they were not a party to the negotiated agreement; therefore, they were not bound by anything that resulted from an arbitration under the negotiated grievance machinery --

2/ By letter of May 9, 1977, Complainant pursuant to the collective bargaining agreement and the Executive Order requested of the Department of the Interior that a determination

MR. MEADOWS: No, sir.

JUDGE HALPERN: -- as opposed to a grievance filed under Agency grievance procedure?

MR. MEADOWS: No, sir. Had an arbitrator issued a decision, it would have been binding upon all parties, yes.

JUDGE HALPERN: Do you have any contrary view of that, Mr. Englehart?

MR. ENGLEHART: No. I agree completely. It's our understanding that it was filed under the negotiated grievance procedure and that that negotiated grievance procedure had steps that went outside of the limited relationship of the Superintendent's Office to the Union.

JUDGE HALPERN: Then you both agree, and in essence I can consider it stipulated in this case, that the grievance filed in effect was a grievance against the Area as well as against Papago, and any determination made in that case by the arbitrator would have been binding on both?

MR. MEADOWS: Yes, it was a grievance filed on the same issue that's at hand today, that is, the termination of the government vehicles used by employees.

JUDGE HALPERN: Mr. Englehart?

MR. ENGLEHART: Yes, it's my understanding that what the grievance was about was the withdrawal of the van transportation, and that through the negotiated grievance procedure --

JUDGE HALPERN: Well, You don't have to tell me that. I have --

2/ (cont.) be made as to negotiability in connection with the discontinuance of the van service. As of the date of the hearing hereon, more than a year after the request, no such determination had been made; it is established that the May 9, 1977, letter was received.

MR. ENGLEHART: -- the parties had bound themselves to a determination, because they involved themselves in the consideration of that grievance as it went up prior to arbitration.

JUDGE HALPERN: And that includes the Area. When you say the parties, you mean the parties in this action?

MR. ENGLEHART: Yes. That includes the Area ...

19. Complainant concedes that the issues raised in this unfair labor practice proceeding are the same as had previously been raised in the grievance proceeding. As candidly stated by counsel for Complainant (Tr. 149-150):

MR. ENGLEHART: I think what we're talking about now is whether the 19, Section 19(d) bar applies, and I think in all honesty it must be acknowledged that the items that are in contest in this unfair labor practice are the same items that were in contest in the grievance procedure.

It's the Union's contention that the 19(d) bar does not apply, not because there was not an attempt to raise the same items, but because the Union was never able to get anywhere with that procedure. They made every good faith effort, and I think the record will show what was done, but --

JUDGE HALPERN: All right. I thank you for your clarification, Mr. Englehart.

20. Under the grievance machinery, it was required that the fifth stage grievance be submitted to the Commissioner of Indian Affairs for final decision within five workdays of receipt by Complainant of the fourth stage deciding official's decision. No time limit is specified for the Commissioner's decision. The record reflects (Exhibit R-11) that the fourth stage decision is dated May 18, 1977, and in the absence of evidence to the contrary I infer that it was mailed on that date; in the absence of evidence I decline to make a finding on the date it was received.

It was testified on behalf of Complainant, by the individual who did the mailing, that the fifth stage submission dated June 3, 1977 (Exhibit C-5) was mailed to the Commissioner of Indian Affairs on June 3, 1977. There is no registered or

certified receipt to evidence such mailing; however, I credit the testimony and find said submission in fact was mailed on June 3, 1977. I further find and conclude that Respondent, not having raised the defense of untimely filing at any stage of this proceeding has waived such defense.

21. On August 31, 1977, in a letter to the Commissioner of Indian Affairs, the President of NFFE made reference to the grievance which he assumed was then pending before the Commissioner as a result of the June 3, 1977, transmittal (Exhibit R-13).

By responsive letter of September 19, 1977, advice was given that "the Bureau of Indian Affairs (BIA) is not in possession of a grievance from the employees of NFFE, Local 520." (Exhibit R-13) I credit that representation and find by inference that, as a result of unknown circumstances, the submission mailed on June 3, 1977, either was not received by the Commissioner's office or, having been received, thereafter became unavailable and unretrievable.

22. Complainant having concluded that the Commissioner's office was acting in bad faith, 3/ and on the assumption that the Bureau would assert a time bar if the Commissioner were then furnished with a copy of the June 3, 1977, fifth stage submission, elected to proceed no further in the grievance machinery. Instead, on October 4, 1977, it charged Respondent with an unfair labor practice "regarding the fact that on April 12, 1977, your office ordered that protected transportation be terminated without consultation or negotiation with this Local." (Exhibit R-14).

Conclusions of Law

Preliminary Conclusion

It is a threshold conclusion in this matter that the action of the Area Office, in directing the Activity to terminate the transportation service at issue, provides the basis for finding a violation by it of any part of section 19(a) of the Order, notwithstanding that Complainant was accorded exclusive recognition only at the Activity level. Naval Air Rework Facility, Pensacola, Florida and Secretary of the

3/ While asserted as a separate unfair labor practice in the original Complaint, failure of response to the fifth stage submission was withdrawn as the basis for an unfair labor practice by the amended Complaint.

The Merits

As applicable here it is prohibited by Federal Statute, 31 U.S.C. § 638a (c)(2), that departmental appropriations be expended for the operation of any government owned passenger motor vehicle for the transportation of employees between their domiciles and places of work.

Section 12(a) of the Executive Order, provides that in the administration of agreements between an agency and a labor organization officials and employees are governed by existing laws. Thus, the agreement to provide transportation (and the establishment of the practice thereof) the cessation of which is the gravamen of this action, being antedated by said statute, is subject to its prohibition. Therefore, upon discovery of the unlawful nature of the van transportation Respondent was obliged to cause its cessation; and it was entitled unilaterally to do so. 4/

That the established practice was unlawful however, did not relieve Respondent of its obligation to negotiate with Complainant regarding the impact upon the employees adversely affected by its discontinuance. 5/

It is true that to a minimal degree there were negotiations. These were limited, however, to amelioration of the immediate harsh effect of the discontinuance of the transportation, without prior notice, during a school day, which would have left the employees stranded at work with no practical means of returning to Casa Grande. Such can hardly be considered to have discharged Respondent's obligation to negotiate on the adverse impact of a service the holding out of which is shown by the record to have been a significant inducement at the time of hiring, and which thereby became a condition of the employment.

Although no advice of the discontinuance was given to the Union *qua* Union prior to the general announcement to the employees affected that the service had been discontinued, unquestionably, there was opportunity to give such prior

advice. In this connection, it was or should have been apparent to the Area Director that the written memorandum of April 12 would not reach the Papago Superintendent for effectuation for several days; in fact it did not reach him until April 15. In the interim the Union could (and should) have been notified. Accordingly, I find non-meritorious any suggestion that the situation was akin to an emergency or was otherwise of such urgency as to have precluded Respondent from giving prior advice to the Union and affording it an opportunity to negotiate on the adverse impact of the cessation of the transportation and upon possible alternatives consistent both with law and Respondent's original commitment to provide transportation.

Having thus concluded that there was both a duty to negotiate implementation and impact and a time frame within which to do so, absent other considerations, I would find a violation of section 19(a)(1) and (6) of the Executive Order and make an appropriate recommendation. 6/

There is however, a controlling jurisdictional issue, the resolution of which is dispositive of this matter.

Section 19(d) bar - Further Proceedings

Respondent Area Office asserts, and Complainant concedes, that all issues raised in this action have previously been raised in a grievance filed under the negotiated agreement between the Activity (Papago Agency) and Complainant Union. Complainant and Respondent Area Office as parties to this unfair labor practice action further agree that had the grievance machinery proceeded to completion the ultimate decision of the arbitrator would have been of binding force and effect not only on Complainant and the Activity but upon the Respondent herein as well.

Under such circumstances there can be little doubt of the applicability of section 19(d) of the Executive Order, which provides in pertinent part that "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures."

6/ A recommendation that the unlawful activity be reinstated would of course not be appropriate.

4/ Department of the Army Dugway Proving Ground, Dugway, Utah, A/SLMR No. 745.

5/ Ibid.

I do not conclude, as Complainant contends, that it was prevented from exhausting its grievance remedy, either by Respondent or its higher agency authority. As to the fate of the fifth stage grievance submission mailed by Complainant on June 3, 1977, upon the record before me I find it possible to conclude only that the circumstances as a result of which it failed to reach the Commissioner of Indian Affairs are unknown; and, that whatever happened to said submission the Commissioner in fact did not receive it and was therefore unable to act upon it.

I further conclude, however, that Complainant may not be held to have abandoned the grievance, notwithstanding that it has brought this unfair labor practice action. Upon receipt of advice that the Commissioner was not in possession of its submission, without a decision on which it could not proceed to invoke arbitration, Complainant in essence assumed bad faith, left the grievance in its then posture and undertook to pursue its unfair labor practice remedy. Complainant's cynicism was based in part upon the dilatory handling of its request for a negotiability determination, which request having been made by letter of May 9, 1977, had not yet been acted upon at the time it filed its charge letter of October 4, 1977. That circumstance, while not conclusive of how the fifth stage submission would have been processed had it been received, in my view provides sufficient justification for Complainant's further course of action so as to estop Respondent from asserting that Complainant has abandoned the grievance; and, I so hold. Furthermore, it appearing from the testimony that Complainant, at about the time it mailed the fifth stage submission to the Commissioner, placed a copy thereof in Respondent's possession, Respondent upon learning of the situation might well have displayed good faith by so informing the Commissioner and furnishing its copy to him.

Under these circumstances, I conclude that the grievance remains viable and is subject to reactivation upon Complainant's filing with the Commissioner of Indian Affairs a copy of its June 3, 1977, fifth stage grievance submission.

Recommendation

In view of the foregoing I recommend to the Assistant Secretary that the complaint be dismissed in its entirety.



STEVEN E. HALPERN
Administrative Law Judge

Dated: June 30, 1978
San Francisco, California

SEH:vag

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND REMAND OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION AND
 WELFARE, SOCIAL SECURITY ADMINISTRATION,
 BUREAU OF HEARINGS AND APPEALS, REGION II,
 SAN JUAN, PUERTO RICO
 A/SLMR No. 1127

This proceeding arose upon the filing of an unfair labor practice complaint by the American Federation of Government Employees, AFL-CIO, Local 3534 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by its action of assigning on an annual performance evaluation an "R" rating (better than unsatisfactory but not as high as outstanding) to Violeta Crespo regarding her ability to get along with others instead of an "O" rating (outstanding) because of her activities as a shop steward on behalf of the Complainant during the period covered by the evaluation.

The Administrative Law Judge concluded that the complaint should be dismissed. He described the issue as being whether the appraisal "was motivated, at least in significant part," by Crespo's union activities. He then noted a conflict in testimony between the Respondent's Administrative Law Judge Buono (for whom Crespo works as a hearing assistant) and its Hearing Administrator Perez (Crespo's rater and supervisor). Buono testified that when he spoke to Perez about raising Crespo's rating concerning her ability to get along with others, among the reasons Perez gave for not doing so was that Crespo went to Goldman's (the Respondent's Administrative Law Judge In Charge) office too much, presumably on union matters. Perez denied making any such statement. However, the Administrative Law Judge determined that a credibility resolution was unnecessary as he found that, "Even if Perez made a statement susceptible to the interpretation Buono gave it, I have no doubt the view expressed did not play the slightest part in the appraisal given Crespo by Perez and Goldman."

In the Assistant Secretary's view, to establish a violation of Section 19(a)(2) of the Order, it is not necessary to establish that agency management had engaged in conduct effecting employee terms and conditions of employment based solely, or to a significant extent, on union considerations. Rather, the Complainant would have to demonstrate only that one of the reasons for agency management's conduct was based on the union activity of the employee or employees involved. He found, therefore, that a finding of fact with respect to whether or not Perez had indicated to Buono that Crespo's rating was based, in part, on her union activities could well be determinative of whether a violation of the Order had occurred.

Accordingly, the Assistant Secretary remanded the subject case to the Administrative Law Judge for the purpose of making the necessary finding of fact and preparing and submitting to the Assistant Secretary a Supplemental Recommended Decision and Order.

UNITED STATES DEPARTMENT OF LABOR
 BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND
 WELFARE, SOCIAL SECURITY ADMINISTRATION,
 BUREAU OF HEARINGS AND APPEALS, REGION II,
 SAN JUAN, PUERTO RICO

Respondent

and

Case No. 37-01914(CA)

AMERICAN FEDERATION OF GOVERNMENT
 EMPLOYEES, AFI-CIO, LOCAL 3534

Complainant

DECISION AND REMAND

On June 27, 1978, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Respondent filed an answering brief.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. Except as provided below, the rulings are hereby affirmed. Upon consideration of the entire record in the subject case, including the Complainant's exceptions and supporting brief and the Respondent's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation, only to the extent consistent herein.

The complaint in the instant case alleges that the Respondent violated Section 19(a)(1) and (2) of the Order by its action of assigning an "R" rating (better than unsatisfactory but not as high as outstanding) on an annual performance evaluation to Violeta Crespo regarding her ability to get along with others instead of an "O" rating (outstanding) because of her activities as a shop steward on behalf of the Complainant during the period covered by the evaluation.

The evidence establishes that Rafael Perez Guadalupe, the Respondent's Hearing Administrator and Crespo's supervisor, was the rater and that Solomon Goldman, the Respondent's Administrative Law Judge In Charge, was the reviewer of the disputed appraisal. During the critical period of the appraisal, Crespo was an active shop steward and the hearing assistant to the Respondent's Administrative Law Judge Rafael Buono-Petrilli. For the appraisal in question, Buono was asked to make an initial performance appraisal recommendation.

The Administrative Law Judge described the issue in the instant case as being whether the appraisal "was motivated, at least in significant part," by Crespo's union activities. He then noted a conflict in testimony between Buono and Perez. Buono testified that when he spoke to Perez about raising Crespo's rating concerning her ability to get along with others, "among the reasons Perez gave for not doing so was that Crespo went to Goldman's office too much, presumably on union matters." Perez denied making any such statement. The Administrative Law Judge determined that a credibility resolution in this regard was unnecessary as he found that, "Even if Perez made a statement susceptible to the interpretation Buono gave it, I have no doubt the view expressed did not play the slightest part in the appraisal given Crespo by Perez and Goldman."

Section 1(a) of the Order guarantees to each employee of the executive branch of the Federal government the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity. Agency management's abridgment of these rights by discrimination in regard to hiring, tenure, promotion, or other conditions of employment is violative of Section 19(a)(2) and (1) of the Order.

To find a Section 19(a)(2) violation of the Order, the evidence must show that agency management has discriminatorily affected employee terms and conditions of employment based on union considerations. Further, such a violation will be found in "mixed motive" situations, i.e., where a legitimate basis for the management action exists, but where union considerations also are shown to have played a part.

Applying the foregoing principles to the instant case, if the evidence demonstrates that agency management's rating of Crespo was based on her union activity, in whole or in part, a violation of Section 19(a)(2) would be established. Thus, it would not be necessary for the Complainant to establish that agency management had acted solely, or to a significant extent, on the basis of union considerations. Rather, the Complainant would have to demonstrate only that one of the reasons for agency management's conduct was based on the union activity of Crespo.

As indicated above, the Administrative Law Judge in the subject case made no finding of fact with respect to whether or not Perez had indicated to Buono that Crespo's rating was based, in part, on her union activities. Under these circumstances, and in accordance with the principles outlined

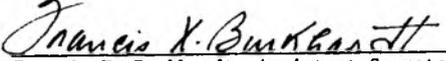
above, I find that such a finding may well be determinative of whether a violation occurred herein. Accordingly, I shall order that the subject case be remanded to the Administrative Law Judge for the purpose of making an appropriate resolution as to the statement in question.

ORDER

IT IS HEREBY ORDERED that this proceeding be, and it hereby is, remanded to the Administrative Law Judge for the purpose of making an appropriate finding of fact determined to be necessary in reaching a resolution of the subject complaint.

IT IS FURTHER ORDERED that, upon making the appropriate finding of fact, the Administrative Law Judge shall prepare and submit to the Assistant Secretary a Supplemental Recommended Decision and Order in accordance with Section 203.23 of the Assistant Secretary's Regulations.

Dated, Washington, D. C.
September 22, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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In the Matter of

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS
REGION II, SAN JUAN, PUERTO RICO
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3534
Complainant
.....

Case No. 37-01914(CA)

Appearances:

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Employees
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For the Complainant

WILLIAM F. CONFALONE
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Department of Health, Education
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26 Federal Plaza, Federal Building
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For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491 as amended.
It was initiated by a complaint dated September 2, 1977 and

filed September 6, 1977 alleging a violation of Sections 19(a) (1) and (2) of the Executive Order. The violation was alleged to consist of assigning an "R" rating (satisfactory) to Violeta Crespo instead of an "O" rating (outstanding) because of her activities as a shop steward on behalf of the Complainant. Under date of September 19, 1977 the Respondent filed a response to the complaint denying the allegations of the complaint and making some affirmative allegations.

On March 8, 1978 the Acting Regional Administrator issued a Notice of Hearing for a hearing to be held on April 18, 1978 in Hato Rey, Puerto Rico. A hearing was held on April 18 and 19 in Hato Rey. Both parties were represented by counsel. They presented witnesses who were examined and cross-examined and offered exhibits which with one exception were received in evidence. Both parties made closing arguments and filed briefs.

Facts

Local 3534 was certified on July 12, 1974 as the exclusive representative of professional and non-professional employees (with certain exceptions) of the Respondent. Violeta Crespo was instrumental in organizing the Local and obtaining recognition. For three years she was the shop steward and in April 1977 was elected Vice-President in San Juan. The Respondent has employees in San Juan, ¹/_{Ponce}, and Mayaguez. The San Juan Vice-President is the chief executive of the Complainant with respect to the San Juan employees.

The Bureau of Hearings and Appeals in Puerto Rico has about twelve Administrative Law Judges. Solomon Goldman is the Administrative Law Judge in Charge. Rafael Perez Guadalupe is the Hearing Administrator. Each Judge has five employees under him. In order of rank they are an attorney-advisor, a hearing assistant, a secretary, and two hearing clerks. Mrs. Crespo is the hearing assistant to Judge Rafael Buono-Petrilli.

This case involves one item in Mrs. Crespo's performance appraisal for the year April 1, 1976 through March 31, 1977.

In making employee appraisals Perez is considered the Rater and Goldman the Reviewer. However, the ALJ is asked

1/ The offices are located in Hato Rey, a suburb of San Juan, and the employees there are referred to as the San Juan employees.

to make an initial recommendation. The appraisal has seven categories in which the employee is to be appraised with a letter. Judge Buono told Mrs. Crespo that he had recommended an "O" for her in category 6, "getting along with others". Perhaps he intended to do so but in fact he recommended an "A" for her in that category. "O" means outstanding and is an appropriate appraisal in all categories. "A" means "exceeds the requirements of the job" and is not an appropriate appraisal in category 6; in that category the only permitted appraisals are "B", or unsatisfactory, "O", and "R", better than unsatisfactory but not as high as outstanding.

When Perez saw Buono's recommendation of an A in category 6 for Mrs. Crespo he knew that letter was not an appropriate appraisal in that category and that only B, R, or O could properly be used. Accordingly, in making his own performance appraisal of Mrs. Crespo he changed the A in category 6 to an R and otherwise agreed with Buono's recommendation. Goldman agreed with Perez. This left Mrs. Crespo's final appraisal with an R in category 6, 3 A's, and 3 O's.

Several employees had complained to Perez about Mrs. Crespo's conduct in performing the work and Mrs. Crespo had complained to Perez about several employees. Relations between Crespo and Sonia Detres, a clerk in Buono's unit, became so bad that Perez transferred Detres to another unit but then Crespo had difficulties with Detres' replacement. Overall, however, Crespo did get along well with people but Perez and Goldman did not consider her outstanding in that respect.

On the same day that Goldman and Perez made their final appraisal of Mrs. Crespo they recommended to their Regional Office in New York that Mrs. Crespo receive a grade promotion.

When Mrs. Crespo received her final appraisal she complained to Buono about her rating in category 6. Buono spoke to Perez and tried to persuade him to have Crespo's appraisal in category 6 changed to outstanding but Perez refused and pointed out that Buono himself had originally recommended her for an A in that category.

In the appraisals for the prior year the ALJ's were the raters and Goldman the reviewer. Crespo's ALJ that year was Judge Ana Rodriguez. She gave Crespo an overall appraisal of outstanding and Goldman concurred. The New York Regional Office called Judge Goldman and questioned the appraisal of Crespo and three others and asked him to justify them. Goldman could not do so. He lowered Crespo's appraisal in

getting along with others over the objection of Judge Rodriguez. Crespo asked him to lower some other category to lower her overall rating, but Goldman refused. 2/

Discussion and Conclusion

The issue in this case is not whether the appraisal of Mrs. Crespo in category-6 was right or wrong, sound or unsound. It is whether it was motivated, at least in significant part, by her union activities. The evidence that it was so motivated scarcely exists. Buono testified that when he spoke to Perez about raising Crespo's appraisal in category 6, among the reasons Perez gave for not doing so was that Crespo went to Goldman's office too much, presumably on union matters. Perez categorically denied making any such statement. I have not made a finding on which of them testified falsely or was mistaken in his recollection because it is unnecessary to do so. Even if Perez made a statement susceptible to the interpretation Buono gave it, I have no doubt the view expressed did not play the slightest part in the appraisal given Crespo by Perez and Goldman.

It is plain from the testimony of Goldman and Perez, and the appraisal they gave Crespo, 3/ including the highly laudatory justification for the "O" ratings, that they considered her a valuable and valued employee, well above the average in qualification and performance. In three of the categories appraised they appraised her as outstanding. In three others they appraised her as in excess of job requirements. Only in category 6, getting along with others, they appraised her as neither unsatisfactory nor outstanding, the only other appraisals permitted under the regulations in that category. There was considerable evidence that there were some people with whom Mrs. Crespo did not "get along" at times, on occasion giving rise to consideration of reassignment of personnel.

2/ Most of the facts found in this paragraph are based on findings in Department of Health, Education and Welfare, Social Security Administration, Bureau of Hearings and Appeals, San Juan, Puerto Rico and American Federation of Government Employees, AFL-CIO, Local 3534, A/SLMR No. 861. The parties in that case and this one are the same and both cases involve the same category in the performance appraisal of the same person.

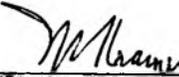
3/ Exh. C-3.

September 25, 1978

Since I have concluded that Mrs. Crespo's appraisal was not motivated even in part by considerations of her union activities, I must recommend that the complaint be dismissed.

RECOMMENDATION

The complaint should be dismissed.


MILTON KRAMER
Administrative Law Judge

Dated: June 27, 1978
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, DISABILITY
INSURANCE PROGRAM STAFF,
CHICAGO, ILLINOIS
A/SIMR No. 1128

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3400 (Complainant) alleging that the Respondent violated Section 19(a)(1) of the Order by refusing to process a grievance beyond Step 2 of the negotiated procedure pending the completion of a related Equal Employment Opportunity (EEO) proceeding.

The Administrative Law Judge found that the Respondent's decision to hold the grievance in abeyance was based upon a legitimate belief that Section 13(a) of the Order and the Respondent's published personnel instructions precluded the operation of the negotiated grievance/arbitration procedure while the EEO case was still pending. He found no evidence that the Respondent had intentionally frustrated the grievance/arbitration machinery, nor that it had otherwise acted in bad faith. He thus concluded that under these circumstances the Respondent had not violated Section 19(a)(1) of the Order.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation. In this regard, he noted particularly that at all times material the Respondent had indicated its willingness to proceed with the grievance once the EEO matter had been resolved. Accordingly, the Assistant Secretary ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, DISABILITY
INSURANCE PROGRAM STAFF,
CHICAGO, ILLINOIS

Respondent

and

Case No. 50-17010(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3400

Complainant

DECISION AND ORDER

On August 8, 1978, Administrative Law Judge Randolph D. Mason issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions and supporting brief filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

The Administrative Law Judge concluded that, under the circumstances of this case, the Respondent's refusal to process a grievance beyond Step 2 of the negotiated procedure, pending completion of a related Equal Employment Opportunity (EEO) proceeding, did not constitute a violation of Section 19(a)(1) of Executive Order 11491,

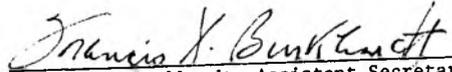
as amended. I agree. In this regard, it is noted particularly that at all times material the Respondent had indicated its willingness to proceed with the grievance once the EEO matter had been resolved. Moreover, upon becoming aware that no further use of the EEO procedures was contemplated, the Respondent indicated its willingness to resume consideration of the matter under the negotiated grievance procedure, and to proceed to arbitration if the Complainant so desired.

Under these circumstances, I find that the Respondent's conduct herein was not violative of the Order. 1/ Accordingly, I shall order that the instant complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-17010(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 25, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1/ Cf. Department of the Treasury, Internal Revenue Service, Milwaukee District Office, Milwaukee, Wisconsin, Case No. 51-3911(CA), Request for Review No. 996 (1977), FLRC No. 77A-135 (1978).

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



RECOMMENDED DECISION AND ORDER

Preliminary Statement

.....
 In the Matter of :
 :
 DEPARTMENT OF HEALTH, EDUCATION AND WELFARE :
 SOCIAL SECURITY ADMINISTRATION :
 DISABILITY INSURANCE PROGRAM STAFF, :
 CHICAGO, ILLINOIS :
 :
 Respondent :
 :
 and :
 :
 AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES :
 (AFGE), AFL-CIO, LOCAL 3400 :
 :
 Complainant :

Case No. 50-17010 (CA)

Robert B. Breisblatt, Esquire
 Catherine Luntz, Esquire
 Department of Health, Education and
 Welfare
 Region V, 300 South Wacker Drive
 Chicago, Illinois 60606
 For the Respondent

Ms. Chanon Williams
 Bill Loftis, President
 American Federation of Government
 Employees, Local 3400
 300 South Wacker Drive
 Chicago, Illinois 60606
 For the Complainant

Before: RANDOLPH D. MASON
Administrative Law Judge

This proceeding was heard in Chicago, Illinois, on May 2, 1978, and arises under Executive Order 11491, as amended. Pursuant to the Regulations of the Assistant Secretary Of Labor For Labor-Management Relations (hereinafter called the Assistant Secretary), a Notice of Hearing on Complaint was issued on February 28, 1978. This case was initiated by a complaint filed on December 21, 1977, by the American Federation of Government Employees, Local 3400 (hereinafter the Union). The Union alleges that respondent engaged in dilatory tactics in the processing of a grievance and thereby violated §19(a)(1) of the Executive Order. 1/

At the hearing, all parties were represented and were afforded full opportunity to be heard, adduce evidence, examine and cross-examine witnesses, and argue orally. Following the hearing, a deposition was taken on May 25, 1978. The deposition was received in evidence on June 15, 1978, and marked for identification as Assistant Secretary's Exhibit No. 3. Thereafter, both parties filed briefs. Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendation.

Findings of Fact

The American Federation of Government Employees, Local 3400, was the exclusive bargaining representative of certain employees of the respondent, Region V, Department of Health, Education and Welfare, in Chicago, Illinois, at all times relevant herein.

Article XXI of the parties' negotiated agreement sets forth a grievance and arbitration procedure. The negotiated grievance procedure replaced the agency grievance procedure with respect to all employees covered by the agreement. The negotiated procedure provided for three steps of review by management officials prior to arbitration. The third-step official was required to render a written decision within ten workdays after receipt of the grievance. Article XXI also provided, in pertinent part, as follows:

1/ The Union did not allege a violation of §19(a)(6).

Section F. If the Employer and the Union fail to settle any grievance processed in accordance with the procedure outlined above, the subject grievance shall, upon written request by the Employer or the Union, be referred to arbitration. Such written request must be submitted not later than ten (10) workdays following the receipt of the written decision at the third step.

. . . .

Section J. All time limits and/or procedures set forth in this Article may be extended or waived by mutual consent of the parties.

During the summer of 1977, one of the respondent's employees (hereinafter referred to as the "grievant") requested approximately four months maternity leave beginning in September of 1977. She requested that the period preceding November 28, 1977, be comprised of about 176 hours of sick leave and 240 hours of leave without pay. The remainder of the requested period constituted 168 hours of annual leave from November 28 to December 27, 1977. Management refused to allow her to take more than 64 of the final 168 hours of annual leave.

On August 18, 1977, a Union steward filed a grievance pursuant to the negotiated agreement on behalf of the above grievant. The grievance objected to the above denial of 104 hours of annual leave, and disputed management's claim that the workload of the office necessitated denial of the leave in question. In this regard, it is noted that Article XVI of the negotiated agreement provides that requests for advance annual leave will ordinarily be approved unless the employer decides the productivity of the office would be unduly impaired.

Thereafter, the grievance was timely processed through the second step in accordance with the requirements set forth in the negotiated agreement. Management's second-step official also denied the requested leave due to the workload of the office.

In a memorandum dated September 8, 1977, the Union presented the grievance to an individual designated by respondent as the third-step management official. The memorandum was received by that official on September 9, 1977. Shortly before that, management ascertained for the

first time that the grievant was also simultaneously seeking a remedy for the denial of the annual leave in question through the use of the Equal Employment Opportunity (EEO) procedures. In this regard, on August 22, 1977, the grievant had initiated the EEO process by having a conference with her EEO Counselor.

The EEO process arises out a federal statute which provides, in pertinent part, that all personnel actions affecting employees in certain federal executive agencies shall be made free from any discrimination based on race, color, religion, sex, or national origin. 42 USCA §2000(e)(16)(a) (1974 ed.). The statute then provides generally for "appropriate remedies" to effectuate the above policy. Applicable regulations require that the aggrieved party first consult with an EEO counselor. 5 CFR §713.213. That regulation also sets forth specific steps that the Counselor must take after his initial conference. He must make necessary inquiries and seek a solution to the matter on an informal basis. He also is required to keep certain records. In addition, he must conduct his final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to his attention by the aggrieved person. If the final interview is not concluded within twenty-one days and the matter has not previously been resolved, the aggrieved person shall be informed in writing at that time of his right to file a complaint of discrimination. The regulation further provides that the notice shall inform the complainant of his right to file a complaint at any time after receipt of the notice up to fifteen calendar days after the final interview.

On or about September 8, 1977, the EEO Counselor held conferences, in accordance with the above regulation, with three of the grievant's supervisors, including the individual who had been named as the third-step official for purposes of the negotiated grievance procedure. Subsequently, on September 12, 1977, the EEO Counselor wrote the grievant the following letter:

This is to advise you that our final interview was completed today. Since I was unsuccessful in informally resolving your complaint..., you were advised by phone today that you may file a formal complaint with any of the officials listed on the Notice of Right to File a Discrimination Complaint.

The "notice" attached to the above letter instructed the grievant that she had fifteen calendar days within which to file a formal complaint. It further stated that the complaint could be filed in person or by mail at any one of six different locations. The first location listed was in Washington, D.C. Only one of the other locations listed was in Chicago, Illinois.

On September 16, 1977, the third stage official wrote the following letter to the grievant:

I am unable to consider your request for relief sought in the third stage grievance filed on September 8, 1977. The decision on the third stage is being deferred pending a resolution of the EEO complaint you recently filed covering this same issue. I will render a decision on the third stage grievance on receiving a notice of the final resolution of your EEO complaint.

The above official had been advised by the Division of Management and Administration and by the Assistant Regional Commissioner For Disability Insurance that the position taken in the above letter was appropriate. It appears that this decision was based, in part, upon section 713-1(H)(2) (appendix B) of the HEW Personnel instructions (SSA TN no. 128, 11/26/76), which states:

... A negotiated grievance procedure may not cover matters for which a statutory appeals procedure exists. Therefore, written allegations of discrimination made in connection with a grievance filed by any employee under a negotiated grievance procedure shall be terminated under that procedure and processed in accordance with [the agency EEO procedures].

... Written allegations of discrimination in connection with a grievance filed by an employee covered by [the agency grievance procedure] shall be referred for investigation and otherwise processed under [the EEO procedures] according to the following rules:

a. Acceptance of the discrimination allegation will automatically suspend related proceedings under [the agency grievance procedures]....

The September 16, 1977, letter from the third stage official was received by the grievant on September 20, 1977.

In a letter dated September 21, 1977, the Union president wrote to the respondent's Acting Principal Regional Official and requested that the grievant's case be referred to arbitration. He further stated as follows:

The Agency has refused to give a decision at the third step until a decision on the EEO complaint is rendered. Since regulations allow for employees to seek redress simultaneously through both Title VII and the negotiated agreement, the Union is invoking step four under the negotiated agreement.

On September 27, 1977, the third-step official wrote a letter to the Union steward who had been representing the grievant. He told the steward about the September 16 letter that he had written to the grievant and stated that "her grievance is being deferred pending final disposition of the EEO complaint she has filed." He then informed the steward that he was not the appropriate third stage official because he could not grant the relief requested by the grievant. He stated that he was forwarding the file to the appropriate third-stage official, the Assistant Regional Commissioner for Disability Insurance, for a reply under the negotiated grievance procedures.

The Assistant Regional Commissioner did not reply at that time because she was told by management's personnel officials that a reply was not necessary since the third-stage time period had expired and the request for arbitration had been filed. In any event, even if she had responded, she had been informed by the local EEO office that the EEO process was still continuing, and she would have taken the same position as the prior third-stage official.

On October 1, 1977, the above Union steward visited the grievant at her home and learned for the first time that no formal EEO complaint had been filed. This information was not communicated to management until October 17, 1977, when the pre-complaint charge was filed in the instant unfair labor practice proceeding.

Meanwhile the request for arbitration had been given to one of respondent's labor relations officers for appropriate response. Prior to making this response, this officer was informed by the local EEO office that the EEO case could still be pending, i.e. that the time for filing a formal EEO complaint had not yet expired and that there were seven places where a complaint could have been filed. This information, coupled with the Union's September 21 statement that the EEO procedure and the grievance could proceed "simultaneously," caused the labor relations officer to assume that the EEO case was still pending. With this belief, on October 5, 1977, the above officer responded to the Union president's September 21 request for arbitration. This response was signed by the appropriate management official. The response maintained management's position that the grievance and the EEO case could not proceed simultaneously. The respondent relied primarily on section 13(a) of the Executive Order which provides that a negotiated grievance procedure "may not cover matters for which a statutory appeal procedure exists." Respondent pointed out that any EEO case is subject to a statutory appeal procedure, and contended that the instant EEO case should take precedence over the operation of the grievance machinery because both cases involved the same factual questions. In this regard, both cases would require a thorough examination of management's reasons for denying the grievant's requested annual leave. Under the circumstances, respondent took the position that the arbitration request could be held in abeyance pending resolution of the EEO complaint.

On October 11, 1977, the Union's president wrote respondent a letter in which he requested the respondent to clarify it's position regarding the arbitrability of the grievant's case.

Prior to receiving management's reply 2/, on October 17, 1977, the Union's president filed the pre-complaint charge in the instant unfair labor practice proceeding. In this charge, the Union indicated to management for the first time that the grievant had decided not to file a formal EEO complaint.

2/ On October 21, respondent replied that the case would be arbitrable only if the grievant no longer contended that the denial of annual leave was due to discrimination.

Conclusions of Law

The primary issue presented for decision is whether respondent's refusal to process a grievance after the second step, and its subsequent refusal to proceed to arbitration, constituted a violation of section 19(a)(1) of the Executive Order. That section prohibits management from interfering with, restraining, or coercing an employee in the exercise of the rights assured by the Order. An employee has a protected right to properly utilize the negotiated grievance and arbitration machinery. See e.g. Army and Air Force Exchange Service, Dix-McGuire Consolidated Exchange, Fort Dix, New Jersey, A/SLMR No. 700. The essential question in this case is whether the respondent's actions were taken in good faith and were founded upon a legitimate belief that the grievant's pending EEO case precluded the simultaneous operation of the negotiated grievance and arbitration procedures.

The original grievance filed on August 18, 1977, objected to respondent's denial of a portion of the annual leave requested by the grievant. The basic contention of the grievant was that no legitimate reason existed for denying the leave in question. Respondent's position was that the productivity of the office would have been impaired if the leave had been granted. Shortly after filing her grievance, the grievant initiated an EEO proceeding as an additional means of obtaining the requested leave. The issue in the EEO case also focused upon management's reasons for denying the leave. The specific issue in the EEO proceeding was whether the denial was due to discrimination based on race, color, religion, sex, or national origin.

At the hearing, management officials testified that the decision to hold the grievance in abeyance (and subsequent refusal to proceed to arbitration) was based upon their belief that section 13(a) of the Order and respondent's published personnel instructions precluded the operation of these procedures while the related EEO case was still pending. I choose to credit this testimony. Section 13(a) of the Order provides, in part, that negotiated grievance procedures "may not cover matters for which a statutory appeal procedure exists." The same language is contained in the published personnel instructions upon which the respondent relied. Management contended that the grievance involved an inquiry into the reasons for denying annual leave and that the same inquiry would have to be made in the EEO case. The grievance alleges that there was no "legitimate" reason for

the denial of leave; by invoking the EEO procedures, the grievant was simultaneously alleging that the denial was due to an illegitimate reason, i.e. discrimination proscribed by 42 USCA §2000(e)(16)(a) (1974 ed.).

On the other hand, the Union argues that the respondent should not have refused to process the above grievance or proceed to arbitration. It contends, *inter alia*, that the grievance did not cover a matter for which a statutory appeal procedure existed since no "formal" EEO complaint had been filed. In this regard, the grievant only employed the procedures involving an EEO counselor, which constitute a prerequisite to the filing of a formal complaint. The Union also argues that the discrimination issue could be separated from the grievance and be resolved by means of a simultaneous EEO proceeding.

I hold that it would be improper to resolve the grievability and arbitrability questions at this time. Section 13(d) of the Order states that questions that cannot be resolved by the parties as to whether or not a grievance is on a matter for which a statutory appeal procedure exists, shall be referred to the Assistant Secretary for decision. The Regulations of the Assistant Secretary provide a procedure for such determinations. 29 CFR §205.1 *et seq.*

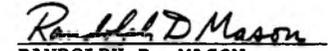
After a careful review of the record, I have found no convincing evidence indicating any intentional frustration of the grievance and arbitration machinery or any evidence that respondent otherwise acted in bad faith. 3/ Under the circumstances, I must conclude that the respondent did not violate §19(a)(1) of the Order. 4/ Naval Air Rework Facility, Cherry Point, North Carolina A/SLMR No. 849; Department of the Army, U.S. Army Materiel Development and Readiness Command, A/SLMR No. 1025.

3/ The Union also argues that the reassignment of a new third-step management official constitutes a dilatory tactic; however, the Union had already requested arbitration and there is no evidence that management's action was taken for the purpose of delaying the proceedings.

4/ The Union did not allege a violation of §19(a)(6); however, the result in this case would not have been changed had it done so. Naval Air Rework Facility, A/SLMR No. 849.

Recommendation

Having concluded that the respondent did not violate Section 19(a)(1) of the Order, I hereby recommend that the complaint filed in this case be dismissed in its entirety.


RANDOLPH D. MASON
Administrative Law Judge

Dated: August 8, 1978
Washington, D.C.

RDM:Zee

September 26, 1978

A/SLMR No. 1129

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NORTH-ATLANTIC REGION,
INTERNAL REVENUE SERVICE,
DEPARTMENT OF THE TREASURY
A/SLMR No. 1129

NORTH-ATLANTIC REGION,
INTERNAL REVENUE SERVICE,
DEPARTMENT OF THE TREASURY

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 15 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by instituting a new working condition, namely, the monitoring of Appeals Officers' conferences, without notifying the Complainant and negotiating with respect to such action.

The Administrative Law Judge found, among other things, that the monitoring of conferences constituted a continuation of an established practice, and thus the Respondent was under no obligation to negotiate with the Complainant on the matter. Accordingly, he recommended dismissal of the complaint.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

Respondent

and

Case No. 30-07730(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 15

Complainant

DECISION AND ORDER

On August 15, 1978, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation. ^{1/}

^{1/} In view of the Administrative Law Judge's finding, with which I concur, that the supervisory monitoring of Appeals Officers' conferences constituted a continuation of a prior practice rather than a new policy or change in policy, I find it unnecessary to pass upon his further conclusion that such monitoring is a right privileged to management under Sections 11(b) and 12(b) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-07730(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 26, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of :
North-Atlantic Region :
Internal Revenue Service :
Department of the Treasury :
Respondent : Case No. 30-07730 (CA)
and :
American Federation of Government :
Employees, AFL-CIO, Local 15 :
Complainant :
.....

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National Representative
American Federation of Government
Employees, AFL-CIO
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For the Complainant

Before: RHEA M. BURROW
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is an unfair labor practice proceeding in which a formal hearing of record was held on May 31, 1978 in New York City, New York, pursuant to Executive Order 11491, as amended, (hereinafter referred to as the Order).

The Respondent in a complaint filed on April 22, 1977 was charged with violating Section 19(a)(1) and (6) of the

Order by instituting a new working condition, namely, monitoring employee Appeals Officers' Conferences without notifying the union and refusing to negotiate the Act of such monitoring. 1/

Upon the basis of the entire record, including the evidence adduced, the briefs submitted by the parties and my observation of the witnesses, I make the following findings, conclusions and recommendations.

Position of the Parties

The matter for consideration in this proceeding is the final decision of the Respondent refusing to bargain on the alleged monitoring practice of Appeals Officers' Conferences by management supervisors. In this connection Counsel for the Complainant, American Federation of Government Employees, AFL-CIO Local 15, (hereinafter referred to as the union), stated at the hearing "...that the Agency violated Sections 19(a)(1) and (6) of the Order in that they refused to negotiate on the decision concerning monitoring of journeymen Appeals Officers' Conferences. We believe their refusal is improper and is properly a matter before the Assistant Secretary. The remedy that we seek is that they be directed to negotiate on this matter which we feel is within the personnel policies and practices that are fully negotiable under the Order..."

The Respondent urged that monitoring Appeals Officers' Conferences did not constitute a unilateral change in working conditions or change in personnel policies and practices as monitoring had been done periodically in the past and well before 1976; also, that utilization of supervisory observations of appellate conferences is within the privileged prerogative of management and management was not required to bargain on the issue under the Order.

1/ The parties stipulated at the hearing that impact and implementation of the subject decision by supervisors in the New York Appellate Office had been presented to the Federal Labor Relations Council and is not an issue with the instant hearing. The Council later issued a decision in the matter on July 7, 1978 (FLRC No. 78A-4) holding in part that the instant appeal, attempting to raise issues as to the negotiability of the disputed proposals under the Order, is prematurely filed and the conditions for Council review of such issues, as prescribed by section 1(c)(4) of the Order and section 2411.22 of the Council's rules (5 C.F.R. 2411.22) have not been met.

Findings of Fact

1. At all pertinent and material times herein, the Complainant was the exclusive representative of Appeals Officers employees and/or Conferees in the North-Atlantic Region, Internal Revenue Service, Department of the Treasury including offices located in New York City, Boston, Massachusetts, New Haven, Connecticut, and Long Island, New York.

2. Appeals officers serve in government GS grades of 12, 13 and 14. In the New York City office there is a Chief who is head of the office and five Associate Chiefs who each supervise a group of Appeals Officers in the GS grades indicated. The alleged violation in this proceeding relates to the New York City office.

3. The journeyman level for hiring GS-12 Appeals Officers was reduced from GS-13 about August 1976 when it was ascertained that there was a sufficient workload to establish a full working level at the GS-12 level. Prior to that time applicants were hired at GS-12, which was a developmental level clearly identified, and, they remained at this level until they qualified on-the-job for the GS-13 journeyman grade as an Appeals Officer and/or Conferee.

4. For a number of years both prior to and subsequent to 1976 there has been monitoring in the New York City office by certain Associate Chief supervisors, of appellate conferences held by newly hired Appeals Officers and/or Conferees with taxpayers and their representatives. Also, on occasions, both before and after 1976, such supervisors sat in on, or monitored appellate conferences, held by experienced journeymen officers in Grades 13 and 14.

5. In monitoring the appeal conferences between the Appeals Officers and/or Conferees and the taxpayer and his representative, the Associate Chief does not participate in any of the discussions. Among the duties emphasized in the position description for Appeals Officers in each grade 12, 13 and 14 are:

Conducts conferences and negotiations with taxpayers or their representatives in a dignified and orderly manner, with displayed impartiality. Negotiates settlement of cases on the basis of facts developed and applicable law and regulations, considering the hazards of litigation. Raises new issues when pertinent and material.

The monitoring of conferences over the years by Associate Chiefs, though infrequently used, has been considered by the Agency as an available evaluative tool and means of identifying Appeals Officers' training and development needs with regard to the performance of their work in conducting conferences. Performance evaluation is a fundamental supervisory responsibility to: (1) rate each employee in accordance with Service Performance Rating Plan; (2) to evaluate and recommend best qualified individuals for promotion; and (3) to identify employees in need of additional training.

6. The monitoring of Appeals Officers in the New York office was alleged to have become a continuing action on the part of the Respondent on or after September 8, 1976. The record establishes that the Complainant was aware of an earlier incident of monitoring in April 1976. Appeals Officers were generally afforded notice that a hearing would be monitored about 20 minutes to two hours before the session. At the hearing there was evidence of monitoring sessions of Appeals Officers by one or more Associate Chiefs in the New York office during 1974 and 1975 as well as later sessions in 1976 and 1977. Monitoring as early as 1970 was also reported.

7. From September 1976 through April 1978, 3,452 conferences were held by employee Appeals Officers in the New York City Appellate office and of that number 37 were observed or monitored by Associate Chiefs. The number of monitoring sessions prior to 1976 is not indicated by statistical compilation but credible testimony at the hearing referred to and establishes that there has been occasional monitoring of Appeals Officers' Conferences since at least 1970.

Discussion and Conclusions

During the term of an agreement between the Complainant union and the Respondent Activity, supervisors in the Activity's Appellate Division on various occasions attended and observed taxpayer conferences with Appeals Officers. The union expressed concern over such supervisory observation of its appeals officers during 1976 and alleged such observation constituted a change in practice and was negotiable. The activity urged that the practice was one that had always been available to a supervisor at the option of the Chief of each Appellate Office and the practice had been utilized sporadically in recent years in the New York office of the North-Atlantic Region; even if it were not a past practice by the activity, it was urged the matter was exempted from the activity's obligation to negotiate. The activity's refusal to negotiate with the union on the subject matter of

the activity's right to have supervisors monitor Appeals Officers' Conference techniques was alleged to violate Section 19(a) (1) and (6) of the Order.

Section 19(a) (1) and (6) of the Order provides that "Agency management shall not (1) interfere with, restrain, or coerce an employee in the exercise of rights assured by this Order; and (6) refuse to consult, confer or negotiate with a labor organization as required by this Order.

Section 11(a) of the Order imposes upon an Agency the obligation to meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions of unit employees.

Section 11(b) of the Order, however, makes it clear that the obligation to meet and confer (imposed by Section 11(a)) does not include matters with respect to the mission of the Agency; its budget; its organization; the number of employees assigned an organizational unit, work project or tour of duty; the technology of performing its work; or, its internal security practices.

Under Section 12(b) of the Order management officials of the Agency retain the following rights, among others, in accordance with applicable laws and regulations:

- (1) to direct employees of the agency;
- (2) to hire, promote, transfer, assign, and retain employees within the Agency and to suspend, demote, discharge, or take other disciplinary action against employees;
- *****
- (4) to maintain the efficiency of the Government operations entrusted to them;
- (5) to determine the methods, means and personnel by which such operations are to be conducted.

It is evident in this proceeding that both before and after September 1976 the duties and obligations of unit employee Appeals Officers remained the same, standards of case handling performance including work assignments, methods and techniques utilized in conducting hearing conferences and work performance and the means utilized to accomplish daily tasks and case handling were likewise unaffected.

Section 11(a) of the Order describes the limited areas which are subject to the bargaining obligation on the part

of agencies and exclusive representatives. The section has been interpreted to encompass those matters which materially affect and have a substantial impact on personnel policies, practices and general working conditions.

The record clearly establishes that certain Associate Chief supervisors have on occasions, at least since 1970, monitored both new and experienced Appeals Officers Conferences with taxpayers. I conclude that the Respondent was not obligated to negotiate with the Union concerning the observation and monitoring of Conferences of its Appeals Officers because such observations constituted continuation of a prior practice applicable to both new and experienced Appeals Officers. There was neither a new policy or change in policy by reason of supervisory monitoring by Associate Chiefs of their Appeals Officers in 1976 in the New York City office which requires the Respondent to negotiate with the Complainant union. The record does not establish that except for the New York City office, supervisory monitoring was done elsewhere in the region.

As heretofore expressed, the limited areas subject to the bargaining obligation under Section 11(a) of the Order encompass those matters which materially affect and have a substantial impact on personnel policies, practices and general working conditions. From the record, it might be inferred that there was some increase in number of individual monitoring sessions of Appeals Officers by supervisors commencing about September 1976 than previously, but, this had no discernible effect upon Appeals Officers working conditions; it affected only insofar as a term or condition of employment is concerned, supervisors, rather than Appeals Officers, who sat in on the monitoring sessions to observe and evaluate those assigned to them for supervision.

Decisions of the Assistant Secretary indicate that even though an agency is privileged to make unilateral decisions on the matters set forth Sections 11(b) and 12(b) of the Order, nevertheless, prior to changing a policy or working condition encompassed by these Sections an Agency must provide the exclusive representative an opportunity to negotiate the procedures observed in reaching the decision or implementing the action and the impact on adversely affected employees. 2/

2/ See United States Department of the Navy, Bureau of Medicine and Surgery Great Lakes Naval Hospital, Illinois 3 A/SLMR p. 376, A/SLMR 289; Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, 3 A/SLMR 626, A/SLMR No. 329.

I have previously held that the monitoring of new and experienced journeymen Appeals Officers hearing conferences during 1976 were not essentially different from those held since at least 1970. The principal objective of the Appellate Division is, generally, to administratively dispose of tax controversies in accordance with the law, on a basis which is fair and impartial to both the taxpayer and the government. Within this context, the Appellate tax conference has been utilized to resolve tax disputes and accomplish the mission of the Activity. The monitoring of Appeals Officers hearing-conferences by supervisory Associate Chiefs is concluded to be a right privileged to management under Sections 11(b) and 12(b) of the Order.

I further conclude that the Respondent did not interfere with, restrain, or coerce an employee in the exercise of rights assured by this Order; or, refuse to consult, confer or negotiate with a labor organization as required by the Order; and, that the Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of Sections 19(a) (1) and (6) of the Order. 3/

Recommendation

Having found from the record 4/ that the Respondent has not engaged in certain conduct prohibited by Sections 19(a) (1) and (6) of Executive Order 11491, as amended I recommend that the Secretary of Labor for Labor Management Relations enter an Order dismissing the Complaint herein in its entirety.

Rhea M. Burrow
RHEA M. BURROW
Administrative Law Judge

Dated: August 15, 1978
Washington, D.C.

3/ The motion to dismiss the proceeding because of timeliness was not referred to me by the Regional Administrator prior to the hearing and in view of the determination on the merits I find it unnecessary to further consider the denial of the motion at the hearing.

4/ Having announced at the hearing I would accept briefs postmarked on or before the filing date, I consider them to have been timely filed.

RMB:hjc:yw

September 26, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

FEDERAL AVIATION ADMINISTRATION,
AIRWAY FACILITIES DIVISION,
PACIFIC-ASIA REGION
A/SLMR No. 1130

This case involved a petition filed by the Professional Airways Systems Specialists (PASS) seeking an election in a unit of all employees of the Airway Facilities Division, Pacific-Asia Region. The Activity contended that the unit sought by the PASS is inappropriate under Section 10(b) of the Order as the employees do not share a community of interest separate and distinct from other Federal Aviation Administration (FAA) employees and that such unit would lead to fragmentation and would not promote effective dealings and efficiency of agency operations. It also contended that the only appropriate unit for the subject employees would be a nationwide unit. The Intervenor, American Federation of Government Employees, AFL-CIO, Local 2555 (AFGE), the current exclusive representative of the employees in the claimed unit, contended that the unit remained appropriate and that its relationship with the Activity was effective.

The Assistant Secretary found that the claimed nationwide unit was appropriate for the purpose of exclusive recognition. In this regard, he noted that the employees in such unit share a common mission, common overall supervision, generally similar job classifications and duties, and that they also enjoy uniform personnel policies and practices and labor relations policies established under authority delegated to the Regional Director of the FAA. He also found that such unit would promote effective dealings and efficiency of agency operations, particularly in view of the established bargaining history in the petitioned for unit.

Accordingly, the Assistant Secretary ordered an election in the nationwide unit found appropriate.

A/SLMR No. 1130

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
AIRWAY FACILITIES DIVISION,
PACIFIC-ASIA REGION

Activity

and

PROFESSIONAL AIRWAYS SYSTEMS
SPECIALISTS

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2555

Intervenor

Case No. 73-958(RO)

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Dale L. Bennett. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. In its petition, the Petitioner, Professional Airways Systems Specialists, hereinafter called PASS, seeks an election in an existing unit of essentially all professional and nonprofessional employees employed in the Federal Aviation Administration's (FAA) Airway Facilities Division, Pacific-Asia Region, located in the Hawaiian Islands, Guam and American Samoa. The Activity contends that the unit sought is inappropriate under Section 10(b) of the Order as the employees involved do not share a community of interest separate and distinct from other Airway Facilities Division employees and that such a unit would not promote effective dealings and efficiency of agency operations. In this regard, the

Activity argues that the only appropriate unit is a nationwide unit which would promote efficiency of agency operations and effective dealings. The Intervenor, the American Federation of Government Employees, AFL-CIO Local 2555, hereinafter called AFGE, which is the current exclusive representative of the employees in the claimed unit, contends that its unit remains appropriate and that its relationship with the Activity remains effective.

The mission of the FAA is to provide a safe and expeditious flow of aircraft in the nation's airspace system. To achieve this mission, the FAA has been organized into five major operating divisions among which is the Airway Facilities Division. The FAA is organized into a headquarters located at Washington, D.C., and 12 geographically defined regions among which is the Pacific-Asia Region. Each FAA Region is headed by a Regional Director and is divided into five major operating divisions, each headed by a chief who reports to his respective Regional Director. The mission of the Airway Facilities Division in the Pacific-Asia Region is to install and maintain the equipment and facilities of the FAA within that Region. To achieve this mission, the division is comprised of three branches, the Program, Planning and Evaluation Branch, the Engineering Establishment Branch, and the Maintenance Operations Branch which are located in the ten sectors of the Region.

The history of bargaining at the Activity reveals that the AFGE was certified on May 25, 1974, as the exclusive representative of a unit of all professional and nonprofessional employees employed in the Airway Facilities Division, Pacific-Asia Region, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined in the Order. At the hearing, the parties stipulated that the Activity and the AFGE entered into a one-year negotiated agreement in 1975 which agreement was annually renewable. ^{1/} On July 21, 1977, the PASS filed the instant petition for the employees in the existing unit exclusively represented by the AFGE.

The record reveals that there are approximately 255 employees in the petitioned for unit, the majority of whom are classified as Electronic Technicians, GS-0856 series. These employees are responsible for the installation and maintenance of all airways airspace system facilities within the geographic bounds of the Activity. The qualifications for

^{1/} On December 18, 1975, the Assistant Secretary issued his Decision and Direction of Elections in Federal Aviation Administration and Federal Aviation Administration, Eastern Region, 5 A/SLMR 776, A/SLMR No. 600 (1975), finding that either a nationwide, a region-wide or a sectorwide unit of Airway Facilities Division employees may be appropriate for the purpose of exclusive recognition under the Order. At the time of the filing of the petitions which resulted in the Decision and Direction of Elections in A/SLMR No. 600, employees in the petitioned for unit herein were included in the AFGE's exclusively recognized unit which was subject to the above-noted negotiated agreement. As the petitions were untimely filed with respect to the AFGE's unit, such unit was expressly excluded from the elections ordered in A/SLMR No. 600.

such employees are established on a nationwide basis by the FAA and all employees engaged in such functions must be certified based upon the standardized qualifications. Further, the handbooks utilized by employees have been developed nationally by the FAA to provide uniformity in the maintenance of equipment. As a result, the job skills and duties of the employees in the sought unit are substantially similar to those similarly classified employees in other regions throughout the United States.

The parties stipulated that the FAA has a policy of delegating authority with regard to personnel and labor relations matters to the lowest possible level. The authority for such matters has been delegated to the Regional Director of the Pacific-Asia Region subject to FAA and Civil Service Commission guidelines. The area of consideration for promotions involving technicians is frequently determined by the number of qualified applicants available. Thus, while the area of consideration may be confined to an individual sector, it may also be regionwide or nationwide in scope. Consideration for reductions-in-force is generally regionwide, although it may be larger in the case of large scale reductions.

Based on the foregoing circumstances, I find that the petitioned for regionwide unit remains appropriate for the purpose of exclusive recognition within the meaning of Section 10(b) of the Order. Thus, I find that the unit sought herein continues to constitute a comprehensive grouping of employees who share a clear and identifiable community of interest. In this regard, as noted above, all employees of the Activity share in a common mission, common overall supervision, generally similar job classifications and duties, and they also enjoy uniform personnel and labor relations policies and practices established under authority delegated to the Regional Director of the Pacific-Asia Region. Further, noting that the petitioned for unit is coextensive with the regionwide unit represented by the AFGE since 1974, that there is no evidence of any change in its scope and character since its certification, and that there is an established bargaining history between the parties with respect to such unit, I find that the petitioned for unit will promote effective dealings and efficiency of agency operations.

Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Section 10(b) of Executive Order 11491, as amended:

All professional and nonprofessional employees employed in the Airway Facilities Division, Pacific-Asia Region, in the Hawaiian Islands, Guam and American Samoa; excluding employees engaged in Federal personnel work other than a purely clerical capacity, management officials, guards, and supervisors as defined in the Order.

As stated above, the unit found appropriate includes professional employees. However, the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I shall, therefore, direct that separate elections be conducted in the following groups:

Voting Group (a): All professional employees of the Airway Facilities Division, Pacific-Asia Region, in the Hawaiian Islands, Guam and American Samoa; excluding all nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

Voting Group (b): All nonprofessional employees of the Airway Facilities Division, Pacific-Asia Region, in the Hawaiian Islands, Guam and American Samoa; excluding all professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

Employees in the nonprofessional voting group (b) will be polled whether they desire to be represented for the purpose of exclusive recognition by the Professional Airways Systems Specialists; the American Federation of Government Employees, AFL-CIO, Local 2555; or by neither of these labor organizations.

Employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether they wish to be represented for the purpose of exclusive recognition by the Professional Airways Systems Specialists, the American Federation of Government Employees, AFL-CIO, Local 2555; or by neither of these labor organizations. In the event that a majority of the valid votes of voting group (a) are cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued by the Area Administrator indicating whether the Professional Airways Systems Specialists; the American Federation of Government Employees, AFL-CIO, Local 2555; or neither of these labor organizations was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon the results of election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find the following units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees of the Airway Facilities Division, Pacific-Asia Region, in the Hawaiian Islands, Guam and American Samoa; excluding all nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

(b) All nonprofessional employees of the Airway Facilities Division, Pacific-Asia Region, in the Hawaiian Islands, Guam and American Samoa; excluding all professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

2. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find the following unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees of the Airway Facilities Division, Pacific-Asia Region, in the Hawaiian Islands, Guam and American Samoa; excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as soon as possible but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll immediately preceding the date below including employees who did not work during that period because they were out ill, or on vacation, or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or who were discharged for cause since the designated payroll period and who

have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the Professional Airways Systems Specialists; the American Federation of Government Employees, AFL-CIO, Local 2555; or neither.

September 27, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Dated, Washington, D.C.
September 26, 1978

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

VETERANS ADMINISTRATION
WASHINGTON, D.C.
A/SLMR No. 1131

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees (NFFE), Ind., Local Union 1631 (Complainant) alleging that the Respondent violated Section 19(a)(1) of the Order by certain of its statements made to Lena Hall, the Complainant's President, at meetings during which patient care was discussed. The Respondent contended that whatever statements were made must be considered in their context, i.e., meetings wherein Hall's disclosure of confidential patient information was questioned; that the disclosure of confidential information was improper and therefore unprotected activity; and that patient care as a retained management right is not a proper concern of the Complainant in the framework of personnel policies, practices or working conditions.

During 1976, nurses at the Veterans Administration Hospital in Amarillo, Texas, who are unit employees, became concerned about irregularities in patient care. On October 13, 1976, the NFFE's Local President discussed the matter with the Hospital Director and was advised an investigation would be conducted. On October 15, the Local President expressed the same concern with NFFE's National Office and forwarded a list of patients' names and diagnoses. On November 1, and again on November 4, representatives of the Veterans Administration held meetings with the Local President wherein the statements which are alleged to be violative of the Order were made.

Based upon credibility resolutions, the Administrative Law Judge found that certain statements were, in fact, made at the November 1 and 4 meetings, and that these statements had a restraining effect on the Local President's right to discuss patient care as it affected unit employees, a matter which he found to be a proper concern of the Complainant. He further found that certain remarks made at the November 4 meeting were violative of Section 19(a)(2) of the Order as they might tend to discourage membership in a labor organization.

In the Assistant Secretary's view, patient care can relate to the terms and conditions of unit employees, and to the extent that it does, intra-union communication with respect to such matters is a protected activity. In the instant case, however, the Assistant Secretary found the communication, which contained patients' names and diagnoses, to be confidential in nature and its disclosure by the Complainant to its National Office was, therefore, unprotected.

However, in the particular circumstances of this case, the Assistant Secretary found that the Respondent's statements to the effect that patient care was not a concern of the Complainant, and, that the nurses should not have sought the assistance of their exclusive representative, to be violative of Section 19(a)(1). In this regard, the Assistant Secretary noted, as did the Administrative Law Judge, that the Respondent made no attempt, in either of the meetings, to restrict its comments only to the alleged violations of the Privacy Act and other regulations concerning the confidentiality of patient records. Rather, the Respondent made broad, general remarks restricting the Complainant's legitimate concern with patient care, generally, which had a restraining effect on the exercise of rights guaranteed to the Complainant and to unit employees. Under these circumstances, the Assistant Secretary found that the Respondent violated Section 19(a)(1) of the Order. However, contrary to the Administrative Law Judge, the Assistant Secretary found no basis for a Section 19(a)(2) violation in this regard, as such allegation was beyond the scope of the instant complaint, and not properly before the Assistant Secretary.

Accordingly, the Assistant Secretary ordered the Respondent to cease and desist from the conduct found violative of the Order, and to take certain affirmative actions.

- 2 -

A/SLMR No. 1131

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION
WASHINGTON, D.C.

Respondent

and

Case No. 63-7203(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, IND., LOCAL UNION 1631

Complainant

DECISION AND ORDER

On June 21, 1978, Administrative Law Judge Ben H. Walley issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, to the extent consistent herewith.

The Complainant, which represents a unit of nurses at the Veterans Administration Hospital in Amarillo, Texas, alleged that the Respondent violated Section 19(a)(1) of the Order by the statements made to Lena Hall, the Complainant's President, at meetings during which the topic of patient care was discussed. The Respondent took the position that not all of the statements which were alleged to have been made were actually made; that whatever statements were made must be considered in the context of the questioning of Hall regarding her improper and, therefore, unprotected disclosure of confidential patient information; and that patient care, as a retained management right, is not a proper concern of the Complainant within the framework of employee personnel policies, practices or working conditions.

The record reveals that during 1976, the nurses became concerned about irregularities in patient care. On October 13, 1976, Hall met with the Hospital Director to discuss the problem and was advised that an investigation would be conducted. Thereafter, on October 15, Hall sent a letter to the National Office of the National Federation of Federal Employees (NFFE) expressing the same concern with respect to patient care and enclosing a list of patients' names and diagnoses. On November 1, the Hospital's Personnel Officer called Hall to a meeting to ascertain whether she had disclosed patient information to the NFFE National Office, and, if so, to advise her that such disclosure was improper. He then made a comment to the effect that patient care was not a concern of the Complainant and that because the Complainant had engaged in unprotected activity, he would explore the possibility of filing an unfair labor practice complaint. He further added that there had possibly been a violation of the Privacy Act based upon the disclosure of confidential information.

Subsequently, on November 4, an investigator from the Respondent's central office spoke with Hall during the course of his investigation into the irregularities in patient care. The investigator questioned, among other things, why the nurses had not gone through proper agency channels in reporting such irregularities. The parties are in dispute as to certain other alleged remarks made at this meeting.

The Administrative Law Judge initially determined that patient care was a proper concern for both parties and that it could, in fact, have an adverse impact on the working conditions of unit employees. He then found that the Hospital Personnel Officer's statements made at the November 1 meeting were violative of Section 19(a)(1) of the Order, insofar as they restrained Hall in the exercise of her rights to discuss patient care as it affected the working conditions of unit employees. Similarly, and based upon his credibility resolution, he found that certain statements made at the November 4 meeting, which were essentially critical of the nurses for having sought the assistance of their exclusive representative, were not only violative of Section 19(a)(1), but also were violative of Section 19(a)(2) of the Order, on the basis that such statements might tend to discourage membership in a labor organization. ^{1/} Finally, the Administrative Law Judge declined to pass on the question whether the Complainant had improperly disclosed confidential patient information, as he determined such issue was not properly before him.

^{1/} The complaint herein, which was limited to a Section 19(a)(1) allegation, was originally dismissed by the Regional Administrator, but was subsequently remanded by the Assistant Secretary pursuant to a request for review of the Regional Administrator's dismissal action. On remand, the Regional Administrator, for the first time, raised the possibility of a Section 19(a)(2) violation. The Complainant sought to amend its complaint in this regard at the hearing and was so permitted by the Administrative Law Judge.

In agreement with the Administrative Law Judge, I find that matters concerning patient care can relate to the terms and conditions of employment of unit employees such as the nurses involved herein and to the extent that it does, patient care becomes a legitimate concern of the nurses' exclusive representative. Accordingly, intra-union communications with respect to such matters may constitute, in certain circumstances, a protected activity under the Order. In the instant case, however, I find that the information transmitted by the Complainant to its National Office was confidential in nature, and its disclosure was, therefore, not a protected activity. Thus, in my view, the information communicated herein by the Complainant's President went beyond the bounds of the legitimate concern of Complainant in divulging the confidential medical history of identified patients.

However, in the particular circumstances of this case, I find, in agreement with the Administrative Law Judge, that the statement made on November 1 by the Personnel Officer to Complainant's President, that patient care was not her concern, interfered with employee rights assured by the Order and was, therefore, independently violative of Section 19(a)(1) of the Order. Similarly, the statements found by the Administrative Law Judge to have been made by an Agency representative at the November 4 meeting, which were critical of the nurses for having sought the assistance of their exclusive representative, were also violative of Section 19(a)(1) of the Order. In so finding, I note, as did the Administrative Law Judge, that the Respondent's representatives made no attempt, in either of the meetings, to restrict their comments only to the alleged violations of the Privacy Act and other regulations covering confidentiality of patient records. Rather, its representatives made broad, general remarks restricting the Complainant's legitimate concern with patient care, which in my opinion had a restraining effect on the exercise of the Complainant's and unit employees' rights as guaranteed by the Order. Under these circumstances, I find that the Respondent's conduct violated Section 19(a)(1) of the Order. However, contrary to the Administrative Law Judge, I find no basis upon which to conclude that the Respondent's statements at the November 4 meeting were violative of Section 19(a)(2) of the Order as such allegation was beyond the scope of the complaint herein, and was not properly before the Assistant Secretary.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Veterans Administration, Washington, D.C. and the Veterans Administration Hospital, Amarillo, Texas, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees and their representative, the National Federation of Federal Employees, Ind., Local Union 1631, in the exercise of their rights assured by Executive Order 11491, as amended.

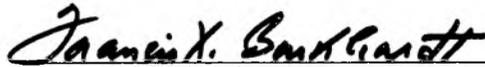
(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Post at its facility at the Veterans Administration Hospital, Amarillo, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Hospital Director, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Hospital Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
September 27, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce employees and their representative, the National Federation of Federal Employees, Ind., Local Union 1631, in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Rm. 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 600
San Francisco, California 94105



REPLY TO SAN FRANCISCO
AREA CODE 415 556-0555

In the Matter of

VETERAN'S ADMINISTRATION
WASHINGTON, D.C. Respondent
and
NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, IND., LOCAL UNION 1631 Complainant

CASE NO. 63-7203(CA)

D. Keith Rollins, Esquire
Office of District Counsel
1400 N. Valley Mills Drive
Waco, Texas
For the Respondent

John Helm, Staff Attorney
National Federation of
Federal Employees
1016 16th Street, N. W.
Washington, D. C.
For the Complainant

Before: BEN H. WALLEY
Administrative Law Judge

Recommended Decision and Order

This case arises under Executive Order 11491, as amended, and on January 7, 1977, Local 1631, National Federation of Federal Employees, Independent, 5118 Chisolm Trail, Amarillo, Texas 79109, hereafter referred to as Complainant, filed a Complaint against Veterans Administration, 810 Vermont Avenue, N.W., Washington, D.C., Thomas J. Fitzgerald, M.D., the person to contact, hereafter referred to as the Respondent, said Complaint alleging an unfair labor practice because of conduct alleged to be violative of Executive Order 11491, as amended, section 19(a), subsection (1), hereafter referred to as the Order.

The substance of the Complaint was Ms. Lena Hall, President of NFFE Local 1631, was called into conference by Mr. Kenneth Gossett, Personnel Officer at Amarillo VA Hospital, and was confronted with a "rumor" that she had contacted NFFE, National, requesting an investigation into "patient care" at the hospital; that "patient care" was none of her business and was not a protected right under the Executive Order; and that he, Mr. Gossett, felt it necessary to advise the Director to file an unfair labor practice against her.

In addition, and some four days later, Ms. Hall was contacted by a Dr. Hughes from VA Central Office and allegedly "began the conversation by stating that she had been very stupid to take the problem relating to patient care to the Union." He expressed the probability of a suit against VA for sending this information to the Union. (Background for the charge will be hereafter set out in the Findings of Fact).

The Area Administrator investigated the Complaint and filed his report with the Regional Administrator and on March 17, 1977, the Regional Administrator notified Counsel for Complainant that release of the information in question "is not an action protected by the Order" and dismissed the Complaint in its entirety (Asst. Sec. Ex. 6(a)(1)). Promptly, and on March 28, 1977, Counsel for Complainant appealed the dismissal Order to the Assistant Secretary for Labor-Management Relations (Asst. Sec. Ex. 6(a)(2)), and on September 2, 1977, the Assistant Secretary reversed the Regional Administrator's dismissal order.

Therefore, inasmuch as it appeared there was a reasonable basis for the Complaint and no satisfactory settlement of the difference between the parties could be found, on September 26, 1977, the Regional Administrator advised the parties that he was going to and did issue Notice of Hearing to be held in Amarillo, Texas, on November 2, 1977.

In referring this Complaint for hearing and disposition, the Office of the Regional Administrator, LMSA, Kansas City Region, requested evidence and testimony be adduced on the following issues:

1. Does the local union officer have the right to communicate with the parent organization concerning hospital care? Is this a protected activity assured under Section 1(a) of the Order?

2. Did the Agency's interference with the rights of the individual constitute an independent violation of Section 19(a)(1). Furthermore, if the interference took the form of discrimination against the local union officer in regard to hiring, tenure, promotion or other conditions of employment, would this not also constitute a violation of Section 19(a)(2).

Further, the parties were permitted to develop and offer any evidence relevant to the allegations contained in the Complaint.

Since the Regional Administrator raised the question as to a possible violation of section 19(a)(2) of the Order, Complainant did, at the beginning of the hearing, move to amend the Complaint to include a charge of violation of section 19(a)(2). For reasons hereafter set out in the Findings of Fact and Conclusions of Law, the motion was granted over objections duly made.

At the hearing held, the parties were afforded full opportunity to be heard, to offer, examine, and cross-examine witnesses and to introduce evidence considered relevant to the aforesaid issues and other issues considered by them to be relevant to their position in the premises. After hearing the testimony of the witnesses and observing their demeanor, having received the exhibits and the transcripts, having considered the post-hearing briefs filed herein, and based upon the entire record, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

1. Inasmuch as there is evidence of record, via exhibits, that should not be further publicized, and especially since I conclude that much of that evidence is not relevant to the stated issues and specific identification of such evidence is not necessary to a resolution of the issues involved, I shall make only such general references as are considered necessary to support the conclusions drawn therefrom.

2. Although no evidence was offered, I find and conclude from a review of the total record and the actions and responses of the parties hereto, that at all times material to the issues here involved Local 1631 National Federation of Federal Employees, Independent, Amarillo, Texas, was the exclusive representative of the employees in the unit involved and had the responsibil-

ities imposed upon it by section 10(e) of the Order; that Ms. Lena Hall, RN, the employee most directly involved, was President of Local 1631 which, although "...independent", was affiliated with the National Federation of Federal Employees.

3. Ms. Lena Hall, RN, and President of NFFE Local 1631, VA Hospital, Amarillo, and other nurses, all employees of the hospital, became concerned and discussed patient care and their ability to discharge their duties to the patients as they were affected by the scheduling of surgery at the hospital. A decision was made to assemble the specific information about incidents of which they were concerned and have Ms. Hall present it to Mr. Leon E. Edman, Director, VA Hospital, (hereafter Mr. Edman), for his information, investigation and action.

4. The information about some nineteen (19) patients, including name, diagnoses, treatment and results, was assembled, in writing, and on October 13, 1976, was presented to Mr. Edman by Ms. Hall and Mrs. Joan Houchin. He examined the material, realized the impact of the presentation and promised a full inquiry. Inasmuch as Dr. George Smith, Chief of Staff, was going to be out until October 21, and this fact was made known to them, Mr. Edman requested time and "I understood they agreed to let me" have the time. But, after their departure, Mr. Edman decided to "get on with it" and talk to Dr. Pastma, Chief of Medicine, who was acting Chief of Staff. Dr. Pastma desired to talk with Dr. Scott and Dr. Goding, each on the staff, which he did the following day. Once discussion had begun, concern arose and unrest became evident.

5. A couple of days after the information had been presented to Mr. Edman and he had begun his investigation (although he had requested of Ms. Hall time, implying that he would wait until Dr. Smith returned on October 21), a doctor friend (not otherwise identified for fear of reprisal) contacted Ms. Hall and she testified that he said "... that I was going to lose my job, to waste no time, to get someone down here from the central office." Whereupon, Ms. Hall, accepting advice from her friend, made contact with her national representative and further contacts by him resulted in advice to transmit to the National President of NFFE a request for help in the investigation. This request was made on October 15, 1976, (Comp. Ex. #2), and included a copy of the information furnished Mr. Edman two days earlier.

6. On October 20, 1976, Dr. Nathan T. Walkomir, President of NFFE, transmitted to the Veterans Administration the information received by him from Ms. Hall, which was acknowledged by Dr. John D. Chase, Chief Medical Director, on November 5, 1976, and he advised that further information would be furnished when the matter had been looked into (Comp. Ex. #3). During the time from transmittal to acknowledging receipt of the "information", the investigation was in progress.

7(a). On November 1, 1976, Mr. Kenneth Gossett, Personnel Officer, VA Hospital, Amarillo, Texas, (hereafter Mr. Gossett), asked Ms. Hall to come to his office, which she did. Since the testimony and exhibits reflect two views as to what transpired at this meeting which may be considered contradictory, I find it necessary to discuss them fully.

(b). Ms. Hall testified that when Mr. Gossett called her into the office, on November 1, 1976, he said he had heard rumors that I had taken this matter to National headquarters and when I confirmed it, he said "something to the effect that I think it's fair to tell you that I am going to advise Mr. Edman to file an Unfair Labor Practice against you ... that our actions were not protected under the Executive Order, that patient care was none of our business." (Tr. p. 123). At this juncture it is significant to observe that the "meeting" began by a claim of fairness in informing Ms. Hall that he (Mr. Gossett) intended to advise Mr. Edman "to file an unfair labor practice against you." Too, I observe that the record contains no evidence of any effort by Mr. Gossett, or Dr. Hughes (whose meeting will be hereafter discussed) to explain, discuss or attempt to distinguish the difference, if any, to Ms. Hall the acts and/or actions involved, i.e., the "contacts" actually made with the National President and/or the "information" transmitted to him. Substantially the same information appears in evidence as a memorandum in diary form prepared by Ms. Hall on December 18, 1976, and under daily entry of "Monday, November 1st." The entry concluded: "Mr. Gossett asked me to "forget what he had said and said that he had had a hard day." (Asst. Sec. Ex. II 3-A(1)). This exhibit was attached to and in support of the formal complaint filed herein on January 7, 1977. The testimony elicited from Ms. Hall at the hearing again asserted that the memorandum accurately reflected her memory of what transpired.

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(c). Mr. Gossett, testifying on direct examination and in response to inquiry as to the purpose of his conference with Ms. Hall on November 1, 1976, said:

A. For two reasons, well, actually three; one is to confirm the rumor or the information that I had received that she had mailed the information given to Mr. Edman to her national office; secondly, was to advise her that in my opinion, that it was not a protected activity under the Executive Order to be involved in patient care. And in regard to this, I did mention to her that I would have to look at the Executive Order and look at the evidence, the information I received from her to see if there possibly had been a violation of the Executive Order. And thirdly, which she did not mention in her letter, I did mention to her the possibility of there could have been a violation of the Privacy Act. (Tr. pgs 244-45).

In further interrogation it was fully developed that Mr. Gossett was considering whether an unfair labor practice would be appropriate, and upon inquiry as to Ms. Hall's reaction, he said:

A. It was my impression that Miss Hall became -- it shocked her. She mentioned at that time I remember vividly that this would be contrary to what Mr. Edman had preached or his philosophy of labor relations and of trying to get along and cooperate with unions. It did upset her. I tried to get off the subject as soon as I could.

(d). The foregoing views have differences in specifics but not in substance. Ms. Hall says that Mr. Gossett said he was going to advise Mr. Edman to file an unfair labor practice against you. Mr. Gossett said he told her that he was going to look into it and see if there possibly had been a violation of the Order. Both agree that Mr. Gossett said that it (expressed concern about patient care) was not a protected activity under the Order. Ms. Hall recalls that Mr. Gossett said "that patient care was none of our business" and Mr. Gossett recalls having said, "in my opinion, that it was not a protected activity under the Executive Order to be involved in patient care." Mr. Gossett concluded by mentioning the possibility that she had violated the Privacy Act. This conclusion did not appear to impress Ms. Hall because she did not become aroused about this possibility until a subsequent meeting with another witness to be later discussed.

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8(a). On November 4, 1977, Dr. Carl Wilson Hughes, Director of Surgery, Department of Medicine and Surgery, Veterans' Administration, Washington, D.C., (hereafter Dr. Hughes), while in the course of making an investigation of the conditions raised by the information transmitted to Veterans' Administration, 1/ contacted Ms. Hall, the hour being unknown but assumed to be about 3:00 p.m., and since the testimony and exhibits admit of two views as to what transpired at this confrontation, I find it necessary to discuss them fully.

(b). Ms. Hall testified that when she entered the room where Dr. Hughes was, (other occupants not of record)

"... one of the first thing he says to me was I hope you girls realize how stupid you are for taking this to a union, and the implication was that he didn't realize that it was our union, that we had the right to go to the union.

At that time, he mentioned the Privacy Act and chastised me for having violated the Privacy Act and said that we might get sued as a result of this. And I don't remember all of it." (Tr. p. 128).

She went on to say, "I was very -- I felt very threatened that suddenly it was of great magnitude", when informed about the Privacy Act. Basically, her testimony corroborated the memorandum documented on November 6, 1976, and compiled on November 18, 1976, and appearing as A/S Exhibit 4A.

1/ The purpose of the investigation being made by Dr. Hughes was not the "basis of the Complaint" filed herein. Rather, his investigation was into the "quality of patient care" that had been raised and identified by the "information" transmitted by Ms. Hall to the President of National Federation of Federal Employees and, by him, transmitted to Veterans Administration. It was the "nature" of this "information" that was the basis of the expressed concern for possibilities of violations of the Privacy Act and violations of statutes and regulations concerning confidentiality. This question is not properly before me and I shall not discuss it beyond the necessity to construct the setting within which the alleged remarks were made as the basis of the complaint filed.

(c). On November 9, 1976, Dr. Hughes prepared a memorandum to the Assistant Director and Chief Medical Director for Operations, reporting in detail the results of his investigation, which contained reference to his encounter with Ms. Hall only to the following extent:

When the nurse who signed the complaint as President of the Union was questioned, she stressed that her only interest was in good care, that she was medical nurse representing other nurses and that they were not trying to serve as a peer review group. When asked if she did not fear being in violation of the Privacy Act for sending patients names and diagnoses to a union, she stated that she did so on the advice of Union legal counsel. (A/S Ex. 15).

On direct examination as a witness for Respondent, Dr. Hughes denied making "any accusatory remarks" to Ms. Hall or about the union. He did, however, admit making inquiry as to why she had not gone through "professional channels" in dealing with "patient care" and expressed fear that going outside of channels would constitute a violation of the Privacy Act.

9. Based upon the testimony of Ms. Hall; Mr. Gosset and Dr. Hughes, having observed the demeanor of each of these witnesses, and having carefully examined the transcript and exhibits admitted, I find and conclude that the version given by Ms. Hall as to what acutally transpired at the meeting between her and Mr. Gossett on November 1, 1976, is more credible. I find and conclude that Ms. Hall had a right to and did understand Mr. Gossett to tell her he was going to advise Mr. Edman to file an unfair labor practice; that her actions were not protected by the Executive Order; and that "patient care" was none of her business. The remarks were accusatory, not explanatory of the problem. However, I do find and conclude that Mr. Gossett did advise Ms. Hall that there had possibly been a violation of the Privacy Act. Likewise, with reference to the meeting with Dr. Hughes on November 4, 1976, I find and conclude that the version given by Ms. Hall to be more credible. I find and conclude that Ms. Hall had a right to and did interpret Dr. Hughes' remarks to be critical of the "girls" in "taking this to the union" and questioning their right to do so; that a violation of the Privacy Act was involved; and some legal action may result. The remarks, in the context of the meeting, were more accusatory than explanatory. There was no effort to separate the subjects of

the contact with National NFFE. The record is replete with references to possible violations of the Privacy Act and confidentiality. As a matter of fact, the principal thrust of Respondent's defense is possible violations of privacy and confidentiality and that NFFE Local 1631 had no business being concerned with patient care.

10. In the instant case, Complainant has used the term "patient care" to claim justification for the initial action taken herein, i.e., making written request of the Director for an investigation of "patient care" and subsequently thereto furnishing him a list of particular incidents, and making written request to the President, NFFE, for assistance in obtaining an investigation of "patient care", and transmitting to him a copy of the "list of particular incidents." It has been used by Respondent as a defense to the charge of an unfair labor practice, contending that "patient care" is a function reserved to management and is not an activity protected by Executive Order 11491; that it is not a concern for members of NFFE Local 1631. I cannot accept the contentions of either party to such a restricted use.

I have found no medical or legal definition of the term "patient care." I do not consider that bad. To the contrary, it suggests to me that it is two simple words, each having a common, easily understood and widely accepted meaning not made difficult or mystic by using them jointly. It is something that all parties involved can understand. While the term has not been legally or medically defined, each separate word has an acceptable, widely understood meaning.

"Patient" is defined in an ordinary desk dictionary to mean: one under medical treatment. See Brown v. Moore, 247 F.2d 711, 720. "Care" is defined in the same dictionary to mean: Protection; supervision; charge; in the care of a nurse. See Mansfield v. Hyde, 112 C.A. 2d 133, 245 F.2d 577, 581. "Patient care" is not exclusive. To the contrary it is all inclusive. Clearly, "patient care" is a proper concern for all the parties hereto, to be expressed within proper channels. 2/ The nurses had

2/ This conclusion should not be construed to be approval or disapproval of the manner in which concern has been expressed about "patient care", and "information" transmitted to the National President NFFE. See my caveat in note 1.

discussed "patient care" as it affected their duties to the patients and had jointly concluded that they should express that concern to Mr. Edmon, the Director, as they had an admitted right to do. Inasmuch as I find that "patient care" is a proper concern of all parties hereto, it clearly becomes a function that adversely affects working conditions if not given proper consideration by either or both parties.

Conclusions of Law

Those portions of section 19(a) of the Order which are pertinent to the issues raised herein provide that Agency management shall not (1) interfere with, restrain, or coerce an employee in the exercise of the rights as assured by the Order, or (2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment.

Section 11(a) of the Order creates a mutual duty upon an agency and a union to negotiate in good faith in respect to personnel policies, practices and matters affecting working conditions so far as may be appropriate under applicable laws and regulations, including impact on employees as a result of "policies and practices" properly reserved unto management.

Section 11(b) provides that in prescribing regulations relating to personnel policies, practices and working conditions an agency shall have due regard for the obligation imposed by paragraph (a) of this section. In addition, section 12(a) establishes that any agreement between an agency and a labor organization is subject to existing or future laws and regulations, by published agency policies and regulations in existence at the time the agreement was approved.

However, assuming arguendo that "patient care" could be or has been reserved unto Respondent, it is well established that even as to excepted or reserved areas of management, there is an obligation to bargain regarding the implementing procedures which it employs in respect to these areas. United Air Force Electronics Systems Division (AFSC)-and-Local 975, National Federation of Federal Employees, A/SLMR No. 571; Department of Navy, Dallas Naval Air Station-and-American Federation of Government Employees Local Union 2427, AFL-CIO, A/SLMR No. 510. The requirement of negotiation as to the implementation and impact of personnel policies and practices and matters affecting working conditions relates

only to changes therein. (Department of the Navy, Mare Island Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO, A/SLMR No. 736) or additions thereto. (Section 11(d) of the Order). Army and Air Force Exchange Service, Pacific Exchange System, A/SLMR No. 451; Federal Railroad Administration, A/SLMR No. 418.

In the instant case I have found and concluded that "patient care" was a matter of proper concern for all of the parties hereto; that if not given proper consideration by all parties hereto it would adversely affect working conditions; and that Ms. Hall, as an individual employee of the unit and a President of NFFE Local 1631, had every right under section 10(e) of the Order to make request of and have a meeting with Respondent for the purpose of discussing "patient care" and how it affected members of Local 1631. Such meetings as were held with Ms. Hall by both Mr. Gossett and Dr. Hughes were "formal meetings" within the meaning of section 10(e) of the Order, and NASA, Johnson Space Center, FLRC No. 74A-95 (1975), and the right of Ms. Hall to contact the National President of NFFE is too elementary to require the citation of any authority. 3/

Based upon the aforesaid findings of fact and conclusions of law, I find and conclude that Respondent by the manner in which the meeting by Mr. Gossett on November 1, 1976, and the manner in which Dr. Hughes on November 4, 1976, were conducted, did interfere with and restrain Ms. Hall, President of Local 1631, NFFE, in her rights and responsibilities to discuss "patient care" as it affected the working conditions of unit employees and their rights assured by the Order and was violative of section 19(a)(1) of the Order. I further find that the manner in which Dr. Hughes approached Ms. Hall and the remarks made would tend to discourage membership in a labor organization, implying that the desired results could only be obtained through "professional channels", and was violative of section 19(a)(2) of the Order. This conduct discourages the use of the bargaining procedures of labor-management relations assured by section 10(e) of the Order. Therefore, I find and conclude,

3/ I renew my efforts to avoid drawing any conclusions as to the propriety of transmitting the "information" alluded to in my caveat in note 1. This conclusion is limited to the right to make proper contact for help in representing the Local and its members at a meeting concerning working conditions as affected by "patient care."

within the facts of this case and conclusions of law set out above, that the answers to all of the questions identified as the "issues" in this case are in the affirmative.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.23 of the rules and regulations, I recommend that the Assistant Secretary of Labor for Labor-Management Relations adopt the following Order designed to effectuate the policies of Executive Order 11491, as amended.

Recommended Order

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 102.16(b) of the rules and regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Veterans Administration, Washington, D. C., and Veterans Administration Hospital, Amarillo, Texas, shall:

1. Cease and desist from:

a. Interfering with, restraining, or coercing any officer or member of NFFE Local 1631, Amarillo, Texas, or any employee of the unit for which Local 1631 has the exclusive representational responsibility under the provisions of section 10(e) of Executive Order 11491, as amended, from expressing concern within proper channels for "patient care" as it affects conditions of employment.

(b). Encouraging or discouraging the officers and/or members of NFFE Local 1631, or any employee of the unit it represents, from expressing concern for "patient care" at the Amarillo Veterans Administration Hospital by requesting assistance of officials of said VA Hospital, and/or by contacting the President of NFFE and requesting advice and representation in the exercise of rights assured by Executive Order 11491, as amended.

(c). In any like manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a). Post at Veterans Administration Hospital, Amarillo, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, Veterans Administration, and it shall be posted at Veterans Administration Hospital, Amarillo, Texas, and maintained by the Director of said hospital for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b). Pursuant to section 203.27 of the regulations notify the Assistant Secretary in writing, within twenty (20) days from the date of this Order, as to what steps have been taken to comply herewith.

Ben H. Walley
BEN H. WALLEY
Administrative Law Judge

Date: June 21, 1978
San Francisco, California

Enclosure

BHW:tl

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce any officer or member of NFFE Local 1631, or any employee for which Local 1631 has the exclusive representational responsibility under the provisions of section 10(e) of Executive Order 11491, as amended, in their efforts to express proper concern for "patient care", within proper channels, at Amarillo VA Hospital.

WE WILL NOT encourage or discourage the officers and/or members of NFFE Local 1631, Amarillo, Texas, or any employee of the unit it represents, from contacting the President, or other National Officer, of National Federation of Federal Employees, Washington, D. C., for advice and representation in their exercise of any and all rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice of compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 911 Walnut Street, Kansas City, Missouri 64106.

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September 27, 1978

A/SLMR No. 1132

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
OKLAHOMA CITY AIRWAY FACILITIES SECTOR,
WILEY POST AIRPORT, BETHANY, OKLAHOMA
A/SLMR No. 1132

FEDERAL AVIATION ADMINISTRATION,
OKLAHOMA CITY AIRWAY FACILITIES SECTOR,
WILEY POST AIRPORT, BETHANY, OKLAHOMA

Activity

and

Case No. 63-7342(RO)

PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS

Petitioner

and

FEDERAL AVIATION SCIENCE AND TECHNOLOGICAL
ASSOCIATION, NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES (FASTA/NAGE)

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Paul W. Hall. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including a brief submitted by the Activity, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. In its petition, the Petitioner, Professional Airways Systems Specialists, hereinafter called PASS, seeks an election in a unit of all nonprofessional "Class Act" (GS) and Wage Grade (WG) employees of the Federal Aviation Administration assigned to the Oklahoma City Airway Facilities Sector located at the Wiley Post Airport, Bethany, Oklahoma. The Activity contends that the unit sought is inappropriate under Section 10(b) of the Order as the employees involved do not share a community of interest separate and distinct from the other employees within the Southwest Region of the Federal Aviation Administration (FAA) and that such unit would lead to fragmentation and would not promote effective dealings and efficiency of agency operations. The Intervenor, Federal Aviation Science

This case involved a petition filed by the Professional Airways Systems Specialists (PASS) seeking an election in a unit of all unrepresented, nonprofessional employees of the Oklahoma City Airway Facilities Sector, Wiley Post Airport, Bethany, Oklahoma. The Activity contended that the unit sought is inappropriate under Section 10(b) of the Order as the employees involved do not share a community of interest separate and distinct from other Federal Aviation Administration employees and that such unit would lead to fragmentation and would not promote effective dealings and efficiency of agency operations. The Intervenor, the Federal Aviation Science and Technological Association, National Association of Government Employees (FASTA/NAGE) contended that the employees in the petitioned for unit should be included in the existing nationwide unit represented by the NAGE.

The Assistant Secretary found that the claimed unit was appropriate for the purpose of exclusive recognition. He concluded the claimed employees shared a clear and identifiable community of interest and that the unit would promote effective dealings and efficiency of agency operations. In this regard, he noted that the petitioned for unit was appropriate both as a sectorwide unit and also as a residual regionwide unit.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate, ordering that if the FASTA/NAGE were selected by the employees in the claimed unit, the unit would be added to the FASTA/NAGE's nationwide unit.

and Technological Association, National Association of Government Employees, hereinafter called FASTA/NAGE, takes the position that the proposed sector-wide unit is inappropriate and that the petitioned for employees should be included in the FASTA/NAGE's nationwide unit.

The mission of the FAA is to provide a safe and expeditious flow of aircraft in the national airspace system. The Southwest Region of the FAA is headed by a Regional Director. Under his jurisdiction is, among other components, the Southwest Region's Airway Facilities Division, which is composed of four branches: the Program and Planning Branch, the Environmental Engineering Branch, the Maintenance Operations Branch, and the Electronic Engineering Branch. The Division also contains 19 airway facilities sectors, of which the Activity is one, each headed by a Sector Manager who is responsible to the Division Chief. The mission of the Activity, and all airway facilities sectors, is to maintain and operate all national airspace system facilities within the sector, assuring that performance is within established tolerances of accuracy and meets operational requirements of availability and reliability, to maintain environmental support facilities and equipment, and to effectively manage available resources.

At the hearing, the parties stipulated as to the history of bargaining in the petitioned for unit. The stipulation indicates that on January 4, 1974, the International Association of Machinists and Aerospace Workers, Local 960, hereinafter called IAM, was certified as the exclusive representative of a unit consisting of all eligible nonsupervisory, non-professional GS and WG employees assigned to the Oklahoma City Airway Facilities Sector. Representatives of the IAM and the Activity met on March 20, 1975, to discuss ground rules to be used during the negotiation of an agreement. No further meetings were held by the parties as a decertification petition had been filed by a unit employee, which resulted in the IAM's decertification on June 17, 1975. On December 18, 1975, the Assistant Secretary issued a Decision and Direction of Elections in Federal Aviation Administration and Federal Aviation Administration, Eastern Region, 5 A/SLMR 776, A/SLMR No. 600 (1975), finding that a nationwide, regionwide, or sectorwide unit of Airway Facilities Division employees may be appropriate for the purpose of exclusive recognition under the Order. At the time of the filing of the petitions which resulted in the Decision and Direction of Elections in A/SLMR No. 600, the employees in the unit petitioned for herein were included in the IAM's exclusively recognized unit which was subject to a certification bar and, therefore, the employees in the claimed unit were expressly excluded from the units found appropriate in A/SLMR No. 600. 1/ Subsequently, on March 30, 1977,

1/ The record shows that since 1966, IAM Local 2266 has been the exclusive representative of a unit of similarly classified employees of the Tulsa Airway Facilities Sector, Tulsa, Oklahoma. That unit was also excluded from the units found appropriate in A/SLMR No. 600. The remaining 17 airway facilities sectors in the Southwest Region were included in one of the units found appropriate in A/SLMR No. 600 and were included in the unit certified as a result of the election ordered therein.

the PASS filed the instant petition.

The parties also stipulated that for the purpose of determining the appropriateness of the petitioned for unit, the Assistant Secretary should consider the facts as previously established in the hearing which led to the issuance of the decision in A/SLMR No. 600. Furthermore, the parties stipulated that personnel and labor relations policies issued at the national or regional levels of the FAA apply to employees in the petitioned for unit in the same manner as they apply to employees in the unit found appropriate by the Assistant Secretary in Department of Transportation, Federal Aviation Administration, O'Hare Airway Facility Sector, Chicago, Illinois, A/SLMR No. 927 (1977). Finally, the parties stipulated that the instant case is distinguishable from the above-cited A/SLMR No. 927, from Federal Aviation Administration, Oakland Airway Facilities Sector, Oakland, California, A/SLMR No. 1010, and from Federal Aviation Administration, Atlanta Airway Facilities Sector, Atlanta, Georgia, A/SLMR No. 1086, only by the instant unit's bargaining history, the Activity's internal organization and structure, and the FAA region in which the Activity is located.

The petitioned for unit is composed of approximately 54 employees of whom the majority are classified as Electronic Technicians, GS-0856 series. Such employees are responsible for the operation of equipment such as radar, nav aids, data processing, and communication systems so that the safety of air travel will not be compromised. The qualifications for such employees are established on a nationwide basis by the FAA, and all employees engaged in such functions must be certified based on these standardized qualifications. Further, the technical handbooks utilized by such employees have been developed nationally to provide uniformity in the maintenance of equipment nationally. The record also reflects that, consistent with the FAA policy of delegating authority with respect to personnel and labor relations matters to the lowest possible level, the authority for such matters has been delegated to the Regional Director, subject to FAA and Civil Service Commission guidelines.

As noted above, the Assistant Secretary has found that a nationwide, regionwide, or sectorwide unit of Airway Facilities Division employees may be appropriate for the purpose of exclusive recognition. Based on the foregoing circumstances, including the stipulations of the parties, I find that the unit sought herein contains employees who share a clear and identifiable community of interest. In this regard, all employees of the Activity share in a common mission, common overall supervision, generally similar job classifications and duties, and enjoy uniform personnel policies and practices and labor relations policies. I find also that such a unit will promote effective dealings and efficiency of agency operations and will prevent further fragmentation of units in the Sector and in the Region. Thus, as the employees in the other 18 sectors in the Southwest Region are included in the FASTA/NAGE's nationwide unit or in the IAM Local 2266's exclusively recognized unit at the Tulsa Airway Facility Sector, the petitioned for unit constitutes, not only an appropriate sectorwide unit, but also a regionwide residual unit of all unrepresented, nonprofessional employees of the Southwest Region's Airway Facilities Division.

Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Section 10(b) of Executive Order 11491, as amended:

September 28, 1978

All General Schedule and Wage Grade employees assigned to the Oklahoma City Airway Facilities Sector, Wiley Post Airport, Bethany, Oklahoma, excluding all professional employees, employees engaged in Federal Personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined in Executive Order 11491, as amended.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

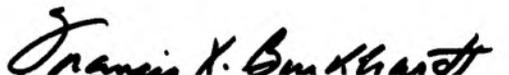
DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE
AND IRS MILWAUKEE DISTRICT
A/SLMR No. 1133

In view of the FASTA/NAGE's clear intention to have the unit found appropriate included within its existing nationwide unit, I find that the employees in such unit should be afforded the opportunity to choose whether or not they wish to become part of the existing nationwide unit represented by the FASTA/NAGE. Accordingly, if a majority of the employees in the unit found appropriate votes for FASTA/NAGE, they will be taken to have indicated their desire to be included in the existing nationwide unit represented by that labor organization and the appropriate Area Administrator will issue a certification to that effect. If, on the other hand, a majority of the employees votes for the PASS, they will be taken to have indicated their desire to be included in the separate sectorwide unit found appropriate and the appropriate Area Administrator will issue a certification to that effect.

DIRECTON OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as soon as possible but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below including employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or who were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the Professional Airways Systems Specialists, the Federal Aviation Science and Technological Association, National Association of Government Employees or no labor organization.

Dated, Washington, D.C.
September 27, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 1 (Complainants) alleging that the Respondents violated Section 19(a)(1) and (6) of the Order by refusing to make available, except in an overly sanitized form, evaluation materials used in the selection process for a promotion action. The Complainants contended that the evaluation materials were sought in order for them to determine if there was an incipient grievance regarding the promotion action. The Respondents contended that the evaluation materials were sanitized in such a manner to prevent identification of the candidates and that the procedures used were fully consistent with Civil Service Commission Regulations. They further contended that the IRS National Office was not a proper party in the proceeding.

The Assistant Secretary found that the IRS National Office was a proper party in the proceeding. Further, noting that the Complainants sought the evaluation materials in connection with performance of their representational functions, he found that such materials were necessary and relevant. He noted that his in camera review of the candidates' performance appraisals indicated that the information deleted pertained primarily to the candidates' education, training, and awards, and that disclosure of such information was necessary and relevant to the Complainants in performing their representational functions in the circumstances of this case and would not constitute an unwarranted invasion of an employee's privacy. Therefore, the Assistant Secretary found that such information should have been disclosed to the Complainants.

The evidence established that the IRS Milwaukee District deleted the information from the performance appraisals in dispute in accordance with existing policies established by the IRS National Office. Accordingly, the Assistant Secretary found that the IRS National Office violated Section 19(a)(1) and (6) by prohibiting disclosure of certain information contained in the performance appraisals and that the IRS Milwaukee District did not violate Section 19(a)(1) and (6) of the Order as it was engaging in a ministerial act in compliance with procedures directed by higher agency management.

Under these circumstances, the Assistant Secretary ordered appropriate remedial action by the IRS National Office for the Section 19(a)(1) and (6) violations and further ordered that those portions of the complaint alleging violations of Section 19(a)(1) and (6) of the Order by the IRS Milwaukee District be dismissed.

A/SIMR No.1133

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE
AND IRS MILWAUKEE DISTRICT

Respondents

and

Case No. 51-4261(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 1

Complainants

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator Kenneth M. Bazar's Order Transferring Case to the Assistant Secretary of Labor in accordance with the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits, and briefs, the Assistant Secretary finds:

The complaint herein alleges, in essence, that the Respondents violated Section 19(a)(1) and (6) of the Executive Order by refusing to make available, except in an overly sanitized form, certain evaluation materials used in the selection process for a promotion action. The Complainants contend that the evaluation materials were sought by the Complainants' Chapter President in order for the exclusive representative to determine if there was an incipient grievance regarding the promotion action. The Respondents contend that the evaluation materials involved were sanitized in such manner to prevent identification of the individual candidates and that the procedures used were fully consistent with Civil Service Commission Regulations, particularly Federal Personnel Manual (FPM) Letter 711-126, in which, it argues, the Civil Service Commission termed a sanitized performance appraisal as one which is nonidentifiable. The Respondents further contend that the Respondent, Internal Revenue Service, hereinafter called IRS National Office, is not a proper party in the instant proceeding. ^{1/}

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^{1/} In their "Motion to Cause Compliance with the Assistant Secretary's Regulations" which the Respondents filed with the Area Administrator subsequent to the filing of the instant complaint, as well

(Continued)

The undisputed facts, as stipulated by the parties, are as follows:

In January 1977, Training Announcement No. 77-3 was posted for six Revenue Agent Classroom Instructor vacancies in the IRS Milwaukee District. Of the 17 candidates rated eligible for these positions, 12 were found highly qualified, of whom 9 were determined best qualified. On February 16, 1977, six of the best qualified candidates were selected. Subsequently, on February 18, 1977, Mr. Lawrence Slavik, the President and Chief Steward of NTEU Chapter 1, made a verbal request to the Personnel Branch of the IRS Milwaukee District for all materials used by the ranking panel in connection with the subject training announcement. Thereafter, the Respondents provided Slavik with the following: (1) sanitized copies of the performance appraisals of the 17 eligible candidates, (2) unsanitized copies of the "Roster of Eligibles for Promotion and Promotion Certificate" and the "Internal Revenue Agent Classroom Instructor Criteria," and (3) a sanitized summary of the ranking panel's total scores for each of the 17 eligible candidates. 2/

On March 14, 1977, Slavik, in a letter to the Personnel Chief of the IRS Milwaukee District, renewed his request for all of the materials used by the ranking panel in connection with Training Announcement 77-3, stating that such materials were necessary for the Union in considering possible grievances concerning the promotion action. He further stated that not all of the requested materials had been supplied by the IRS Milwaukee District and that some of the materials which had been supplied were overly sanitized. As a result of this letter, on March 15, 1977, Slavik was given a sanitized copy of a work sheet listing the ranking panel's scores for each candidate in four categories. Finally, in a letter to Slavik dated March 23, 1977, the Personnel Chief of the IRS Milwaukee District stated that the Agency had supplied all the materials it could and still protect the identity of the 17 eligible candidates.

1/ as in their brief, it is contended, among other things, that the complaint should be dismissed against the IRS National Office because the latter was not named as a Respondent in the pre-complaint charge as required by Section 203.2(a) of the Assistant Secretary's Regulations and that the alleged violations of the Order herein involve only the Respondent, IRS Milwaukee District, hereinafter called IRS Milwaukee District. In this regard, the evidence establishes that the IRS National Office did not claim, at any stage of the proceedings herein, surprise or prejudice as a result of its not being specifically named in the pre-complaint charge or in the allegations contained therein or that at any stage of the proceeding it was not fully aware of the allegations against it. Thus, under the particular circumstances herein, I find that dismissal of the instant complaint against the IRS National Office based on procedural grounds is unwarranted.

2/ Unsanitized copies of the 17 performance appraisals were submitted to the Assistant Secretary for an in camera review.

FINDINGS AND CONCLUSIONS

As noted above, the Complainants sought the evaluation materials in connection with performance of their representational functions. In this regard, it has previously been held by the Federal Labor Relations Council that agency management must provide an exclusive representative with the information it seeks which is necessary and relevant for the performance of its representational functions, and that evaluation materials considered in the course of a promotion action, such as were involved herein, are necessary and relevant and must be provided to the exclusive representative, upon its request. 3/

The issue herein concerns the extent to which necessary and relevant materials can be sanitized and still provide the exclusive representative with the information necessary for the performance of its representational functions. 4/ In circumstances such as those which exist in the instant case, where the conflicting rights are broad and involve paramount public interests such as an exclusive representative's right to adequately perform its representational functions, having the Federal government operate within its merit promotional system equitably and encouraging the use of nondisruptive grievance procedures, it has been determined that the mere identification of an employee who is the subject of certain documents is not a violation of privacy so significant as to bar disclosure. 5/ My in camera review of the materials "sanitized" by the Respondents reveals that the information deleted pertains primarily to the candidates' education, training, and

3/ Cf. Department of Defense, State of New Jersey, 3 FLRC 284, FLRC No. 73A-59 (1975).

4/ The Respondents contend that the Complainants could have obtained the deleted information directly from the subject candidates because each of the candidates had a copy of his respective performance appraisal and all were members of the bargaining unit represented by the Complainants. In my view, an exclusive representative is not obligated to obtain from alternative sources materials deemed to be necessary and relevant for the performance of its representational functions. See Department of the Treasury, Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin, A/SLMR No. 974 (1978).

5/ Cf. Internal Revenue Service, Chicago District Office, A/SLMR No. 1004 (1978), and Department of the Treasury, Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin, cited above. In the foregoing cases, it was found that the identified employees would still have the right to have the documents involved sanitized so as to omit any sensitive or damaging personal material.

awards. 6/ In my opinion, such information was necessary and relevant to the Complainants in order to enable them to make an intelligent judgment as to whether or not a grievance should be filed over the promotion action involved herein. Further, in my view, the disclosing of the above noted information in unsanitized form relating primarily to the candidates' education, training and awards would not, under the circumstances of this case, constitute an unwarranted invasion of employee privacy and, therefore, would not be inconsistent with the FPM. Accordingly, to the extent that such information does not contain sensitive or damaging personal material, 7/ I find that the evaluation materials sought herein by the Complainants in connection with the personnel selections made pursuant to Training Announcement 77-3 should have been provided by the Respondents in unsanitized form and that the Respondents failure to do so violated Section 19(a)(1) and (6) of the Order.

The evidence herein establishes that the IRS Milwaukee District Office deleted the information from the performance appraisals in accordance with existing policies first established by the IRS National Office in a memorandum to all IRS Regional Personnel Officers dated August 29, 1975. In this regard, it has previously been held by the Federal Labor Relations Council that the acts and conduct of agency management, at a higher level of an agency's organization, may provide the basis for finding a violation of any part of Section 19(a) of the Order, but may not, standing alone, provide the basis for finding a separate violation by "agency management" at a lower organizational

6/ FPM Letter 711-126, dated December 30, 1976, relied upon by the Respondents in defending their actions herein, states, in pertinent part, that:

. . . the agency official must make a determination as to whether the requested disclosure about an individual will constitute a clearly unwarranted invasion of personal privacy. If the information pertains solely to the person(s)' government service (e.g., tenure, salary, grade, position title, work schedule, agency-sponsored training and awards received) it should be disclosed. If the information pertains to personal or sensitive matters (e.g., allegations of employee misconduct; training course grades; date of birth; marital status) its release may constitute an unwarranted invasion of privacy and therefore it should be released only with the written consent of the subject of the record.

7/ There was no contention that the information involved contained sensitive or damaging personal material.

level of the agency solely on the basis of its ministerial actions in implementing the directions from higher agency authority. 8/ Based on this rationale, I find that the IRS National Office violated Section 19(a)(1) and (6) of the Order by, in effect, prohibiting disclosure of certain information contained in the performance appraisals used in connection with the personnel selections made pursuant to Training Announcement No. 77-3. Further, I find that the IRS Milwaukee District, in performing the ministerial act of deleting the information from the performance appraisals pursuant to procedures established by the IRS National Office, did not violate Section 19(a)(1) and (6) of the Order.

In view of the foregoing, I shall order that, upon request, the information sought herein be made available to the Complainants, after removing therefrom any information of a sensitive or damaging personal nature and I shall dismiss the instant complaint insofar as it alleges a violation of the Order by the IRS Milwaukee District.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, shall:

1. Cease and desist from:

(a) Refusing to permit the National Treasury Employees Union, and NTEU Chapter 1, access to such materials as are necessary and relevant to the National Treasury Employees Union's performing its representational functions regarding the selection process for the Revenue Agent Classroom Instructor vacancies for which Training Announcement No. 77-3 was posted.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, permit the National Treasury Employees Union, and NTEU Chapter 1, access to such materials as are necessary and relevant to the National Treasury Employees Union's performing its representational functions regarding the selection process for the Revenue Agent Classroom Instructor vacancies for which Training Announcement No. 77-3 was posted.

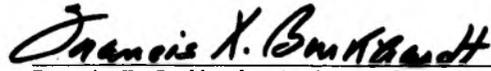
8/ Cf. Naval Air Rework Facility, Pensacola, Florida, FLRC No. 76A-37 (1977).

(b) Post at its facility at the Internal Revenue Service, Milwaukee District, Milwaukee, Wisconsin, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commissioner of the Internal Revenue Service and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Commissioner shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that those portions of the complaint in Case No. 51-4261(CA) alleging violations of Section 19(a)(1) and (6) of the Order by the IRS Milwaukee District be, and they hereby are, dismissed.

Dated, Washington, D.C.
September 28, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

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APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to permit the National Treasury Employees Union, and NTEU Chapter 1, access to such materials as are necessary and relevant to the National Treasury Employees Union's performing its representational functions regarding the selection process for the Revenue Agent Classroom Instructor vacancies for which Training Announcement No. 77-3 was posted.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, permit the National Treasury Employees Union, and NTEU Chapter 1, access to such materials as are necessary and relevant to the National Treasury Employees Union's performing its representational functions regarding the selection process for the Revenue Agent Classroom Instructor vacancies for which Training Announcement No. 77-3 was posted.

(Agency)

Dated: _____ By: _____
(Signature)

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 any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Federal Building, Room 1060, 230 South Dearborn Street, Chicago, Illinois 60604.

September 29, 1978

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from engaging in the conduct found violative of the Order and take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS
A/SLMR No. 1134

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees Local 3615, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to notify and meet and confer with the AFGE concerning a decision made by the Respondent to temporarily suspend promotions from GS-12 to GS-13 for employees classified as Hearings and Appeals Analysts (Analysts).

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to afford the AFGE timely notice and opportunity to bargain concerning the impact and implementation of the Respondent's July 28 determination to temporarily suspend the promotions of Analysts from GS-12 to GS-13. In addition, the Administrative Law Judge concluded with regard to the Respondent's September 7 determination by the Respondent's Director to continue the course of action decided on July 28, that the Respondent had fulfilled its obligations under the Order in giving timely notice to the AFGE and affording it the opportunity to bargain concerning the impact and implementation of such determination. Accordingly, he found that the Respondent's conduct with respect to the determination made by its Director was not violative of Section 19(a)(1) and (6) of the Order.

Although the Assistant Secretary found, in agreement with the Administrative Law Judge, that the Respondent violated Section 19(a)(1) and (6) of the Order, he reached such conclusion for different reasons. The Assistant Secretary rejected the Administrative Law Judge's finding that Respondent's actions on July 28 constituted the basis for finding a violation as such actions were not alleged in the pre-complaint charge or in the complaint and could not constitute the basis for finding a violation. The Assistant Secretary found that the Respondent, by its May 23, 1977, posting of a vacancy announcement for an Analyst position describing the promotion potential of such position to at least GS-12, in effect, decided, at least temporarily, to suspend promotions of Analysts to GS-13. Under these circumstances, the Assistant Secretary found that the Respondent, by failing to notify the AFGE, and afford it the opportunity to bargain concerning the impact and implementation of its decision in May 1977, to suspend the promotion of employees classified as Analysts from GS-12 to GS-13, violated Section 19(a)(1) and (6) of the Order.

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UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS

Respondent

and

Case No. 22-08346(CA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 3615, AFL-CIO

Complainant

DECISION AND ORDER

On June 23, 1978, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter both the Respondent and Complainant filed exceptions and supporting briefs to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the parties' exceptions and supporting briefs, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The instant complaint, filed by the American Federation of Government Employees, Local 3615, AFL-CIO (AFGE), alleges, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to notify and meet and confer with the AFGE concerning a decision made by the Respondent to temporarily suspend promotions from GS-12 to GS-13 for employees classified as Hearings and Appeals Analysts (Analysts).

The AFGE was certified as the exclusive bargaining representative of a unit of the Respondent's nonprofessional employees on July 24, 1975. ^{1/} Included in the exclusively represented unit are Analysts

^{1/} The AFGE is also the exclusive representative of a unit of professional employees, including physicians, employed by the Respondent.

classified as GS-301-9/11/12/13, who perform review functions, including decision writing, and other related duties involved in the adjudication of claims under the Social Security Act and its implementing regulations. Commencing in September 1975, routine position audits were undertaken by the Civil Service Commission (CSC) for a number of classifications within the Respondent, including the Analyst positions.

During a regularly scheduled labor-management meeting held in late May 1977, James Marshall, Vice President of AFGE Local 3615, raised a question with the management representatives about a vacancy announcement for an Analyst position which was posted on May 23, 1977, which stated that the position had a promotion potential of at least GS-12. Marshall noted that prior to that time the promotion potential in the Analyst classification was up to GS-13. The Respondent's representative, John L. Poore, Assistant Bureau Director for Administration, advised Marshall that although the classification studies were incomplete, they raised some problems as to the appropriateness of the existing grade level of the Analysts at GS-13.

As the AFGE was unable to obtain further information from the Respondent about the classification study, on June 1, 1977, pursuant to the Freedom of Information Act, it formally requested the material contained in the study. The requested material was furnished by the Respondent on June 9, 1977. By memorandum dated June 1, 1977, the AFGE asked Respondent's Director to meet and confer on the reclassification of GS-13 Analyst positions and the CSC study concerning reclassification. The Respondent replied by memorandum dated June 9, 1977, stating that it was unaware of the "CSC study concerning reclassification", and that consultation would commence when required by appropriate authorities. On July 5, 1977, the AFGE filed a pre-complaint charge, alleging that the Respondent had violated Sections 19(a)(1) and (6) of the Order by failing to meet and confer on the preparation of the reclassification study and because the Respondent was implementing a moratorium on promotions to the GS-13 level.

Thereafter, on about July 28, 1977, the Respondent's Personnel Officer, Makoff, made an interim determination not to process any additional Analyst promotions from GS-12 to GS-13. In taking this action, he determined that the Analyst positions were no longer classifiable at the GS-13 level, and that further promotions of Analysts would be improper, and possibly illegal. However, the Respondent did not advise the AFGE of Makoff's July 28 determination and the record indicates that a number of such promotion requests were pending at that time.

On July 28, 1977, the Respondent replied to the July 5, 1977, pre-complaint charge, denying that there was any evidence to support the charge. Thereafter, on August 2, 1977, the AFGE filed the instant unfair labor practice complaint. On September 7, 1977, the Respondent's

Director, Robert L. Trachtenberg, made a decision to continue the course of action initiated by Makoff on July 28. Accordingly, Trachtenberg decided to continue the freeze on promotions of Analysts from GS-12 to GS-13 until the Respondent had exhausted all opportunities for protecting the GS-13 Analyst classification. On September 9, 1977, the Respondent's representative met with AFGE representatives and advised them of the moratorium on promotions of Analysts to the GS-13 level, and further advised that the final classification decision would be made by the CSC, but that such decision would not be made in the near future. The AFGE requested, and the Respondent agreed, that a meeting be held with the affected GS-12 Analysts so that the employees could be supplied with the information directly. The meeting was held on September 23, 1977, and while the AFGE was invited, it declined to co-chair the meeting. Thereafter, in October, the AFGE requested a further meeting to discuss the various aspects of the Analyst problem, but, although the Respondent agreed, the evidence does not establish that such meeting was subsequently held.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to afford the AFGE timely notice and an opportunity to bargain concerning the impact and implementation of the Respondent's July 28 determination to temporarily suspend promotions of Analysts from GS-12 to GS-13. In this regard, he found that, although under Sections 11(b) and 12(b) of the Order the Respondent was under no obligation to bargain concerning its decision to impose a moratorium on promotions, it was nevertheless obliged under Section 11(a) of the Order to bargain concerning the impact and implementation of the decision. ^{2/} In addition, the Administrative Law Judge concluded, with regard to the Respondent's September 7 determination to continue the course of action initiated on July 28, that the Respondent had fulfilled its obligations under the Order by giving timely

^{2/} The Respondent contended that the instant complaint should be dismissed because the pre-complaint charge dated July 5, 1977, indicated that the moratorium was already in effect, whereas the evidence establishes that the earliest date upon which moratorium was declared was on July 28, 1977. In rejecting the Respondent's contention in this regard, the Administrative Law Judge reasoned that while the pre-complaint charge herein was filed prior to the July 28 determination by the Respondent, such determination could nevertheless constitute the basis for a finding of violation since it was within the scope of both the charge and complaint. Moreover, the Administrative Law Judge noted that the Respondent failed to notify the Complainant concerning the former's July 28 determination until the hearing herein, and opined that it would frustrate the purposes and policies of the Order to dismiss the instant complaint under these circumstances based on the failure of the charge and complaint to allege the precise date of the management decision to place a moratorium on promotions.

notice to the Complainant in this regard and affording it the opportunity to bargain concerning the impact and implementation of such determination. Accordingly, he found that the Respondent's conduct with respect to the determination made by Director Trachtenberg was not violative of Section 19(a)(1) and (6) of the Order.

In its exceptions, the Respondent contends that the Administrative Law Judge erred in finding that its failure to notify and afford the AFGE an opportunity to bargain over the impact and implementation of its July 28 determination constituted a violation of the Order. In this regard, it made two points: First, noting the fact that the pre-complaint charge was filed prior to the determination, and the instant complaint alleged that the violation occurred on or before June 9, 1977, prior to the determination, the scope of both the charge and complaint herein was insufficient to encompass the July 28 determination within its allegations. Second, in any event, the July 28 determination was not a final decision and, thus, Section 11(a) obligations did not commence on such date. Additionally, the Respondent excepted to the Administrative Law Judge's recommended remedy contending that it was excessively broad as it would require the Respondent to negotiate on matters exempted from its obligation to bargain under the provisions of Sections 11(b) and 12(b).

The AFGE, on the other hand, excepts to the Administrative Law Judge's recommended remedy as too narrow, based on his failure to provide for *status quo ante* relief. In this regard, the AFGE argues that in view of the Respondent's history of committing unfair labor practices, and the fact that the Respondent, itself, contends that no final decision on the promotion of Analysts from GS-12 to GS-13 was reached until September 7, 1977, the Assistant Secretary should require the Respondent to consider for promotion those Analysts eligible for promotion to GS-13 prior to September 7, 1977.

While I agree with the Administrative Law Judge that the evidence herein supports a finding of violation of the Order by the Respondent, I reach such conclusion for different reasons. As indicated above, the pre-complaint charge in this matter was filed on July 5, 1977. It alleged improper conduct engaged in by the Respondent prior to such date as constituting the basis for a violation of the Order. The subsequently filed complaint in this matter alleged violative conduct by the Respondent which occurred on or before June 9, 1977. It has previously been held that while events not specified or encompassed within the allegations of a complaint may serve as background evidence to explain and illuminate the nature and character of the events specified as the actual basis for the complaint, such events may not, themselves, constitute the basis for a finding of violation. ^{3/} Under these circumstances, I disagree with the Administrative Law Judge's finding that

^{3/} See Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, 6 A/SLMR 639, A/SLMR No. 878 (1977).

the Respondent's actions on July 28 and its conduct on September 7, which were not alleged in the pre-complaint charge or the complaint as being violative of the Order, could constitute the basis for findings of violation of the Order.

However, I find that as early as May 23, 1977, when the Respondent posted a vacancy announcement for an Analyst position describing the promotion potential of such position to GS-12, the Respondent had, in effect, decided, at least tentatively, to suspend the promotions of Analysts to GS-13. In this regard, the evidence establishes that Analysts eligible for promotion to GS-13 subsequent to that date were not promoted to such grade level, and the subsequent actions by Personnel Officer Makoff and Director Trachtenberg, on July 28 and September 7, 1977, respectively, constituted a reaffirmation and continuation of this decision.

It is well established that an agency management is obligated to afford an exclusive representative prior notice and an opportunity to bargain concerning the implementing procedures and impact on adversely affected employees of a management decision, even though the subject matter of the decision is non-negotiable. 4/ The record herein is clear that the Respondent failed to notify the AFGE of its promotion suspension determination or afford it an opportunity to bargain concerning its impact and implementation until September 1977, despite the earlier inquiries by the AFGE concerning the Respondent's actions. I reject the Respondent's contentions that it was not obligated to notify or bargain with the AFGE because its determination was not "final." In this regard, I note that however the Respondent characterizes its determination, it was implemented, and its impact on certain bargaining unit employees was immediate (as early as May 23, 1977) and real.

Under all of the foregoing circumstances, therefore, I find that by failing to notify the AFGE, and afford it the opportunity to bargain concerning the impact and implementation of its decision in May 1977, to suspend the promotions of employees classified as Analysts GS-12 to GS-13 the Respondent violated Section 19(a)(1) and (6) of the Order. 5/

4/ See e.g. Bureau of the Mint, U. S. Department of the Treasury, 6 A/SLMR.639, A/SLMR No. 750 (1976), and Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, 1 FLRC 431, FLRC No. 71A-56 (1973).

5/ Under the particular circumstances of this case, and noting particularly the long period of time between the AFGE's first inquiry regarding this matter and the Respondent's conduct in September 1977, in notifying the AFGE of its actions, I do not find that the Respondent's subsequent conduct in this regard "cured" the original violation. Compare Vandenburg AFB, 4392d Aerospace Support Group, Vandenburg AFB, California, 3 FLRC 491, FLRC No. 74A-77 (1975).

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Social Security Administration, Bureau of Hearings and Appeals, Arlington, Virginia, shall:

1. Cease and desist from:

a. Changing job grade classifications and imposing promotion moratoriums affecting employees exclusively represented by American Federation of Government Employees, Local 3615, AFL-CIO, without first notifying and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact and implementation of such decisions.

b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

a. Notify American Federation of Government Employees, Local 3615, AFL-CIO, the exclusive representative of its employees, of any changes in job grade classifications and the imposition of promotion moratoriums regarding employees it represents exclusively, and, upon request, meet and confer, to the extent consonant with law and regulations, on the impact and implementation of such decisions.

b. Post at its facility in Arlington, Virginia, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Director of the Bureau of Hearings and Appeals, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

6/ Contrary to the contention of the AFGE in its exceptions, I do not find it appropriate, in the circumstances of this case, to issue a remedial order which includes a status quo ante remedy. Cf. Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, 4 FLRC 484, FLRC No. 74A-52 (1976).

c. Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
September 29, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended,

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change job classifications and impose promotion moratoriums affecting employees represented exclusively by American Federation of Government Employees, Local 3615, AFL-CIO, without first notifying and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact and implementation of such decisions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify American Federation of Government Employees, Local 3615, AFL-CIO, the exclusive representative of our employees, of any changes in job grade classifications and the imposition of promotion moratoriums regarding employees it represents exclusively, and, upon request, meet and confer, to the extent consonant with law and regulations, on the impact and implementation of such decisions.

(Agency)

Dated _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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In the Matter of :
:
SOCIAL SECURITY ADMINISTRATION :
BUREAU OF HEARING AND APPEALS :
:
Respondent :
:
and : Case No. 22-08346 (CA)
:
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES LOCAL 3615, AFL-CIO :
:
Complainant :
.....

ALBERT B. CARROZZA, Esquire
JAMES E. MARSHALL
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Arlington, Virginia 22210
For the Complainant

JULIAN H. BROWNSTEIN, Esquire
Bureau of Hearings and Appeals
P.O. Box 2518
Washington, D.C. 20013
For Respondent

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on August 2, 1977 under Executive Order 11491, as amended, (hereinafter called the Order) by American Federation of Government Employees, Local 3615 (hereinafter called the Union of Local 3615 AFGE) against the Bureau of Hearings and Appeals of the Social Security Administration (hereinafter called the Activity or Respondent) a Notice of Hearing on Complaint was issued by the United States

Department of Labor Regional Administrator for Labor Management Services for the Philadelphia, Pennsylvania, Region, on January 24, 1978.

Basically the Complainant alleged that the Activity violated Sections 19(a)(1) and (6) of the Order by failing to notify and meet and confer with the Union concerning a decision made by Respondent with respect to reclassifying appeals analysts.

A hearing was held before the undersigned in Washington, D.C. All parties were represented and were afforded a full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. Both parties were afforded an opportunity to argue orally and both parties filed briefs which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

1. The Union was certified as the exclusive collective bargaining representative in two units of Respondent's employees on July 24, 1975. One unit is composed of professional employees and consists of physicians and the other unit is composed of non-professional employees including Hearings and Appeals Analysts.

2. The Hearings and Appeals Analysts were in the GS-9, 11, 12 and 13 grades. Briefly, Hearings and Appeals Analysts perform review functions, including decision writing, remands, and other related duties involved in the adjudication of disabilities and other claims under the Social Security Act and regulations.

3. Commencing in September of 1975 routine position classification audits were undertaken for a number of positions within the Activity including the Hearings and Appeals Analyst position. The Union was aware of these audits.

4. During the labor-management meeting May of 1977 the Union asked about a vacancy announcement for a Hearings and Appeals Analyst which stated that the position had promotion potential to "at least GS-12." The Activity representative, John L. Poore, Assistant Bureau Director for Administration, advised the Union, apparently in very little detail, that although the classification studies were incomplete they raised some problems as to the

appropriateness of the existing grade level of the analysts as a GS-13. The Union attempted, without success, to inquire further about the classification study.

5. On June 1, the Union filed a request pursuant to the Freedom of Information Act for the material contained in the classification study and the requested material was furnished by the Activity on or about June 9, 1977.

6. By memorandum dated June 1, 1977 the Union asked Respondent's Director to meet and confer on the "reclassification of GS-13 Analyst position" and the "CSC study concerning reclassification." Respondent replied by memorandum dated June 9, 1977 stating that it was unaware of the "CSC study concerning reclassification," and stating that consultation would commence when required by appropriate authorities.

7. The Union filed an unfair labor practice charge dated July 5, 1977 alleging that the Activity violated Sections 19(a)(1) and (6) of the Order by failing to meet and confer on the preparation of the reclassification study and because the Activity was implementing a moratorium on promotions to the GS-13 level.

8. The Activity's Personnel Officer, Bryan Makoff, who had initial classification authority, made an interim determination on or about July 28, 1977 not to process any additional promotion requests from GS-12 to GS-13 for Hearings and Appeals Analyst position. He did this because he determined that the analyst positions was no longer classifiable at the GS-13 level and therefore further promotions of Hearings and Appeals Analysts would have been improper and probably even illegal. 1/

9. Respondent Activity did not advise AFGE Local 3615 of Personnel Officer Makoff's July 28 interim determination not to process any promotion requests for Hearings and Appeals Analysts from GS-12 to GS-13. A number of such promotion requests were pending at that time.

10. On September 7, 1977 Respondent's Director, Robert L. Trachtenberg, met with his staff and made the Activity final decision to accept the course of action recommended by Personnel Officer Makoff. Accordingly, Director Trachtenberg determined that the "freeze" on promotions of Hearings and Appeals Analysts from GS-12 and GS-13 would continue while the Activity looked

1/ Mr. Makoff's statement that it would have been illegal for him to promote someone into a job at a level that he had determined was non-classifiable at that level was not contradicted.

into methods and changes for protecting the GS-13 classification. Personnel Director Makoff communicated this decision to the Activity's Director for Appeals Operations and returned the pending requests for promotions without action.

11. On September 9, 1977 the Activity representatives, including Mr. Makoff, met with Union representatives, including the Union Vice President James E. Marshall, and advised them of the moratorium on promotions to the GS-13 level and that the final classification decision ultimately would be made by the Civil Service Commission and that would take a very long time. Mr. Makoff also advised the Union representatives that the employees could file classification appeals if they felt they were performing at a higher level. The Union requested, and the Activity agreed, that a meeting be held with the affected GS-12 Hearings and Appeals Analysts so that the employees could be supplied with the information directly. The Union was invited but declined to co-chair the meeting. 2/

12. On October 3, 1977 the Union requested another meeting with the employees regarding the moratorium and it was arranged and held in late October 1977.

13. By memorandum dated October 3, 1977 the Union President, referring to the failure to promote GS-12 Analysts, requested, that Director Trachtenberg "meet ... on the above matter ... to attempt to reach some settlement on the many charges pending at various levels ..."

14. By memorandum dated October 5, 1977, the Activity's Chief of Labor-Management Relations, John Toner, responded to the Union's October 3 memorandum stating that designated Activity representatives would meet with the Union to discuss all aspects of the GS-12 and 13 analyst problems, including negotiations to settle the various charges. The record contains no evidence to indicate the Union made any subsequent requests to meet with the Activity representatives to discuss the impact and implementation, or any other aspect, of the moratorium on promotions of analysts to the GS-13 level.

15. By memorandum dated October 12, 1977 Director Trachtenberg recommended that his staff examine the problem to see if there was some method to establish that the position in question as classifiable at the GS-13 level. In that same memorandum Mr. Trachtenberg stated "... My only regret is that the Union chose, for whatever reasons to force the issue when it did..."

2/ The meeting was held on September 23, 1977.

16. By memorandum dated March 7, 1978 Director Trachtenberg advised the analysts that he had made a final decision at the Activity level that the analysts positions are not classifiable at the GS-13 level and that he was referring to the matter forwarded to the Office of Social Security Commissioner for review at that higher level.

Conclusions of Law

The Respondent urges that the instant complaint should be dismissed because the unfair labor practice charge in the subject case was dated July 5, 1977 and indicated that a moratorium on promotions was already in force whereas the record established that earliest date upon which a moratorium on analyst promotions was declared was on July 28, 1977. Thus, the Activity contends that because the complaint was not amended to specifically allege the July 28 date, this matter could not properly be decided in this case. In support of this position the Activity cites number of cases. 3/

The cited decisions are not really applicable to the subject case. In the subject case the complaint was filed on August 2, 1977 after the July 28, date and dealt with the Activity's classification decisions and their implementation and impact. No specific date was alleged as the date of any management decision. In any event, where, as here, the charge and complaint deal with a management decision, which was not communicated to the Union, and this failure of communication is an integral part of the alleged violation, it would not be reasonable to require that the charge or the complaint set forth the precise date of each

3/ Veterans Administration, Regional Office Honolulu, Hawaii, A/SLMR No. 796 (ALJ Decision at p. 7, para 1); Department of the Navy, Norfolk Naval Shipyard Portsmouth, Virginia, A/SLMR No. 968 (ALJ Decision at p. 5 para 10); Department of Defense U.S. Navy, Norfolk Naval Shipyard, A/SLMR No. 908 (A/SLMR Decision at p.3, para 1); United States Equal Employment Opportunity Commission, A/SLMR No. 900 (ALJ Decision at p. 6, para 1); Department of the Army, Defense Mapping Agency, San Antonio Topographic Center, Fort Sam Houston, Texas, A/SLMR No. 818 (ALJ Decision at p. 6, para 1); Department of the Treasury, U.S. Customs Service Region IV, Miami, Florida, A/SLMR No. 739 (A/SLMR Decision at footnote 2); Department of the Air Force, Offutt Air Force Base, A/SLMR No. 138 (A/SLMR Decision at footnote 3); Headquarters, U.S. Army Material Command Administration Center, Bath, New York, FLRC No. 76A-21 (May 14, 1976), Council Report No. 105.

decision. In the subject case the July 28 decision date ^{4/} was known only to the Activity's management and was not communicated to the Union. The first time Union was advised of this precise date was at the hearing. It would frustrate the very purposes of the Order to require that the case be dismissed because the charge and the complaint failed to set forth the precise date management arrived at a decision when management did not communicate that decision to the Union. It would permit the Activity to benefit by its own improper conduct. In the subject case, it was quite clear from the charge and complaint that the Union was protesting the failure to bargain about the impact and implementation of the determination that the analyst position could not support a GS-13 and that there would be a moratorium on promotions to that level. The parties all understood that was the matter that was in issue and that was what was fully litigated. Accordingly, it is concluded that the charge and complaint in the subject case were sufficiently precise to encompass the alleged failure to bargain concerning the impact and implementation of the July 28 decision and moratorium on promotions and the impact and implementation of any subsequent Activity decisions concerning whether the analyst position can support a GS-13 and whether there would be a moratorium on promotions to that level.

Sections 11(b) of the Order states that the agency need not meet and confer concerning the "number, types and grades of positions." Thus the classification study itself and the decision that the analyst position can not support a GS-13 are matters that are retained by management under Section 11(b) of the Order and, as such, are not bargainable. Further the decision to impose the moratorium on promotions is free from any bargaining obligations under Section 12(b) of the Order. cf. Department of HEW, SSA, Bureau of Hearings and Appeals Dallas, Texas, A/SLMR No. 816. Accordingly, there was no obligation, under the Order, to notify the Union and bargain it about the classification study itself, any decision that the analyst position could not be properly classified as a GS-13, or the moratorium on promotions.

However, once a decision was made that the analyst position was no longer classifiable at the GS-13 level, the Activity was obliged under Section 11(a) of the Order to give the Union timely notice of that decision and opportunity, upon request, to bargain about the impact and implementation of the decision. Department of HEW, SSA Bureau of Hearings and Appeals, A/SLMR No. 828; U.S.

^{4/} The September 7, 1977 decision by Director Trachtenberg, and the subsequent decisions were continuations of the same conduct.

Department of the Treasury Bureau of the Mint, Assay Office, A/SLMR No. 750; SSA BRSI, Northeast Program Center, A/SLMR No. 984.

In the subject case, Personnel Officer Makoff on July 28, 1977 determined that the analyst position was non-classifiable as a GS-13 and that there would be moratorium on promotions and that he would no longer approve requests for promotions of analysts from a GS-12 to GS-13. Although Makoff's decisions, both with respect to the non-classifiability of the analysts position and the moratorium on promotions, were not the Activity's final decisions, they had a very real and immediate impact on those GS-12 analysts who had already been recommended for promotion and on those who would have soon become eligible for promotion. When Mr. Makoff determined that the analysts position was not classifiable as a GS-13, and that he was required by law to impose a promotion moratorium, he was obligated under Section 11(a) of the Order to notify the Union of his decisions, because they had a very real and immediate affect on the employees in question.

Accordingly it is concluded that the Activity violated Sections 19(a)(1) and (6) of the Order because Mr. Makoff did not give the Union any immediate and timely notice, as discussed above, of his determinations that the analyst position was not classifiable at the GS-13 level and that there would a moratorium on such promotions; by failing to give the required notice, the Union was denied an opportunity to bargain about the impact and implementation of Mr. Makoff's decisions.

With respect to the determinations by Mr. Trachtenberg on September 7, 1977 that the analyst position was not classifiable as a GS-13 and that the promotion moratorium would continue, it is concluded that the Union was promptly notified of these determinations on September 9, 1977 and was given an opportunity to request to bargain concerning their impact and implementation. The Union did not then request to so bargain; rather it requested that the Activity meet and explain the situation to the employees, and the Activity complied. ^{5/} By memorandum dated October 3, 1977 the Union requested to bargain, inter alia, about the moratorium and the Activity designated representatives to meet with the Union, but the Union did not follow up on its request. ^{6/}

^{5/} There is some issue as to whether one of such meetings might have constituted an unfair labor practice, but that will not be dealt with in this case because it is the subject of another unfair labor practice complaint.

^{6/} To some extent the October 3 memorandum also seemed to be attempting to set up meetings to discuss settlement of the subject case. To the extent settlement was the subject matter of this memorandum, it will not be considered in the case.

Thus with respect to the determinations made by Director Trachtenberg on September 7, the Union was given prompt and timely notice and the record fails to establish that the Activity refused to meet and bargain with the Union concerning the impact and implementation of these determinations. 7/ Accordingly, with respect to the determinations made by Director Trachtenberg it is concluded that the Activity did not violate Section 19(a)(1) and (6) of the Order.

In the subject case it would not be appropriate to institute a status quo ante remedy because Mr. Makoff's July 28 decision with respect to the moratorium on promotions was required by law and it would not be appropriate to compel the Activity to take an illegal action. Further, the final Activity decisions with respect to both the classification and moratorium were made on September 7, and March 7, and the Union did have adequate notice and opportunity to bargain about the impact and implementation of such decisions. It would seem that a prospective remedy is sufficient.

Finally there was some litigation and discussion that the Activity attempted to blame the Union for the classification action and moratorium on promotions and that this violated Section 19(a)(1) and (6) of the Order. Such allegations were nowhere set forth in either the charge or the complaint in the subject case and thus can not be appropriately dealt with this case.

Recommendation

Having found that Respondent violated Sections 19(a)(1) and (6) of the Executive Order 11491, it is recommended that the Assistant Secretary of Labor adopt the order as hereinafter set forth which is designed to effectuate the policies of Executive Order 11491.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Bureau of Hearings and Appeals, Social Security Administration, Arlington, Virginia shall:

7/ These determinations were finalized on March 7, 1978 and again the Union was given adequate and timely notice.

1. Cease and desist from:

a. Making decisions with respect to changing job grade classifications or to imposing promotion moratoriums with respect to employees represented by Local 3615, American Federation of Government Employees, AFL-CIO without notifying and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the implementation and impact which such decisions will have on the employees it represents.

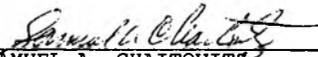
b. In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions, in order to effectuate the purposes and policies of Executive Order 11491, as amended.

a. Notify Local 3615, American Federation of Government Employees, AFL-CIO of any decisions concerning changes in job grade classifications and the imposition of promotion moratoriums with respect to employees represented by Local 3615, AFGE and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the implementation and the impact any such decisions will have on the employees in units exclusively represented by Local 3615, AFGE.

b. Post at it's facility in Arlington, Virginia copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

c. Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.


 SAMUEL A. CHAITOVITZ
 Administrative Law Judge

Dated: June 23, 1978
 Washington, D.C.

SAC:yw

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT make decisions with respect to changing job classifications or to imposing promotion moratoriums with respect to employees represented by Local 3615, American Federation of Government Employees, AFL-CIO, without notifying and affording such representatives the opportunity to meet and confer, to the extent consonant with law and regulations, on the implementation and impact which such decisions will have on the employees it represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify Local 3615, American Federation of Government Employees, AFL-CIO of any decisions concerning changes in job grade classifications and the imposition of promotion moratoriums with respect to employees represented by Local 3615, AFGE and upon request meet and confer in good faith, to the extent consonant with law and regulations on the implementation and the impact any such decision will have on the employees in units exclusively represented by Local 3615, AFGE.

(Agency)Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. CUSTOMS SERVICE AND
HOUSTON REGION, U.S. CUSTOMS SERVICE
A/SLMR No. 1135

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 143 (Complainant) alleging, in substance, that the Respondents violated Section 19(a)(1) and (6) of the Order by failing to release to the Complainant all the material which was necessary and relevant to the Complainant's representation of certain employees of the Houston Region to whom notices of proposed suspension and/or discipline had been issued.

The Administrative Law Judge concluded, in effect, that the Respondent U.S. Customs Service violated Section 19(a)(1) and (6) of the Order by improperly withholding from the Complainant material and information available to it during the formulation and preparation of notices of proposed suspension and/or discipline which were issued to the employees who had designated the Complainant as their representative upon receipt of the notices. In reaching this conclusion, the Administrative Law Judge found, in effect, that the material sought by the Complainant was necessary and relevant to the processing of the employees' appeals of their charges, and that, therefore, the material should have been released to the Complainant so as to permit it to properly perform its representational duties under the Order. The Administrative Law Judge further concluded that the Respondent properly withheld a transcript of a Grand Jury proceeding which had been released to it for certain limited purposes by a United States District Court Judge.

The Assistant Secretary agreed with the Administrative Law Judge that the Respondent U.S. Customs Service violated Section 19(a)(1) and (6) of the Order by withholding material necessary and relevant to the performance of the Complainant's representational duties, and further, that it did not violate the Order by withholding the Grand Jury transcript. Thus, at the time the Complainant originally sought the material at issue herein, it indicated that it sought the material in order to "answer" the charges against the employees it represented. The Complainant was seeking the information which could have been used at that stage of the proceedings to determine what appeals, if any, might be filed on behalf of the employees it represented. One option would have been to file a grievance pursuant to the parties' negotiated grievance procedure.

The Assistant Secretary noted, in this regard, that it is well established that an exclusive representative is entitled to information necessary and relevant to determine whether or not to initiate a grievance. He found that, similarly, an exclusive representative is entitled to the information necessary and relevant to determine which appellate procedure, if any, to pursue in the course of representing unit employees. Thus, by failing to provide the necessary and relevant material with which the Complainant might have determined whether to file a grievance, and if so, which grievance procedure it might have invoked, the Assistant Secretary found that the Respondent U.S. Customs Service violated Section 19(a)(1) and (6) of the Order.

However, in the particular circumstances herein, the Assistant Secretary found that the Respondent Houston Region had not violated Section 19(a)(1) and (6) of the Order. Thus, he found that the Houston Region, insofar as it refused to release all of the necessary and relevant material sought by the Complainant, was acting in accordance with the directions of the Respondent Agency.

Accordingly, the Assistant Secretary ordered the Respondent U.S. Customs Service to institute appropriate remedial actions in this matter, and he dismissed the complaint insofar as it alleged a violation of the Order by Respondent Houston Region.

-2-

A/SLMR No. 1135

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. CUSTOMS SERVICE AND
HOUSTON REGION; U.S. CUSTOMS SERVICE 1/

Respondents

and

Case No. 63-6852(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 143

Complainant

DECISION AND ORDER

On June 6, 1978, Administrative Law Judge Ben H. Walley issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent Agency had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, both the Respondents and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision

1/ The Houston Region was added as a respondent herein by amendment to the complaint. The Respondents moved to dismiss the amendment, contending that the Houston Region was not served with a proper pre-complaint charge pursuant to Section 203.2(a) of the Assistant Secretary's Regulations. Under the particular circumstances herein, I adopt the Administrative Law Judge's conclusion that the Motion be denied, and find that the Houston Region was properly made a party in this matter. Thus, it was served with a copy of the original complaint which cited its involvement in the alleged violations of the Executive Order, and it did not object to its inclusion as a party in this matter pursuant to the amended complaint, although the Respondent Customs Service subsequently objected to the inclusion of the Houston Region in this proceeding. Further, the Notice of Hearing included the Houston Region as a party and no objection was made during the two-month period between the issuance of Notice of Hearing and the holding of the hearing. Finally, there is no contention that the Respondent Houston Region was prejudiced in this matter by surprise or was otherwise impeded in its preparation of an adequate defense. Accordingly, the Administrative Law Judge's denial of the Respondents' Motion to Dismiss is hereby affirmed.

and Order and the Complainant filed an answering brief with respect to the Respondents' exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the parties' exceptions and briefs and the answering brief filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, as modified herein.

The Administrative Law Judge concluded, in effect, that the Respondent U.S. Customs Service violated Section 19(a)(1) and (6) of the Order by improperly withholding from the Complainant material and information available to it during the formulation and preparation of notices of proposed suspension and/or discipline which were issued to certain employees who had designated the Complainant as their representative upon receipt of the notices. In reaching this conclusion, the Administrative Law Judge found, in effect, that the material sought by the Complainant was necessary and relevant to the processing of the employees' appeals of their charges; and that therefore the material should have been released to the Complainant so as to permit it to properly perform its representational duties under the Order. 2/ The Administrative Law

2/ In so finding, the Administrative Law Judge, in effect, dismissed the Respondents' contention that they were precluded from releasing to the Complainant anything more than the material on which the notices were based and which was relied on to support the reasons in the notices, pursuant to applicable portions of the Federal Personnel Manual (FPM) regarding the appeal of proposed notices of suspension.

In this regard, Section 752.2-2 of the FPM provides, in part:

(2) ...the material on which the notice [of proposed adverse action] is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his/her review....

While the applicable portions of the FPM cited by the Respondents establish minimum standards as to what material must be released in the context of an appeal of a proposed adverse action, the FPM regulation, cited above, does not, on its face, preclude the release of additional material. In my view, therefore, the finding of violation herein does not present a conflict between the requirements established by the FPM and those regarding the release of documents under the requirements of the Executive Order.

Judge further concluded that the Respondent properly withheld a transcript of a Grand Jury proceeding which had been released to it for certain limited purposes by a United States District Court Judge.

I agree with the Administrative Law Judge that the Respondent U.S. Customs Service violated Section 19(a)(1) and (6) of the Order by withholding certain material necessary and relevant to the performance of the Complainant's Section 10(e) duties, and further, that it did not violate the Order by withholding the Grand Jury transcript. 3/ Thus, at the time the Complainant originally sought the material at issue herein, it indicated that it sought the material in order to "answer" the charges against the employees it represented. The Complainant was seeking information which could have been used at that stage of the proceedings to determine what appeals, if any, might be filed on behalf of the employees it represented. One option would have been to file a grievance pursuant to the parties' negotiated grievance procedure. In this latter regard, it is well established that an exclusive representative is entitled to information necessary and relevant to determine whether or not to initiate a grievance. 4/ Similarly, an exclusive representative would be entitled to the information necessary and relevant to determine which appellate procedure, if any, to pursue in the course of representing unit employees. Thus, by failing to provide the necessary and relevant material with which the Complainant might determine whether to file a grievance, and if so, which grievance procedure it might invoke, I find that the Respondent U.S. Customs Service violated Section 19(a)(1) and (6) of the Order.

However, in the particular circumstances herein, I do not find that the Respondent Houston Region violated Section 19(a)(1) and (6) of the Order. Thus, the evidence establishes that the Houston Region, insofar as it refused to release all of the necessary and relevant material sought by the Complainant, was acting in accordance with the directions of the Respondent U.S. Customs Service. 5/

3/ The Administrative Law Judge found at p. 10 of his Recommended Decision and Order that the Complainant had recourse under the Privacy Act to the Grand Jury transcript. In my view, whether such recourse is available under the Privacy Act is not determinative as to whether material is necessary and relevant in the context of an exclusive bargaining relationship under the requirements of the Order. Internal Revenue Service, Chicago District Office, A/SLMR No. 1004 (1978).

4/ Department of Health, Education and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, 4 A/SLMR 466, A/SLMR No. 411 (1974).

5/ The Federal Labor Relations Council (Council) has held that the acts of higher agency management may not, standing alone, be the
(Continued)

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Customs Service shall:

1. Cease and desist from:

(a) Refusing to provide to the National Treasury Employees Union, Chapter 143, such documents and materials as are necessary and relevant to determine the manner in which to discharge its representational obligation to Henry D. Wade, Will Rojewsky, James Clinton, William Long, Lee Fraser, Alan Denué, Edward Hager, Ronald McGinty, Jose Vasquez, and James E. Putnoky, who had designated the National Treasury Employees Union to be their representative upon receipt of proposed notices of suspension and/or discipline.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, provide to the National Treasury Employees Union, Chapter 143, such documents and materials as are necessary and relevant to determine the manner in which to discharge its representational obligation to Henry D. Wade, Will Rojewsky, James Clinton, William Long, Lee Fraser, Alan Denué, Edward Hager, Ronald McGinty, Jose Vasquez, and James E. Putnoky, who had designated the National Treasury Employees Union to be their representative upon receipt of proposed notices of suspension and/or discipline.

(b) Post at its facilities in the Houston Region, U.S. Customs Service, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commissioner, U.S. Customs Service, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The

5/ basis for finding a separate violation by agency management at a lower level where a unit of recognition exists. This conclusion was predicated upon the actions of the agency management at the higher level in initiating the conduct found violative of the Order, rather than upon the ministerial conduct of agency management at the level of recognition in implementing the higher level directive. See Naval Air Rework Facility, Pensacola, Florida, FLRC No. 76A-37 (1977), and Department of Transportation, Federal Aviation Administration, Metropolitan Washington Airport Service, Dulles International Airport; and Director, Metropolitan Washington Airports, Federal Aviation Administration, A/SLMR No. 1062 (1978).

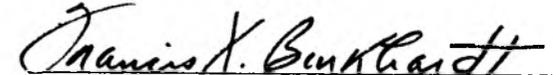
Commissioner shall take steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that those portions of the complaint in Case No. 63-6852(CA) alleging violations of Section 19(a)(1) and (6) of the Order by the Houston Region, U.S. Customs Service, be, and they hereby are, dismissed.

Dated, Washington, D.C.

October 3, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to provide, upon request by the National Treasury Employees Union, Chapter 143, such documents and materials as are necessary and relevant to determine the manner in which to discharge its representational obligation to Henry D. Wade, Will Rojewsky, James Clinton, William Long, Lee Fraser, Alan Denué, Edward Hager, Ronald McGinty, Jose Vasquez, and James E. Putnoky, who had designated the National Treasury Employees Union to be their representative upon receipt of proposed notices of suspension and/or discipline.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, provide to the National Treasury Employees Union, Chapter 143, such documents and materials as are necessary and relevant to determine the manner in which to discharge its representational obligation to Henry D. Wade, Will Rojewsky, James Clinton, William Long, Lee Fraser, Alan Denué, Edward Hager, Ronald McGinty, Jose Vasquez, and James E. Putnoky, who had designated the National Treasury Employees Union to be their representative upon receipt of proposed notices of suspension and/or discipline.

(Activity or Agency)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 600
San Francisco, California 94105



REPLY TO SAN FRANCISCO
AREA CODE 415 556-0555

In the Matter of)
)
TREASURY/U. S. CUSTOMS,)
WASHINGTON, D. C., and)
HOUSTON U. S. CUSTOMS)
SERVICE)
Respondents)
)
and)
)
NATIONAL TREASURY EMPLOYEES)
UNION and CHAPTER LOCAL 143)
Complainants)

CASE NO. 63-6852 (CA)

Gary B. Landsman
Assistant Chief Counsel for
Labor-Management Relations
U. S. Customs Service
1301 Constitution Avenue, N.W.
Room 3305
Washington, D. C. 20229
For the Respondents

Rob V. Robertson
Assistant Counsel
National Treasury Employees
Union
300 East Huntland Drive
Suite 104
Austin, Texas 78752
For the Complainants

Before: BEN H. WALLEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

On June 21, 1976, the National Treasury Employees Union, 1730 K Street, N.W., Suite 1101, Washington, D. C. 20005, and Local #168, #12 Sweetgum Lane, Destrehan, Louisiana 70047, hereafter referred to as Complainant, filed a Complaint against United States Customs Service, 1301 Constitution Avenue, Washington, D. C. 20229, J. Murry Martin, Director, Personnel Management Division, same address, as the person to contact, hereafter referred to as Respondents; said Complaint alleging an unfair labor practice because of conduct allegedly violative of Executive Order 11491, as amended, section 19(a), sub-sections (1) and (6), hereafter referred to as the Order.

On June 8, 1977, Complainant filed an "Amended Complaint against Agency," heretofore referred to as "Respondents," which "Amended Complaint" changed only the "name of Activity and/or Agency" as stated in paragraph 1 A of Form LMSA 61 (Rev. 4-75) to read: "United States Customs Service and Houston Region, United States Customs Service" (Asst. Sec. Ex. #1).

Pursuant to filing of the Complaint and the Amended Complaint as aforesaid, and upon failure to resolve the differences between the parties hereto, Notice of Hearing on said Amended Complaint was issued by the Regional Administrator for Labor-Management Services Administration, Kansas City Region, Kansas City, Missouri 64106, to be held in El Paso, Texas, on September 6, 1977. For good cause shown and on July 12, 1977, the Regional Administrator issued his Order Rescheduling Hearing in El Paso, Texas, on September 27, 1977.

Following the filing of the Amended Complaint aforesaid and on June 23, 1977, the Respondents filed objections to the Amended Complaint in which it moved that said Amended Complaint be dismissed for reasons therein stated (Exhibit J-26), which objections and Motion were received by the Regional Administrator, LMSA, on June 30, 1977. Due to the short notice to the Regional Administrator, and the fact that Complainant had not had an "opportunity to comment, and that the Motion involves major policy considerations," the Regional Administrator referred "said Motion to the Administrative Law Judge for ruling" (Asst. Sec. Ex. #2).

Respondent did not avail itself of the opportunity to make an "opening statement" at the beginning of the hearing.

Instead, counsel said: "... at this time I am just going to state that I am going to reserve my opening statement until the completion of the Complainant's case and the beginning of Respondent's case." Then, after Complainant had rested its case, the Motion to Dismiss was raised and argued. In addition, Respondent moves for a dismissal as against Customs Headquarters, and argues for dismissal on the grounds that the facts alleged as an unfair labor practice is covered by a statutory appeals procedure and, as such, is precluded by section 19(d) of the Order.

Inasmuch as it was considered that the merits of the respective motions should properly be measured by the facts of the case, rulings were reserved until the testimony could be heard, the exhibits examined and the transcripts reviewed. These motions were not further renewed at the conclusion of the hearing but have since been considered.

For reasons hereinafter set out and stated in the Findings of Fact and Conclusions of Law, the Motion to Dismiss the Amended Complaint because: (1) The Amended Complaint joins the Houston Region, United States Customs Service as an additional Respondent; (2) Customs Headquarters is improperly joined because the bargaining agreement (Ex. J-1) is between Regional Commissioner of Customs, Region VI, and Complainant and there is no collective bargaining relationship between Complainant and Customs Headquarters, with regard to Region VI employees; and, (3) The unfair labor practice therein charged is improper because the matters complained of can be addressed through a statutory appeals procedure and is prohibited by section 19(d) of the Order, should be and are all hereby denied.

Following the hearing and on October 18, 1977, Complainant mailed to the undersigned a Motion to Accept New Evidence into Record, which was received on October 21, 1977, before the transcripts were received, but marked and held for further information. The Motion urged a continuation of the hearing at which the "new evidence" would be offered, or in the alternative, the "new evidence" be accepted into the record by mail with copies to Respondent. On October 27, 1977, Respondent mailed its objections to the Motion, which were received on November 2, 1977, and "held for action." The objections of Respondent urged denial of the Motion and the "alternative" mentioned above. Complainant mailed a supplemental letter which was received on November 8, 1977, and all information has been considered.

For reasons hereinafter set out and stated in the Findings of Fact and Conclusions of Law, the Motion to

Accept New Evidence into Record, together with its alternative, should be and is hereby denied.

With the preliminaries aside, the Complaint alleged a breach of section 19(a), sub-sections (1) and (6), of the Order as follows:

Roland Raymond, Assistant Commissioner of Customs, Office of Operations, Washington, D. C., acting upon authority delegated to him by V. D. Acree, Commissioner of Customs, and with assistance and advice of other staff personnel in Customs Headquarters, Washington, D. C., formulated proposed adverse action and disciplinary charges against Henry Wade and nine other named employees, all of whom were employees of U. S. Customs, El Paso, Texas, District and members of NTEU, Local Chapter 143, within the bargaining unit of Houston, Region VI, United States Customs, which unit was represented by Complainant.

Complainant made proper demand on Respondent(s) "for all papers, tapes, records, statements, memoranda, regulations and any other evidence whatsoever used or relied upon by the United States Customs Service in proposing disciplinary action against" Henry Wade and the nine other named employees.

Respondent(s) admittedly did not furnish to Complainants "all" the information requested, contending that it was only required to furnish copies of information it relied upon to formulate the proposed charges. It asserted several "reasons" for its refusal, each of which will be hereafter discussed. As a result of the refusal to furnish Complainant with the information it thought it needed to properly represent the unit members involved, the Complaint was filed.

In referring this Complaint for hearing and disposition, the Regional Administrator, LMSA, Kansas City Region, has requested evidence and testimony be adduced on the following issues:

Has U. S. Customs Service Region VI, Houston, Texas, acting as principal in an exclusive bargaining relation, designated the Deputy Commissioner of Customs, Washington, D. C. and/or Employee Relations Program Branch, U. S. Customs Service, Washington, D. C. to act as its agent in dealings with NTEU and NTEU, Chapter 143?

Has U. S. Customs Service, Washington, D. C. thereby become party to the bargaining relation and incurred the obligation to negotiate in good faith with NTEU and NTEU, Chapter 143 including the duty to supply upon request, information and documentation necessary to the discharge by NTEU of its Section 10(e) duty of fair representation?

Has U. S. Customs Service, Washington, D. C. failed or refused to negotiate in good faith where a bargaining obligation exists?

At the hearing held, the parties were afforded full opportunity to be heard, to offer, examine, and cross-examine witnesses and to introduce evidence considered relevant to the aforesaid issues and other issues considered by them to be relevant to their position in the premises. After hearing the testimony of the witnesses and observing their demeanor, having received the exhibits and the transcripts, having examined the post-hearing Motion to offer new evidence and the objections filed thereto, having considered the post-hearing briefs filed herein, and based upon the entire record, I make the following findings of fact, conclusions and recommendations.

Findings of Fact and Conclusions of Law

1. An agreement under the provisions of Executive Order 11491, as amended, was negotiated and entered into by and between National Customs Service Association, Region VI, and Regional Commissioner, Region VI, Bureau of Customs, on August 18, 1972, which was approved by the Commissioner of Customs on September 13, 1972 (Ex. J-1). By its own terms the agreement has been extended from time to time, and by proper notice from the Area Director, Dallas Area Office, LMSA, dated April 30, 1976, Complainant was certified as the exclusive representative of all employees, except those specifically excluded, in U. S. Customs Service, Region VI, Houston, Texas (Ex. J-27), and at all times material to the issues here involved said agreement was in full force and effect.

2. During the summer of 1975, Henry D. Wade and nine other employees of United States Customs, El Paso District, El Paso, Texas, and each a member of NTEU, Chapter 143, El Paso, Texas, were suspected of being involved in questionable conduct. An investigation was ordered and was made by an Audit and Inspection team with Internal Affairs. Because of the sensitivity of the issues involved, and on February 10, 1976, Commissioner of Customs, V. D. Acree,

signed a memorandum delegating authority to Roland Raymond, Assistant Commissioner of Customs, Office of Operations, Washington, D. C., to "propose adverse action(s), as necessary," against twenty-four Customs employees in El Paso, Texas, including Henry D. Wade and nine other employees. 1/ Clearly, this was a change in "the line of authority," that no one questioned, and all management personnel acted accordingly.

3. Following delegation of authority to the Assistant Commissioner of Operations, and upon completion of the Field investigation by Internal Affairs, twenty-four (24) investigative reports concerning employees under investigation, and including "files" on Henry D. Wade and nine other employees, were received by Robert E. Abba, Employee Relations Chief, Employee Relations Program Branch, U. S. Customs, who was acting for and on behalf of the Assistant Commissioner for Operations, and with the assistance of other management personnel in Customs Headquarters and Region VI, prepared for and cleared with the Assistant Commissioner, Mr. Roland Raymond, charges and specifications for the disciplinary actions taken. Although the records do not reflect a transmittal of these charges and specifications to the affected employees through Houston Region VI, Mr. Abba testified that their preparation was coordinated with Houston Region and Personnel Form 52, was submitted to have a Form "50" cut at the Regional level (Houston Region VI). Therefore, I find and conclude that Houston Region VI was fully aware of and did participate in the preparation and processing of the charges and specifications contained in the disciplinary action(s) as directed by Customs Headquarters.

4. Knowing that an investigation had been made and that proposed disciplinary action had been proposed,

1/ "The purpose of this memorandum is to delegate authority to you to propose adverse action(s), as necessary, in the case of twenty-four Customs employees regarding incidents which occurred in El Paso, Texas.

This delegation is taken in that the line of authority in most cases is derived from this office to the Regional Commissioner. However, due to the sensitivity of the issues involved, it was determined that any action required would be proposed and decided at Headquarters.

This authority may not be redelegated."

Henry D. Wade and nine other employees, 2/ designated Complainant to represent them in all aspects of such proposals. Whereupon, Complainant did on or about February 20, 1976, make proper demand on United States Customs Service in Washington, D. C. and in the El Paso District for "all papers, tapes, records, statements, memorandum, regulations and any other evidence whatsoever used or relied upon ..., in preparing disciplinary action against the employees in question." (Ex. J-4) The "request" was acknowledged by Customs Headquarters and Complainant was advised that "... all material customs has relied upon to support the proposed disciplinary actions will be placed in adverse action files for each individual employee and forwarded to the District Director's Office, El Paso, Texas, where they will be made available for your review."

5. The employees in question did on March 15, 1976, receive the material alluded to above and after inventory concluded that the file(s) for each individual employee contained only a fraction of the material that was available

2/ "We the undersigned hereby designate the National Treasury Employees Union, Chapter 143, National Treasury Employees Union national office and Joseph A. Rose, National Employees Union counsel to represent us for all purposes what so ever in connection with terms and conditions of our employment and in the disciplinary actions brought against us individually and as a group.

We authorize these representatives to act fully in our behalf and as our agents in obtaining all information from any source what so ever that they in their sole discretion deem necessary to our defense."

Henry Wade	/s/ Henry Wade
Will Rojewsky	/s/ Will Rojewsky
James Clinton	/s/ James Clinton
William Long	/s/ William Long
Lee Fraser	/s/ Lee Fraser
Alan Denu	/s/ Alan Denu
Edward Hager	/s/ Edward Hager
Ronald McGinty	/s/ Ronald McGinty
Jose Vasquez	/s/ Jose Vasquez
James E. Putnok	/s/ James E. Putnok

to Respondent(s), was totally insufficient to meet the requests made, and was inadequate for the preparation of replies and a defense to the charges made. Respondent(s), speaking through Mr. Abba, testified that each individual file contained "all" the information "relied upon" to formulate the charges and specifications and repeated questioning elicited the same response. Specific inquiry developed the fact that there was other information available to him but justification for withholding it continued to be based on his assertions that it was not material relied upon to formulate the charges and specifications in the proposed disciplinary action; that all information furnished and contained in each file was in accordance with the applicable regulations (Ex. J-6). Another request was made by the President, NTEU Chapter 143, asking for "copies of all documents, hearing transcript, Internal Affairs reports and any other documents used to arrive at the proposed adverse action." (Ex. J-3) This request was further enlarged by counsel for Complainant on March 5, 1976, (Ex. J-7) and each request based their rights to the information on the Freedom of Information Act (5 U.S.C. § 552) and the Privacy Act of 1974 (5 U.S.C. § 552a).

6. Despite the fact Complainant repeatedly asserted that each file of each employee affected contained all the information relied upon in formulating the charges and specifications, it further asserted that the investigatory material requested was exempt from disclosure under the Freedom of Information Act (5 U.S.C. § 552(b)(7)(A) 3/

3/ " ... investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel." (Emphasis added)

and 31 C.F.R. § 1.2(c)(1)(vii)(A) as an investigatory record, and it had the further right to refuse under (d)(5) and (k)(2) of the Privacy Act of 1974 (5 U.S.C. § 552a (d)(5) 4/ and (k)(2)). I do not agree with these contentions. Clearly, the investigation was made and the records were compiled for the purpose of determining whether disciplinary action would be imposed according to FPM and CPM and the rules and regulations applicable thereto. It was not for law enforcement purposes. It was for "administrative purposes" and did not come within the exemptions claimed. "Center for National Policy Review on Race and Urban Issues v. Weinberger, 1974, 502 F.2d 370. The basic purpose of the statute is to promote disclosure of information, Charles River Park 'A', Inc. v. Department of Housing and Urban Development, 1975, 519 F.2d 935, and the exemptions are to be given a narrow construction. Washington Research Project, Inc. v. Department of Health, Education, and Welfare, 1974, 504 F.2d 238, 164 U.S. App. D.C. 169, certiorari denied 95 S.Ct. 1951, 421 U.S. 963, 44 L.Ed.2d 450." For the same reasons, I find and conclude that it cannot be withheld under a pretense that it was "compiled in reasonable anticipation of a civil action or proceeding." (See note "4").

7. Clearly, the record reflects that Respondents had "access to transcripts of testimony and exhibits, or copies thereof, introduced before the September, 1974 Federal Grand Jury" investigating the "questionable conduct" of the employees affected and being represented. This information was made available to Respondents by an Order of the United States District Judge having jurisdiction of the matter and for a limited purpose "in order to determine whether there are violations of ... regulations of the Customs Service ... which would warrant administrative proceedings or sanctions..." (Ex. J-40). Although Mr. Abba, the agent of Respondent who received and reviewed the "files" of each individual affected and who made recommendations of proposed charges and specifications to the Assistant Commissioner for Operations, testified that he did not receive the "Grand Jury" transcript or have access to it, which was a believable statement and which I do believe, I am not convinced that the file of each employee affected did not contain information which would, of necessity, be derivative from the "Grand Jury" transcript.

4/ "Nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding."

RECOMMENDED ORDER

Complainant has been quite persistent and insists that it needed access to the Grand Jury transcript to enable it to properly represent the unit members. The "need" is not the question, but its availability. Since Respondent had access to the Grand Jury transcript on orders of the United States District Judge who had control of it, and that access for the limited purpose stated, I find and conclude that it was properly withheld by Respondent(s). If Complainant felt a compelling need for such information, it had recourse under subsection (g)(1)(A) of the Privacy Act (5 U.S.C. § 552a (g)(1)(A)). For any other material and information received and reviewed by Respondent, I find and conclude that there was no valid reasons to deny Complainant reasonable access thereto.

8. The record is replete with evidence to establish the fact, and I so find and conclude, that United States Customs, Washington, D. C., by Commissioner's Memorandum of February 10, 1976, (Ex. J-1), took unto itself the sole authority to and responsibility for making investigation and compiling records, for receiving and reviewing them, for proposing and processing charges and specifications, if necessary, for disciplinary actions against the affected employees, and for the administration and review of any such disciplinary actions taken; that this action pre-exempted any authority or responsibility then existing in Houston Region VI, and in El Paso District, United States Customs, and that thereafter any actions taken or performed by either were ministerial only and they or either of them had no choice but to do so.

9. The normal "line of authority" and the proper level of exclusive recognition for bargaining relations under the agreement attached is between Complainant and Houston Region VI. However, it has been held that the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of any part of a section 19(a) violation, Naval Air Rework Facility, Pensacola, Florida, FLRC No. 76A-37 (1977), and since I have heretofore found that there was material and information available and used in formulating the charges and specifications that were improperly withheld from Complainant, I find and conclude that Respondent engaged in conduct violative of sections 19(a)(1) and (6) of Executive Order 11491, as amended.

Recommendations

Therefore, I recommend that the Assistant Secretary adopt the following Order designed to effectuate the policies of Executive Order 11491, as amended.

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that United States Customs, Washington, D. C., shall:

1. Cease and desist from:

(a) Refusing to make available to Complainant, National Treasury Employees Union and NTEU Chapter 143, 6004 Isabella, El Paso, Texas, the material and information available to you, except the Grand Jury Transcript or the notes and memoranda extracted therefrom, and considered and examined by you in formulating, preparing and proposing disciplinary actions against unit member employees as follows:

Henry D. Wade
Will Rojewsky
James Clinton
William Long
Lee Fraser
Alan Denu
Edward Hager
Ronald McGinty
Jose Vasquez
James E. Putnoky

(b) Interfering with, restraining or coercing the employees by refusing to make available to National Treasury Employees Union and NTEU Chapter 143, the material and information available to you and considered and examined by you, except that excluded above, in formulating, preparing and proposing disciplinary actions against unit member employees named above.

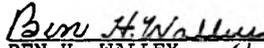
2. Take the following affirmative action in order to effectuate the purposes and provision of the Executive Order:

(a) Upon request make available to National Treasury Employees Union and NTEU Chapter 143, El Paso, Texas:

The material and information available to you and considered and examined by you, except that excluded in paragraph 1(a) above, in formulating, preparing and proposing disciplinary actions against unit employees named above.

(b) Post at its offices in Houston Region VI, Houston, Texas, and El Paso District, El Paso, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commissioner of Customs and they shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Commissioner shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

(c) Pursuant to section 203.27 of the regulations, notify the Assistant Secretary in writing within 20 days from the date of this Order as to what steps have been taken to comply therewith.


BEN H. WALLEY
Administrative Law Judge

Dated: June 6, 1978
San Francisco, California

Attachment

BHW:vag

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO

A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to make available to National Treasury Employees Union and NTEU Chapter 143, El Paso, Texas, the material and information available to Customs and examined and considered by Customs, except the Grand Jury transcript and notes and memoranda extracted therefrom, in formulating, preparing and proposing disciplinary actions against unit member employees named below:

Henry D. Wade
Will Rojewsky
James Clinton
William Long
Lee Fraser
Alan Denu
Edward Hager
Ronald McGinty
Jose Vasquez
James E. Putnoky

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Executive Order.

(Agency of Activity)

Dated _____ By _____
(Commissioner)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

October 13, 1978

common supervision, engage in integrated work functions, and enjoy common personnel and labor relations policies. Under these circumstances, he concluded that such employees enjoy a clear and identifiable community of interest and that the unit will promote effective dealings and efficiency of agency operations.

Accordingly, the Assistant Secretary dismissed the petition with respect to the unit represented by AFGE Local 421 which he found continued to remain appropriate and ordered an election in a unit of all eligible DOE Headquarters employees.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION, ORDER AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. DEPARTMENT OF ENERGY
A/SLMR No. 1136

This case involved three RA petitions filed by the U.S. Department of Energy (DOE), which was created by combining three independent agencies - the Federal Power Commission (FPC), the Federal Energy Administration (FEA), and the Energy Research and Development Administration (ERDA) - and various energy related functions of other agencies. Specifically, the DOE questioned the continued appropriateness of a nationwide unit of employees of the FPC represented by the American Federation of Government Employees, AFL-CIO, Local 421 (AFGE Local 421); a nationwide unit of FEA employees represented by the National Treasury Employees Union (NTEU); and a unit of Headquarters employees of the ERDA represented by the American Federation of Government Employees, AFL-CIO, Local 2195 (AFGE Local 2195). The DOE took the position that as a result of the reorganization these three units no longer remained appropriate. Instead, in its view, the following two units would be appropriate for the purpose of exclusive recognition: a unit of DOE Headquarters employees and a unit of employees of the Federal Energy Regulatory Commission (FERC), which was established as an independent regulatory commission within DOE and which DOE claimed to be the "successor" employer to the unit represented by AFGE Local 421.

The Assistant Secretary found that the FERC is the "successor" employer of the employees in the unit represented by AFGE Local 421. In this regard, he noted that the bargaining unit was transferred substantially intact to the FERC and that such unit is presently separate, identifiable, and encompasses a homogeneous grouping of employees. Further, he found that the appropriateness of the unit has remained unimpaired subsequent to the transfer and that no question concerning representation has been raised as to the representative status of AFGE Local 421.

With regard to the NTEU and the AFGE Local 2195 units, the Assistant Secretary found that the reorganization rendered these units inappropriate for the purpose of exclusive recognition under the Order. Thus, he found that the reorganization created a new organizational entity and affected a substantial change in the scope and character of both the NTEU and the AFGE Local 2195 units. He further found that the Headquarters employees of the DOE, excluding the FERC employees, constituted an appropriate unit as such employees share a common mission,

- 2 -

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF ENERGY

Agency-Petitioner

and

Case No. 22-08582(RA)

NATIONAL TREASURY EMPLOYEES UNION

Labor Organization

U.S. DEPARTMENT OF ENERGY

Agency-Petitioner

and

Case No. 22-08583(RA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 2195

Labor Organization

U.S. DEPARTMENT OF ENERGY

Agency-Petitioner

and

Case No. 22-08584(RA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 421

Labor Organization

DECISION, ORDER AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing was held before Hearing Officer Colleen Duffy Raap. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject cases, including briefs submitted by the National Treasury Employees Union, hereinafter called NTEU, and the American Federation of Government Employees, AFL-CIO, Locals 2195 and 421, hereinafter called AFGE Local 2195 and AFGE Local 421, respectively, the Assistant Secretary finds:

The Department of Energy, hereinafter called Agency, filed the subject petitions seeking a determination by the Assistant Secretary with respect to the effect of a reorganization on the continued appropriateness of 3 of 37 existing exclusively recognized units. In essence, as a result of the reorganization, the Federal Power Commission (FPC), the Federal Energy Administration (FEA), and the Energy Research and Development Administration (ERDA) were disestablished and their missions, resources, and personnel were transferred to the Agency, along with certain organizational elements of the Department of the Interior, the Department of Commerce, the Department of the Navy, and the Interstate Commerce Commission. The Agency contends that the following exclusively recognized units are inappropriate due to the aforementioned reorganization:

- (1) In Case No. 22-08584(RA), a unit exclusively represented by AFGE Local 421, consisting of all General Schedule and prevailing rate employees, including professional employees, of the former FPC;
- (2) in Case No. 22-08582(RA), a unit exclusively represented by the NTEU, consisting of all professional and nonprofessional employees of the former FEA; and
- (3) in Case No. 22-08583(RA), a unit exclusively represented by AFGE Local 2195, consisting of all professional and nonprofessional Headquarters employees of the former ERDA with regular duty stations in the Washington, D.C. metropolitan area.

The Agency takes the position that, under present circumstances, only the following two units remain appropriate for the purpose of exclusive recognition: A nationwide unit of Federal Energy Regulatory Commission (FERC) employees, and a unit of all Headquarters employees of the Agency, excluding the FERC employees.

The labor organizations involved herein took conflicting positions regarding the appropriateness of the units involved. The AFGE asserts that the following three separate units of Agency employees are each appropriate for the purpose of exclusive recognition: (1) Headquarters and field employees of both the Economic Regulatory Administration (ERA) and the Energy Information Administration (EIA) and field employees of the Regional Representative; (2) Headquarters employees of the outlay programs (Conservation and Solar Applications, Defense Programs, Energy Technology, Environment, Office of Energy Research, and Resource Applications) and the administrative support functions (Administration, Controller, General Counsel, Inspector General, Intergovernmental and Institutional Relations, International Affairs, Policy

and Evaluation, and Procurement); and (3) all FERC employees. In addition, the AFGE contends that the petition in Case No. 22-08584(RA), regarding AFGE Local 421's unit, was filed by an individual who lacked the legal authority to file such a petition, and it moved for its dismissal on this basis. The NTEU contends that the only appropriate unit consists of all Headquarters employees and all former FEA field employees or, in the alternative, the aforementioned unit, excluding all FERC employees.

BACKGROUND

The Agency was created by the Department of Energy Organization Act on August 4, 1977, and became an operating agency on October 1, 1977. It was established to assure a coordinated national energy policy by bringing together three independent agencies and various energy related functions of other agencies.

The mission of the FPC was the regulation of interstate natural gas and electricity. It was headed by a five member Commission, including a Chairman, with administrative control and support shared equally by the five Commissioners. The FPC was headquartered in Washington, D.C., with five field offices located in California, Georgia, Illinois, New York, and Texas. Reporting to the Commissioners, and located at the Headquarters, were the heads of 11 offices and 2 bureaus. The offices primarily contained administrative support functions and consisted of the following offices: Administrative Law Judges, Administrative Operations, Chief Accountant, Comptroller, General Counsel, Personnel Programs, Public Information, Policy Analysis, Regulatory Information Systems, Secretary, and Special Assistants. The Bureau of Power, which contained the field offices, and the Bureau of Natural Gas were primarily concerned with rate regulation, licensing, and electric and natural gas supplies.

The mission of the FEA was to conserve scarce energy supplies, to ensure the fair and efficient distribution of such supplies, to maintain reasonable consumer prices for such supplies, to promote the expansion of readily useable energy sources, and to assist in developing policies and plans to meet the nation's energy needs. It was headed by an Administrator who was assisted by two Deputy Administrators. There were six Assistant Administrators who were each responsible for one of the following offices: Conservation and Environment, Energy Information and Analysis, Energy Resource Development, International Energy Affairs, Regulatory Programs, and Strategic Petroleum Reserves. Two Associate Administrators were responsible for the Offices of Management, and Policy and Program Evaluation. The Offices of Communications and Public Affairs, Congressional Affairs, Intergovernmental Relations and Special Programs, and Private Grievances and Redress were each headed by a Director, and the Office of General Counsel was directed by a General Counsel. A variety of functions were performed at the field level of

the FEA such as compliance and enforcement, fuels regulation, and exceptions and appeals. The field structure was comprised of ten regions each headed by a Regional Administrator who exercised authority over the various functions and reported to a Deputy Administrator.

The mission of the ERDA related to research and development with respect to various sources of energy. The ERDA was headed by an Administrator, headquartered in Washington, D.C., with eight operations offices located in California, Idaho, Illinois, Nevada, New Mexico, South Carolina, Tennessee, and Washington. Reporting to the Administrator were 10 Assistant Administrators, 7 Office Directors, and 8 Operations Office Managers. The Assistant Administrators headed the following functions: Administration; Conservation; Environment and Safety; Fossil Energy; Institutional Relations; International Affairs; National Security; Nuclear Energy; Planning, Analysis, and Evaluation; and Solar, Geothermal, and Advanced Energy Systems. The Office Directors were responsible for the following functions: Congressional Relations, Controller, Equal Opportunity, General Counsel, Internal Review, Programs Integration, and Public Affairs.

With respect to the bargaining history of the three units involved herein, AFGE Local 421 was certified on November 23, 1970, as the exclusive representative for a nationwide unit of FPC employees. The parties' most recent negotiated agreement became effective for a two year period on March 3, 1977. The NTEU was certified on April 19, 1976, as the exclusive representative for a nationwide unit of FEA employees. In anticipation of the reorganization which occurred herein and its impact on the master agreement negotiations then underway, on May 3, 1977, the NTEU and the FEA entered into a national interim agreement which was in effect until September 30, 1977. Finally, AFGE Local 2195 was certified on May 23, 1975, as the exclusive representative for a Headquarters unit of ERDA employees. Thereafter, the parties negotiated an agreement which became effective in October 1975, and provided for automatic renewal annually. The terms of this agreement were extended mutually until October 1978.

In addition to the above noted 3 bargaining units, which are involved in the instant petitions, there are 34 other bargaining units in the Agency, all of which were in existence prior to the reorganization. One of the 34 units includes certain employees at the Headquarters level of the Agency with the remaining 33 units consisting of employees in the Agency's field structure. ^{1/} The above mentioned employees represented at the Headquarters level of the Agency include 4 of 16

^{1/} The Agency claims that 19 of the 33 bargaining units located throughout its field structure continue to remain appropriate.

employees transferred from the Interstate Commerce Commission (ICC), who were in a unit of nonprofessional employees exclusively represented by the American Federation of Government Employees, AFL-CIO, Local 1779. 2/

As noted above, the Department of Energy became an operating agency on October 1, 1977. The Secretary of Energy is the chief officer of the Agency and is assisted by a Deputy Secretary and an Under Secretary. The FERC is a separate, independent entity within the Agency and is governed by five Commissioners. The Agency, apart from FERC, is comprised of 20 Headquarters components with offices located in approximately 11 buildings in the Washington, D.C. metropolitan area. Additionally, several of these Headquarters components contain field elements which are located in offices throughout the United States.

Eight Assistant Secretaries bear responsibility for the following program areas: Conservation and Solar Applications, which is concerned with conservation measures and commercialization programs related to solar energy; Defense Programs, which manages the defense programs and weapons complexes and reports directly to the Secretary on matters of national security; Energy Technology, which involves resource, supply and conversion research, and development and technology demonstration in all fields of energy; Environment, which assures the Agency's compliance with environmental laws and procedures, reviews and approves environmental impact statements prepared within the Agency, and monitors research and development programs regarding the impact of energy on the environment; Intergovernmental and Institutional Relations, which handles such "outreach" functions as Intergovernmental Relations, Congressional Affairs, Public Affairs, Extension, Education, Business, Labor, Consumer Affairs, and advisory committee management; International Affairs, which maintains responsibility for international energy policy; Policy and Evaluation, which handles policy planning analysis and evaluation, and assures that the Agency's policies and programs promote competition in the energy industry; and Resource Applications, which primarily concerns managing the major operational programs of energy production and supply, and the commercialization programs unrelated to conservation and solar technology.

Five Directors are responsible for the following offices: Administration, which involves personnel management, labor relations, organization and management studies, real property, and administrative services; Energy Research, which concerns physical and energy research and the

2/ A petition was filed by the Agency in Case No. 22-08581(RA) questioning the continued appropriateness of this unit as it pertained to the four employees transferred from the ICC, but the petition was withdrawn prior to the issuance of the Notice of Consolidated Representation Hearing in this matter.

training and financial assistance of such activities; Equal Opportunity; Hearings and Appeals; and Procurement and Contracts Management, which handles business agreements, procurement contracts, and contract management matters. 3/

There are two Administrations, the Economic Regulatory Administration (ERA) and the Energy Information Administration (EIA) within the Agency, each headed by an Administrator. The ERA is responsible for administering those major economic regulatory programs which are not within the purview of the FERC. The EIA has overall responsibility for energy data collection, and the analysis, reporting, forecasting, and dissemination of such data.

Other functions at the Headquarters level reporting to the Office of the Secretary are: Committees and Boards, which contains the functions of military liaison, patent compensation, and contract appeals; Controller, which handles budgetary and financial matters; Executive Secretariat, which assures proper coordination and follow-up in the Secretarial decision process and serves as an institutional memory; General Counsel, which provides legal services to the Agency's components; and Inspector General, which investigates and audits all activities of the Agency and the FERC.

The following seven Headquarters components also have a field structure consisting of organizational elements formerly in the ERDA, the FEA, and the Departments of Interior and Navy: Defense Programs, Economic Regulatory Administration, Energy Research, Energy Technology, Environment, Intergovernmental and Institutional Relations, and Resource Applications. Field elements of these components report either to an Assistant Secretary, an Administrator, or a Director who exercises authority over each particular program area.

There are contractor operated laboratories and facilities, staffed by non-Federal government employees, in the following five programs: Defense Programs, Energy Research, Energy Technology, Environment, and Resource Applications. While six Operations Offices administer the contracts in certain contractor operated facilities and report to the Under Secretary, they receive their day-to-day program direction from either the Assistant Secretaries of Energy Technology, Environment, and Resource Applications, or the Director of Energy Research. In addition, there are two other Operations Offices located in Defense Programs performing duties solely in that program area and reporting to the Assistant Secretary for Defense Programs.

The field structure of Intergovernmental and Institutional Relations consists of a single field element, the Technical Information Center located at Oak Ridge, Tennessee. Additionally, the ten Regional

3/ Subsequent to the reorganization, the Offices of Equal Opportunity and Hearings and Appeals were established as separate offices at the Headquarters level of the Agency.

Representatives receive day-to-day guidance and coordination from the Assistant Secretary for Intergovernmental and Institutional Relations. These Regional Representatives represent the Secretary of Energy in all regional activities of the Agency, assist in establishing Regional Energy Advisory Boards, and assure the effectiveness of the "outreach" programs.

The ERA field structure performs many of the same duties previously performed in the FEA's field structure, including the investigation and auditing of refineries and enterprises engaged in the reselling and retailing of petroleum products. These field elements receive program direction from, and report to, the ERA Headquarters, but receive administrative support from the Regional Representatives. Finally, there are a number of personnel in the field organizationally assigned to the EIA, the General Counsel, and the Inspector General. Personnel assigned to the General Counsel provide legal support and guidance to Agency field elements and receive their program direction from Headquarters. ^{4/}

THE EFFECT OF THE REORGANIZATION

Pursuant to the Agency's assertion in its RA petitions that three of its units are no longer appropriate as a result of the 1977 reorganization, I have examined the reorganization's effect upon each of the three units. With respect to the unit represented by AFGE Local 421, I find that as a result of the reorganization the FERC became the "successor" employer to the FPC. As to the units represented by the NTEU and AFGE Local 2195, I find that the reorganization resulted in a material alteration in their scope and character and their disappearance as recognizable appropriate units.

Specifically, I make the following findings with respect to the continued appropriateness of each of the three exclusively recognized units:

The AFGE Local 421 Unit (FPC)

The record reveals that, except for the administrative support and energy information functions involving approximately 225 employees, this unit was transferred essentially intact from the FPC to the FERC. In this regard, the administrative functions of the FPC were transferred to the respective Agency offices handling similar functions and the FPC's energy information functions were transferred to the EIA of the

^{4/} The record is unclear with respect to the functions performed by the field staff assigned to the EIA and the Inspector General.

Agency. ^{5/} In addition, the oil pipeline regulation function involving 16 ICC employees was added to the FERC. As a result of such transfers and the reorganization attendant to the creation of the FERC, the following changes in the organizational structure occurred: The Bureau of Power became the Office of Electric Power Regulation; the Bureau of Natural Gas was subsumed in the Office of Pipeline and Producer Regulation; and the Offices of Special Assistants, and Policy Analysis became the Offices of Opinions and Reviews, and Regulatory Analysis, respectively. In addition, a new Division of Planning and Evaluation, an Office of Enforcement, and a Division of Budget and Administrative Liaison were created.

The evidence establishes that unit employees essentially have remained at the same physical locations and perform the same job functions under the same working conditions and same immediate supervision as prior to the creation of the FERC. Further, all of the FERC employees, including those formerly with the ICC, are subject to the same personnel and labor relations policies established by the Chairman of the FERC.

Under the circumstances outlined above, I find that the FERC is the "successor" employer with respect to the unit represented by AFGE Local 421. ^{6/} Thus, the record reflects that the bargaining unit exclusively represented by AFGE Local 421 was transferred substantially intact to the FERC and that such unit is presently separate, identifiable, and encompasses a homogeneous grouping of employees. Further, having applied the three criteria established in Section 10(b) of Executive Order 11491, as amended, I find that the appropriateness of the AFGE Local 421 unit remains unimpaired subsequent to its transfer to the FERC. Thus, as noted above, the unit was transferred intact with the unit employees remaining essentially at the same locations and performing the same job functions, under the same working conditions and same immediate supervision as prior to the transfer. Consequently, I find that employees in the unit continue to enjoy a clear and identifiable community of interest

^{5/} Subsequent to the reorganization, a "Common Support Agreement" between the FERC and the Agency, dated February 2, 1978, was consummated which provided that certain administrative support services such as contracting and procurement, recruiting and personnel administration, payroll, automated data processing, management information systems, property management, facility maintenance, and equal employment opportunity could be provided by the Agency without jeopardizing the programmatic independence of the FERC.

^{6/} See Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, 3 FLRC 787, FLRC No. 74A-22 (1975).

separate and distinct from other employees of the Agency. 7/ Further, as all FERC employees are subject to the same personnel and labor relations policies, I find that such unit will promote effective dealings and efficiency of agency operations.

Accordingly, and noting that no question concerning representation has been raised as to the representative status of AFGE Local 421, I find the FERC to be the "successor" employer of the employees in the AFGE Local 421 unit and, as such, is obligated to accord AFGE Local 421 recognition as the exclusive representative of employees in such unit. Therefore, I shall dismiss the petition in Case No. 22-08584(RA). 8/

The NTEU Unit (FEA) and The AFGE Local 2195 Unit (ERDA)

As a result of the reorganization, the FEA and the ERDA were disestablished and the employees in these two units were reassigned, according to similar functions performed, to newly designated components within the Agency with the result that the employees now work as one unit with a common mission. The NTEU unit employees are scattered throughout the Agency with approximately 2,183 unit employees (58 percent) assigned to 17 of 20 Headquarters components with the majority of these employees located in the following components: Conservation and Solar Applications, ERA, EIA, General Counsel, and Resource Applications. The remainder of the unit, approximately 1,595 employees (42 percent), are assigned to field elements of the following components: ERA, Energy Technology, and Resource Applications.

The regulatory and enforcement functions, previously performed under the FEA, continue to be performed in the Agency. However, the enforcement function is now split into separate Offices of Special Counsel, and Enforcement. Each has its own reporting structure at the field level and reports ultimately to the Administrator of the ERA. 9/ In addition, the hearings and appeals function, previously located at the field level,

7/ With respect to the 16 employees who were transferred from the ICC, including the 4 employees who were exclusively represented in a unit while at the ICC, as they share a community of interest with the FERC employees, and their inclusion in the AFGE Local 421 unit will promote effective dealings and efficiency of agency operations and eliminate the possibility of unit fragmentation, I find that they have accreted into the AFGE Local 421 unit.

8/ In view of the determination herein that the AFGE Local 421 unit remains appropriate, I find it unnecessary to pass upon the AFGE's motion to dismiss the RA petition in Case No. 22-08584(RA) on the basis that it was filed by an individual who lacked authority to file such a petition.

9/ The Office of Special Counsel is divided into three districts all of which report to a Director of Field Operations located in Dallas, Texas, who, in turn, reports to the Deputy Special Counsel for Compliance in ERA Headquarters.

is now a separate function at the Headquarters level reporting to the Office of the Secretary. While the network of ten regions continues to exist for most functions, the position of Regional Administrator was abolished and replaced with Regional Representatives who perform similar administrative and support functions, but do not exercise programmatic authority over the enforcement and regulatory functions.

With regard to AFGE Local 2195 unit employees, the record reveals that such employees are also scattered throughout the Agency with approximately 3,602 unit employees assigned to 17 of 20 Headquarters components. The majority of these employees are located in the following components: Administration, Defense Programs, Energy Technology, Environment, and Procurement and Contracts Management.

In addition to combining similar functions, the reorganization also precipitated interplay, interdependence, and interaction among the Headquarters components of the Agency. In this regard, the record reveals that administrative staff support is provided to all Headquarters components and that all research and development activities of the Agency are monitored by two Headquarters coordinating councils. In addition, as noted above, the FEA and the ERDA were disestablished and the unit employees involved were physically and/or administratively transferred to various components within the Agency where they were commingled with each other and with other employees transferred to the Agency. As a consequence, former FEA and ERDA employees now work with each other at the Headquarters level in integrated operations and share a common mission, common supervision, generally similar job functions, working conditions, and are subject to the same personnel and labor relations policies which are centrally established and administered by the Agency's Director of Administration.

Under these circumstances, I find that the reorganization herein created a new organizational entity and affected a substantial change in both the scope and character of each of the two exclusively recognized units previously located in the FEA and the ERDA and represented by the NTEU and AFGE Local 2195, respectively. Accordingly, I find that the reorganization rendered these exclusively recognized units inappropriate for the purpose of exclusive recognition under the Order. 10/

With respect to what unit would be appropriate for the purpose of exclusive recognition pursuant to the Agency's RA petitions in Case Nos. 22-08582(RA) and 22-08583(RA), I find that a unit consisting of Headquarters employees of the Agency, excluding FERC employees, would meet the unit criteria contained in Section 10(b) of the Order. Thus, as noted above, these Headquarters employees share a common mission, common

10/ Cf. U.S. Department of the Navy, Naval Air Engineering Center, Lakehurst, New Jersey, A/SLMR No. 1104 (1978), and U.S. Department of Agriculture, Office of Automated Data Systems, New Orleans Computer Center, 7 A/SLMR 1067, A/SLMR No. 950 (1977).

supervision, engage in integrated work functions, and enjoy common personnel and labor relations policies. Under these circumstances, I find that such employees enjoy a clear and identifiable community of interest. Moreover, I find that such a unit will promote effective dealings and efficiency of agency operations. In this regard, it is noted that all employees are subject to the same personnel and labor relations policies, which are centrally established and administered, and that such a unit, which embraces all eligible Headquarters employees of the Agency, will eliminate the possibility of unit fragmentation. In reaching this determination, I reject the contention by the NTEU and AFGE Local 2195 that certain field employees of the Agency should be included in the same unit with the Agency's Headquarters employees, inasmuch as the evidence is insufficient to establish that the existing relationships between Headquarters employees and such field employees warrant the latter's inclusion in a unit of Headquarters employees.

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended: 11/

All professional and nonprofessional employees of the Department of Energy Headquarters employed in the Washington, D.C. metropolitan area, excluding Federal Energy Regulatory Commission employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

As noted above, the unit found appropriate includes professional employees. However, the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in any unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such unit. Accordingly, the desires of the professional employees must be ascertained. I shall, therefore, direct separate elections in the following groups:

Voting group (a): All professional employees of the Department of Energy Headquarters employed in the Washington, D.C. metropolitan area, excluding professional employees of the Federal Energy Regulatory Commission, all nonprofessional

11/ In the absence of any record evidence as to whether or not the NTEU or AFGE Local 2195 desire to appear on the ballot in this matter, they will be placed on the ballot because they have properly intervened herein. If either or both do not wish to appear on the ballot in the matter, they should so advise the appropriate Area Administrator within 10 days of the date of this decision.

employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

Voting Group (b): All nonprofessional employees of the Department of Energy Headquarters employed in the Washington, D.C. metropolitan area, excluding nonprofessional employees of the Federal Energy Regulatory Commission, all professional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

The employees in nonprofessional voting group (b) will be polled whether they desire to be represented by AFGE Local 2195, the NTEU, or neither.

The employees in professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition, and (2) whether they wish to be represented for the purpose of exclusive recognition by AFGE Local 2195, the NTEU, or neither. In the event that a majority of the valid votes of voting group (a) is cast in favor of inclusion in the same unit as the nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) is cast for inclusion in the same unit as the nonprofessional employees, they will be taken to have indicated their desire to constitute a separate unit, and an appropriate certification will be issued indicating whether AFGE Local 2195, the NTEU, or neither was selected by the professional employee unit.

The unit determination in the subject case is based, in part, then, upon the results of the election among the professional employees. However, I will now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees votes for inclusion in the same unit as the nonprofessional employees, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

All professional and nonprofessional employees of the Department of Energy Headquarters employed in the Washington, D.C. metropolitan area, excluding employees of the Federal Energy Regulatory Commission, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

2. If a majority of the professional employees does not vote for inclusion in the same unit as the nonprofessional employees, I find that the following two groups of employees constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees of the Department of Energy Headquarters employed in the Washington, D.C. metropolitan area, excluding professional employees of the Federal Energy Regulatory Commission, all nonprofessional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

(b) All nonprofessional employees of the Department of Energy Headquarters employed in the Washington, D.C. metropolitan area, excluding nonprofessional employees of the Federal Energy Regulatory Commission, all professional employees, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

DIRECTION OF ELECTION

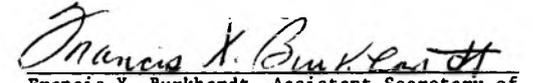
An election by secret ballot shall be conducted among employees in the unit found appropriate as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who

quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether they wish to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 2195; the National Treasury Employees Union; or neither.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 22-08584(RA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
October 13, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

October 17, 1978

A/SLMR No. 1137

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION CENTER,
SAN JUAN, PUERTO RICO
A/SLMR No. 1137

VETERANS ADMINISTRATION CENTER,
SAN JUAN, PUERTO RICO

Respondent

and

Case Nos. 37-01926(CA) and
37-01952(CA)

This consolidated proceeding involved two unfair labor practice complaints filed by American Federation of Government Employees, AFL-CIO, Local 2408 (AFGE) alleging that the Respondent violated Section 19(a)(1) and (2) by failing to promote Juan R. Bruno Hance in order to discourage his union activities.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2408

Complainant

The Administrative Law Judge concluded that the Respondent did not violate Section 19(a)(1) and (2) of the Order and recommended that the complaints be dismissed in their entirety. In this regard, he found that, although the record indicated that Juan R. Bruno Hance was active in the AFGE, it failed to establish that he was not selected for promotion to a new job based on his union activities.

DECISION AND ORDER

On August 1, 1978, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled consolidated proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaints and recommending that the complaints be dismissed in their entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge and ordered that the complaints be dismissed.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject cases, 1/ including the Complainant's exceptions and brief, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations.

1/ As the Respondent failed to request permission to file a reply brief to the Complainant's exceptions in this matter, its reply brief was not considered in reaching a determination herein.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 37-01926(CA) and 37-01952(CA) be, and they hereby are, dismissed.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



Dated, Washington, D.C.
October 17, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

.....
In the Matter of :

VETERANS ADMINISTRATION CENTER :
SAN JUAN, PUERTO RICO :
Respondent :

and : Cases Nos. 37-01926 (CA)
37-01952 (CA)

AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, AFL-CIO, LOCAL 2408 :
Complainant :

Appearances:

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Staff Counsel, American Federation
of Government Employees, AFL-CIO
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For the Complainant

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CHARLES M. JOHNSTON
Assistant General Counsel
Veterans Administration
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Washington, D.C. 20420
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

These cases arise under Executive Order 11491 as amended. Case No. 37-1926 was initiated by a complaint dated September 26, 1977, filed September 28, 1977 alleging a violation of Sections 19(a)(1) and (2) of the Executive Order. The violation was alleged to consist of the Respondent failing to promote Juan R. Bruno Hance on or about May 5, 1977 to discourage his active union activities. By an amended complaint dated September 28, 1977 and filed October 26, 1977 the Complainant

made the same allegations and added that the Respondent again on or about August 10, 1977 failed to promote Mr. Bruno Hance to discourage his active union activities. By response dated October 27, 1977 the Respondent denied both sets of allegations. Case No. 37-1952 was initiated by a complaint dated November 14, 1977 and filed November 18, 1977 alleging that Mr. Bruno Hance again, on or about October 5, 1977 was treated discriminatorily and again was not promoted because of his union activities. By response dated November 28, 1977 the Respondent denied the allegations of that complaint; it alleged that the action of October 5, 1977 was not a failure to promote but a failure to reassign Mr. Hance to a position for which he had applied but that the reasons for not reassigning him were unrelated to his union activities.

On March 9, 1978 the Acting Regional Administrator issued a Notice of Hearing in Case No. 37-1926 for a hearing to be held April 20, 1978 in Hato Rey, Puerto Rico. On March 22, 1978 he issued an Order Consolidating Cases in which he consolidated the two cases for hearing on April 20, 1978 in Hato Rey, Puerto Rico. Hearings were held on that day in that City. Both parties were represented by counsel. They presented witnesses who were examined and cross-examined and offered exhibits which were received in evidence. Both parties made closing arguments and filed briefs.

FACTS

The Complainant is the recognized exclusive representative of a unit of Respondent's employees and has been such representative at least since 1970. Juan R. Bruno Hance (hereinafter, as during most of the hearing, "Bruno") was employed by the Respondent in 1970 and became a member of the Complainant the same year. From the inception of his membership he took an active part in union affairs and was appointed Chief Steward by the President of Local 2408. For a period from sometime in 1976 to March 1977 he was also President of the Local; on the latter date he resigned the Presidency but continued as Senior Steward.

From May 1975 to April 1, 1978 (three weeks before the hearing in this case) the Director of the Respondent was John Fears. On April 1, 1978 he became Director of a larger and more prestigious facility in Chicago. While Director in San Juan he took little part in labor-management relations, delegating most of his responsibility in that area to the Chief of Personnel, Gilbert R. Gonzales.

The procedures in merit promotion are covered in part by the collective agreement between the parties. The section or service of the Respondent that has a vacancy it desires

to fill notifies the Personnel Office which prepares and posts a vacancy announcement. The names of those who apply and are found to have the essential qualifications are referred to a promotion panel. The panel consists of three members: one selected by the service that has the vacancy to be filled, one selected by the union, and the third selected by the Personnel Office. The panel ranks the applicants according to prescribed standards, the most important of which is the applicant's performance evaluation in his current job no matter how unrelated to the job to be filled. The panel certifies the names of the applicants with the five highest scores to the selecting official, usually the chief of the service with the vacancy to be filled. He interviews each of the five, reviews their personnel folders, and makes a selection. He is not bound to base his selection on the scores given by the promotion panel and is free to choose any of the five highest regardless of their relative ranking by the promotion panel.

The record contains evidence of three vacancies for which Bruno applied, was rated by the promotion panel among the top five applicants, and was not selected for the vacancy, in addition to the three mentioned in the complaints. Before reviewing them it should be noted that Bruno's entire employment with the Respondent has been as a nursing assistant. He was first employed as a GS-3. He applied for a promotion to GS-4 and was selected, and then applied for a promotion to GS-5 and was selected. All the vacancies for which he applied and was not selected although ranked among the top five applicants were in a service other than the one in which he was employed.

In October 1976 there were two vacancies of veterans representative on campus. The selecting official was Jose Lopez, the Assistance Officer. The scores of the names certified by the promotion panel were very close. Six names were certified. The scores of the third, fourth, and fifth names (including Bruno) were 116, the first and second were a fraction of a point higher, and the sixth a fraction of a point lower. Bruno's name was listed fourth. The first three names were already employed in Lopez' service and the first two were eligible for preferential consideration for some undisclosed reason. The first two already held counselling positions. Lopez selected them.

A month later Lopez had a vacancy for veterans benefits counsellor. He was given the same roster as for the previous vacancies with the first two names deleted. Bruno's name was second although he had the same score as the first name. The first name already worked for Lopez and he considered her an outstanding employee. Also, he thought fluency in the

English language important in that position. Mrs. Quintana, the first name, was completely bi-lingual in English and Spanish, having been born in New York. Bruno testified through an interpreter. Lopez selected Quintana.

All three whom Lopez selected were known to him and he was familiar with their work. He also knew Bruno because he still retained his union membership and generally went to the union meetings. There was no evidence, none at all, that his selections were influenced by Bruno's union activities.

The other three positions are the subjects of the complaints. The selecting official for all three was Jose M. Pizarro, Chief of Medical Administration Service. In April 1977 he had a vacancy in the position of Medical Administration Specialist (Assistant Chief, Ward Administration Section). Bruno's name was second on the list prepared by the promotion panel. He and the person ranked first were not in Medical Administration Service, and the other three were already employed in that Service. Pizarro interviewed all five and selected Alma Iris Jiminez, who was ranked fourth. She had worked as a trainee for such position for six months in the Bronx, and had been working in the Medical Administration Service for eight years in various positions dealing with ward secretaries. Pizarro thought she had done an excellent job in the positions she held and her supervisor had twice obtained quality increases for her.

In August 1977 Pizarro had a vacancy in a newly created position of Medical Administration Assistant. Of the five names referred to Pizarro, Bruno was ranked first but he was the only one of the five who was not already employed in Medical Administration Service. The vacant position was described variously as that of an ombudsman or jack of all trades whose principal function was to improve relations with patients and the public and who should be familiar with various facets of the Respondent's operations. Pizarro selected Hilda Rios, who was ranked second. She had 30 years of Government service, the last ten in various positions in medical administration. She had received one quality increase.

The following month there was a vacancy in the position of Lead File Clerk. The vacancy was posted and Bruno applied for it. He was not ranked by the promotion panel because if selected it would not have been a promotion for him; the vacant position was in the same grade as the position Bruno already held with the same possibilities of increases. However, his name (and three others) were referred, along

with the five who were ranked, for "reassignment consideration". 1/ Pizarro selected the person ranked third. He was already a file clerk in the Medical Administration Service with demonstrated ability.

Evidence of union animus on the part of Pizarro is meager, ambivalent at most, and highly conjectural. He remains a member of the union but is inactive. Blanca Custodio once worked in his Service, from 1970 to 1974 when she was the successful applicant for a promotion to the Pharmacy Service. That Service was in the same building. She was not elected to union office but acted as secretary to the Board of Directors of Local 2408 beginning in 1974. Sometime in 1976 Pizarro saw a union notice on the bulletin board on stationery indicating she was on the Board of Directors. Shortly thereafter he met Ms. Custodio in the hall and commented that he had not known she was on the Board of Directors. (In fact she was not but was the Board's non-elected secretary, but she did not correct him.) Pizarro had rarely spoken to her before, although she had worked for him some years earlier. In 1977 she applied for the vacant position of Medical Administration Specialist, discussed above, for which Bruno also applied. Ms. Custodio was ranked first by the promotion panel, but Pizarro selected Ms. Jiminez for the reasons given above in discussing the non-selection of Bruno for that position and the fact that Ms. Custodio had not worked in the Administration Service for four or five years and was not as familiar as Ms. Jiminez with current procedures and operations. But Ms. Custodio ascribed her non-selection to Pizarro believing she was a member of the Board of Directors. I find that that circumstance was not to any degree a factor in her non-selection.

The Complainant made an effort to show that Fears, the Director of the Respondent at the time here involved, harbored anti-union animus. They did this by showing that on one occasion Fears sarcastically referred to Bruno as "Dr. Bruno". Fears did address Bruno in that manner on one occasion with intended sarcasm when Bruno expressed some views on medical procedures at the hospital which Fears believed only a physician was qualified to express. On another occasion he asked Bruno whether he was a cripple because he never took up a labor-management relations matter with a management representative without the assistance of another union official.

1/ Exh. R-17.

It is unnecessary to decide whether these incidents show anti-union animus on the part of Fears because the evidence is uncontradicted, and I find, that he had no part in the promotion decisions involved in or referred to in these cases. Were it necessary to decide whether the record shows anti-union animus in Fears, I would find it does not.

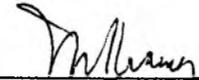
DISCUSSION and CONCLUSIONS

The complaints allege that Bruno was discriminatorily not promoted on three occasions to discourage his union activities. The evidence does show that on the first occasion complained of someone rated lower than Bruno by the promotion panel was selected by the selecting official who selected from the five top ranked applicants a well qualified applicant already employed in his Service. On the second occasion Bruno was ranked first but Pizarro, the selecting official, selected the one ranked second by the panel. She was well qualified and again was already employed in the Service headed by Pizarro. The third alleged occasion did not involve a promotion. Bruno applied for a vacancy in a position in the same grade he already had and with the same potential. Thus he was not ranked by the panel which ranked applicants only for promotion but he was certified to the same selecting official as eligible for appointment to the vacancy by re-assignment. Again Pizarro selected a qualified applicant already in his service.

The record shows also that Bruno was quite active in the union primarily as Chief Steward. But it does not show that he was not selected on the three occasions for that reason. Bruno was the top ranked applicant only once. The rankings by the promotion panel are not binding and the selecting official is free to select any of the top five names for any reason not prohibited. The reasons given by Pizarro for selecting the applicants he did were all legitimate. In addition, the record indicates strongly that he, and Lopez on other occasions not mentioned in the complaints, had a pronounced tendency to select for promotion to vacancies applicants already in their respective Services, applicants whom they already knew and were personally familiar with the quality of their work. That may or may not be a violation of some Veterans Administration regulation or the Federal Personnel Manual or some other regulation or precept. But even if it is such a violation, I find nothing in Executive Order 11491 as amended, that is violated, the only kind of violations with which we can here be concerned.

RECOMMENDATION

The complaints should be dismissed.



MILTON KRAMER
Administrative Law Judge

Dated: August 1, 1978
Washington, D.C.

MK/mm1

October 17, 1978

A/SLMR No. 1138

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE ARMY,
U.S. MILITARY ACADEMY,
WEST POINT, NEW YORK
A/SLMR No. 1138

This proceeding arose upon the filing of an unfair labor practice complaint by the American Federation of Government Employees, Local 2367, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order. A hearing was held on the issue of whether the Respondent changed the area of consideration for promotions without affording the Complainant an opportunity to bargain over the impact and implementation of such change.

The Administrative Law Judge concluded that the complaint should be dismissed. In reaching this conclusion, he found that the Complainant had failed to make a timely request to negotiate on the impact or implementation of the decision to change the area of consideration for promotions.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
U.S. MILITARY ACADEMY,
WEST POINT, NEW YORK

Respondent

and

Case No. 30-07463(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2367, AFL-CIO

Complainant

DECISION AND ORDER

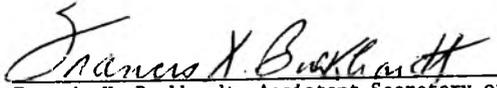
On August 9, 1978, Administrative Law Judge Garvin Lee Oliver issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-07463(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
October 17, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



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 In the Matter of :
 :
 DEPARTMENT OF THE ARMY :
 U.S. MILITARY ACADEMY :
 West Point, New York :
 Respondent : Case No. 30-07463(CA)
 :
 and :
 :
 AMERICAN FEDERATION OF :
 GOVERNMENT EMPLOYEES :
 Local 2367, AFL-CIO :
 Complainant :
 :

Ronald A. Salvatore, Esquire
 Department of the Army
 U.S. Military Academy
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 Cornwall-on-Hudson, New York 11252
 For the Respondent

Eileen M. Zimbaro
 National Representative
 American Federation of Government Employees
 AFL-CIO
 300 Main Street
 Orange, New Jersey 07050
 For the Complainant

Before: GARVIN LEE OLIVER
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arose pursuant to Executive Order 11491, as amended, as a result of an unfair labor practice complaint filed on December 1, 1976 by the American Federation of Government Employees, Local 2367, AFL-CIO (Complainant or Union) against the Department of the Army, U.S. Military Academy, West Point, New York (Respondent). The complaint alleged, in substance, that the Respondent violated Section

19(A)(1) and (6) of the Order by unilaterally changing the area of consideration, the area in which an intensive search is made for eligible candidates for promotion, in the case of a position for automotive and mobile equipment foreman. (Asst. Sec. Ex. 1B).

On May 2, 1977 the Regional Administrator dismissed the complaint, concluding that a reasonable basis for the complaint had not been established in that the Respondent was not obligated under the Order to negotiate with the Complainant concerning the widening of the area of consideration for the supervisory position. (Asst. Sec. Ex. 1C). The Complainant requested review of the Regional Administrator's decision, and on November 2, 1977, the Assistant Secretary of Labor reversed, finding that a reasonable basis had been established for the allegation that the Respondent violated Section 19(a)(1) and (6) by changing the area of consideration for promotions without affording the Complainant an opportunity to bargain over the impact and implementation of such change. (Asst. Sec. Ex. 1E).

A hearing was held on this issue designated by the Assistant Secretary ^{1/} before the undersigned at West Point, New York. ^{2/} Both parties were afforded full opportunity to be heard, adduce evidence, examine and cross-examine witnesses, and present argument and briefs.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, I make the following findings of fact, conclusions and recommendations.

^{1/} Complainant contended that the issue of whether the Respondent was obligated under Section 19(a)(1) and (6) of the Order to meet and confer on the decision to change the area of consideration was also open for determination. This position was rejected on the basis of the Assistant Secretary's specific November 2, 1977 ruling; however, Complainant was allowed to proffer evidence relevant to its position (Tr. 6-8; 15). Cf. Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 1040 (May 11, 1978).

^{2/} The official transcript is hereby corrected in accordance with Appendix A, attached hereto.

Findings of Fact

The Complainant is the exclusive representative of two separate bargaining units of employees, one at the United States Military Academy, West Point, New York, the Respondent, and the other at Readiness Group Stewart, Newburg, New York. At all times pertinent to the complaint, the Complainant and Respondent have been parties to a collective bargaining agreement covering the unit of employees at the United States Military Academy.

Until April 1976, personnel services for Readiness Group Stewart employees were provided by the Civilian Personnel Division of the Respondent. Beginning in April 1976, Fort Devens assumed the responsibility of providing personnel services to the Readiness Group Stewart employees. Because of this change, Readiness Group Stewart employees were removed from Area I for merit promotion purposes and became part of Area II. Area I is defined in the Respondent's Civilian Personnel Merit Placement and Promotion Plan (USMA Regulation 690-10) as "All activities serviced by the Civilian Personnel Division, USMA, plus applicants from the Department of the Army (voluntary applicants)." Joint Ex. 2, p.9). The effect of this change on Readiness Group Stewart employees is that they are no longer recruited automatically for position vacancies at West Point, but they may voluntarily file applications, prior to the posting of a particular vacancy, indicating interest in such positions.

On May 31, 1976 Respondent posted Position Vacancy Notice No. 749-A for an automotive and mobile equipment inspector foreman, WS-5801-11 in the maintenance division. It specified that the area of consideration for the vacancy was Area I.

On approximately June 3, 1976, Mr. Charles Furca, acting chief of recruitment and placement for Respondent, received information (1) that employees at Readiness Group Stewart had not been officially notified that their personnel services were provided by Fort Devens and were, therefore, no longer considered to be in Area I for promotion purposes, and (2) that a complaint had been received which contended that it was unfair that Readiness Group Stewart employees who had not been notified could not apply for the WS-11 vacancy. Mr. Furca researched and discussed the

matter with other personnel employees and concluded that he should recommend to Mr. Reimero, civilian personnel officer, that the area of consideration for the position be extended to Area II.

Mr. Mortimer D. ("Danny") O'Shea, Secretary-Treasurer of Complainant and also shop steward of the maintenance division, was in the civilian personnel office on other business at about this same time on June 3, 1976. Mr. Furca called Mr. O'Shea over and advised him of the proposed recommendation.

Mary Arnold, president of Complainant union, was on sick leave at the time the conversation occurred. Mr. Robert Theroux, executive vice president and acting president, was at Readiness Group Stewart. The daily working relationship between the Complainant and Respondent had been, and was, very satisfactory at the time, and business discussions were generally conducted informally face-to-face or over the telephone. It was the general practice for management to notify the Union of labor-management matters through any one of the three elected officials, including Mr. O'Shea, the Secretary-Treasurer.

Upon being advised of Mr. Furca's proposed recommendation to extend the area of consideration for the foreman position to Area II, Readiness Group Stewart, Mr. O'Shea first voiced his personal disagreement with the decision, as he was an applicant for the position. He then stated that there were more than enough applicants from Area I, the Academy maintenance division. Mr. O'Shea also stated that if the area were extended and Mr. Vito Maiorana, Department Chief, made the selection, then there was a good possibility that Mr. Long, of Area II, would be selected, due to their long friendship and close working relationship. Mr. O'Shea said he would canvass the maintenance shop as to the number of men applying for the position.

After Mr. O'Shea left, Mr. Furca called Colonel Cooper, Chief of Maintenance, where the vacancy existed, and advised him of the proposed recommendation. Colonel Cooper recommended against the extension of the vacancy to Area II. Later in the afternoon of June 3, 1976 or early June 4, 1976, Mr. O'Shea telephoned Mr. Furca to advise him that there were ten or eleven applicants from the maintenance shop and personnel "was opening a can of worms" by extending the areas, because of the possibility of pre-selection. Mr.

Furca replied that he was still going to recommend extension, and that he felt very strongly that selection would be made from within the maintenance shop due to the maintenance shop's opposition to the extension; however, he could not guarantee this. Mr. O'Shea indicated he would not pursue the matter further, but stated that if Mr. Long were selected for the position, a grievance would be filed based on pre-selection. He indicated no other disagreement with the decision. Mr. O'Shea made a similar statement to Mr. Mariano concerning the filing of a grievance if Mr. Long should be selected as a result of the change.

During Mr. O'Shea's conversations with Mr. Furca on June 3 and 4, 1976, he did not at any time request Respondent to meet and confer with Complainant on the decision to widen the area of consideration, or to bargain with Complainant concerning the impact and implementation of such change, nor was additional time requested in order for the Union to study the proposed change.

On or about June 7, 1976, an amended Position Vacancy Notice was posted. Area II was added to the area of consideration. Shortly after the posting, Mr. O'Shea telephoned Mr. Theroux, acting president of Complainant, to advise him of the posting and of his conversations with Mr. Furca. Mr. O'Shea indicated to Mr. Theroux that the odds of anyone in Area II being selected for the job were pretty narrow, so "why generate something that wasn't necessary." (Tr. 30).

The selection for the position was made on August 4, 1976 when Mr. Long of Area II was chosen. On August 27, 1976 Complainant filed its unfair labor practice charge with Respondent and requested that the position not be filled until the dispute was resolved. (Joint Ex. 6).

In order to correct a procedural deficiency relating to the length of time the second notice was posted, an amended notice was posted in November 1976 for the proscribed length of time. No new applicants filed and the selection remained unchanged. Respondent investigated the charge of pre-selection in August 1976, and it found no evidence of pre-selection.

Discussion, Conclusions, and Recommendation

Notwithstanding the fact that a particular management decision is non-negotiable, agency or activity management is required under the Order to afford the exclusive represen-

tative timely notice of its decision and, upon request, meet and confer on the procedures management intends to use in implementing the decision involved and on the impact of such decision on adversely affected employees. New Mexico Air National Guard, A/SLMR No. 362; Pennsylvania Army National Guard, A/SLMR No. 475.

The record establishes that the Respondent notified Mr. Mortimer D. O'Shea, Secretary-Treasurer of Complainant, concerning the forthcoming change in the area of consideration for the supervisory vacancy on June 3, 1976. Complainant and Mr. O'Shea contend that he received and acted on this information only on a personal basis, as an applicant for the position, or, at most, strictly as a shop steward. In view of general practice which was established, that Respondent notified the Union of labor-management matters through any one of its top three officers, I conclude that notice to Mr. O'Shea constituted proper notice to the Union. Mr. O'Shea's subsequent discussion with the Union's acting president concerning what action, if any, the Union should take, also demonstrates that Mr. O'Shea received and acted on the information in accordance with the general practice and as a Union officer.

Where management has notified the union of a forthcoming change, it is incumbent upon the union to avail itself of this opportunity and request either to meet and confer, or be granted more time to consider the proposed change. Department of the Navy, Portsmouth Naval Shipyard, A/SLMR No. 508 (1975).

The record establishes that the Complainant was made aware of the action to be taken on June 3, 1976, prior to its implementation, but did not request to meet and confer, or indicate that it had insufficient time. When the change was implemented on June 7, 1976, the Union again made no attempt to seek negotiations with respect to impact or implementation, deciding "why generate something that wasn't necessary." It was not until over two months later, on August 27, 1976, and after the selection for the position was made, that the Union filed its unfair labor practice charge, alleging a unilateral change by management in the area of consideration for the supervisory position.

October 18, 1978

Accordingly, in my view, Complainant failed to make a timely request for negotiation on the impact or implementation of the decision, and Respondent did not violate Section 19(a)(1a) and (6) of the Order in the circumstances of this case. Cf. Department of Transportation, Transportation Systems Center, Cambridge, Massachusetts, A/SLMR No. 1031 (1978); Hdq.. 63rd Air Base Group (MAC), USAF, Norton Air Force Base, California, A/SLMR No. 761 (1976).

Recommendation

It is hereby recommended that the complaint be dismissed in its entirety.


GARVIN LEE OLIVER
Administrative Law Judge

Dated: August 9, 1978
Washington, D.C.

GLO:hls

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

GENERAL SERVICES ADMINISTRATION,
REGION 5, CHICAGO, ILLINOIS
A/SLMR No. 1139

This case involved an unfair labor practice complaint filed by Local 1300, National Federation of Federal Employees (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to process a grievance, properly filed by an employee under Article 13 of the parties' negotiated grievance procedure, seeking to have certain items changed on her performance rating and potential for promotion assessment. The Complainant also alleged that the Respondent failed to meet and confer with it on the question of the appropriate procedure to be used when it refused to process the employee's grievance.

The Administrative Law Judge concluded, and the Assistant Secretary concurred, that the Respondent violated Section 19(a)(1) and (6) of the Order. In the instant case, the Respondent denied the employee's grievance at Steps 1 and 2 of the negotiated grievance procedure. Thereafter, the employee appealed the Step 2 decision to Step 3 of the negotiated procedure, at which Step the negotiated grievance procedure required the Respondent's Regional Commissioner to make a decision on the grievance. No decision was issued by the Regional Commissioner as required by Step 3 of the grievance procedure, but, rather, the grievance was returned to the employee outside the grievance procedure by the Chief of the Employee Relations Branch who stated that the grievance was inappropriate for processing under the negotiated procedure.

The Administrative Law Judge found that the Respondent's unilateral act of refusing to process the grievance at Step 3 of the grievance procedure not only contravened the terms of the negotiated agreement but also precluded the Complainant from proceeding to additional steps in the grievance procedure, including arbitration. Accordingly, he found the Respondent in violation of Section 19(a)(1) and (6) of the Order.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations and issued an appropriate remedial order for the violation found herein.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 5, CHICAGO, ILLINOIS

Respondent

and

Case No. 50-17018(CA)

LOCAL 1300, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On August 14, 1978, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

In finding that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to process a grievance under the negotiated grievance procedure, the Administrative Law Judge noted and relied on certain decisions of the Assistant Secretary in which the factual situations on which the decisions were based arose prior to the 1971 amendments to Executive Order 11491. Section 13(d) of the amended Order now provides, in part, that the parties may submit to the Assistant Secretary questions of grievability and arbitrability arising under a negotiated grievance procedure. 1/ It is noted that in cases arising since the 1971 amendments

1/ Section 13(d) of Executive Order 11491, as amended, now provides, in pertinent part, that:

(d)---questions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, may by agreement of the parties be submitted to arbitration or may be referred to the Assistant Secretary for decision.

to the Order, the Assistant Secretary has found that, absent bad faith or an intentional frustration of the grievance and arbitration procedures in a negotiated agreement, the question of whether or not a matter is grievable or arbitrable under a negotiated agreement would be more appropriately dealt with by seeking a grievability or arbitrability determination pursuant to Section 13(d) of the Order, rather than by utilizing the unfair labor practice provisions of the Order. 2/

However, in the instant case, the Administrative Law Judge found that the Respondent, after making decisions at Steps 1 and 2 of the grievance procedure, unilaterally refused to process and make a determination on the grievance at Step 3 when its Regional Commissioner, the official designated in Step 3 of the parties' negotiated agreement, refused to make a decision on the grievance. 3/ He found further, and I concur, that the refusal to process the grievance contravened the terms of the negotiated agreement and precluded the Complainant from proceeding to the additional steps in the grievance procedure, including arbitration. In this context, I find that the instant case involves, in effect, a unilateral refusal by the Respondent to process a grievance, rather than a rejection of the grievance based on a determination of nongrievability.

Under these circumstances, I agree with the Administrative Law Judge that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally breaching the terms of the parties' negotiated grievance procedure, and I shall issue an appropriate remedial order for the violation found herein.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the General Services Administration, Region 5, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Breaching the terms of the negotiated grievance procedure by refusing to render a decision at a prescribed step in the negotiated grievance procedure set forth in the negotiated agreement, effective July 14, 1975, with Local 1300, National Federation of Federal Employees.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2/ See e.g. Department of the Army, U.S. Army Materiel Development and Readiness Command, A/SLMR No. 1025 (1978), and Naval Air Rework Facility, Cherry Point, North Carolina, 7 A/SLMR 472, A/SLMR No. 849 (1977).

3/ As indicated above, the Respondent did not except to this finding.

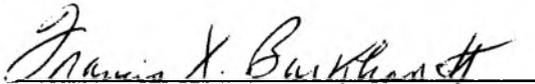
2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, proceed to Step 3 and succeeding steps, if necessary, of the negotiated grievance procedure set forth in the negotiated agreement, effective July 14, 1975, on the grievance of March 31, 1977, which sought to change one or more of the factor ratings on an employee performance rating.

(b) Post at its Chicago, Illinois, facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Administrator and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Regional Administrator shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary of Labor, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
October 18, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

WE WILL NOT breach the terms of the negotiated grievance procedure by refusing to render a decision at a prescribed step in the negotiated grievance procedure set forth in our negotiated agreement, effective July 14, 1975, with Local 1300, National Federation of Federal Employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, proceed to Step 3, and succeeding steps, if necessary, of the negotiated grievance procedure set forth in our negotiated agreement, effective July 14, 1975, on the grievance of March 31, 1977, which sought to change one or more of the factor ratings on an employee performance rating.

Agency or Activity

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Federal Office Building, Room 1060, 230 South Dearborn Street, Chicago, Illinois 60604.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



In the Matter of :

GENERAL SERVICES ADMINISTRATION :
REGION 5, CHICAGO, ILLINOIS
Respondent :

and :

LOCAL 1300, NATIONAL FEDERATION :
OF FEDERAL EMPLOYEES
Complainant :

Case No. 50-17018(CA)

JOHN P. HELM, ESQUIRE
Staff Attorney, National
Federation of Federal Employees
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For the Complainant

JULIA P. GRIP, ESQUIRE
Attorney, Office of
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General Services Administration
Region 5
230 South Dearborn Street
Chicago, Illinois 60604
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding under Executive Order 11491, as amended, (hereinafter also referred to as the "Order"), was initiated by a charge filed on, or about, October 28, 1977, a complaint filed January 27, 1978 (Asst. Sec. Exh. 1) and an amended complaint, also filed on January 27, 1978 (Asst. Sec. Exh. 2), alleging violations of Sections 19(a)(1) and (6) of the Order.

Notice of Hearing issued on March 13, 1978 (Asst. Sec. Exh. 3), pursuant to which a hearing was duly held on May 24, 1978, in Chicago, Illinois. Both parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to present evidence and testimony on the issues involved. Timely briefs were filed by each party and have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I hereby make the following findings, conclusions and recommendation:

FINDINGS

The operative facts are not in dispute and are as follows:

1. Ms. Shirley C. Stroud was a realty specialist, GS-12; she was a member of Local 1300 and a steward for Local 1300.

2. On March 16, 1977, an Employee Performance Rating and Assessment Relevant to Promotion Potential, GSA Form 389, was made for Ms. Stroud. This form was signed by the reviewing officer on March 17, 1977, and Ms. Stroud acknowledged receipt "under protest" on March 30, 1977. The Form consists of two parts: Section I - "Employee Performance Rating" and Section II - "Assessment of Abilities and Traits Relevant to Promotion Potential".

Section I has six factors on which Ms. Stroud, a non-supervisor, was rated only on the first four. There were five possible ratings "Inadequate", "Marginal", "Fully Meets Requirements", "Exceeds Requirements", and "Exceptional". The middle three are designated as "Satisfactory". On Factor 1, "Quantity", Ms. Stroud was rated "Fully Meets Requirements"; on Factor 2, "Quality", Ms. Stroud was rated "Fully Meets Requirements"; on Factor 3, "Cooperativeness", Ms. Stroud was rated "Marginal"; and on Factor 4, "Dependability", Ms. Stroud was rated "Fully Meets Requirements". Her overall performance rating was "satisfactory" (possible overall performance rating possibilities: "unsatisfactory", "satisfactory" and "outstanding").

Section II has eleven factors. On one, Factor 8, "Communicating Orally", Ms. Stroud was rated "Superior"; on three, Factor 1, "Judgment", Factor 5, "Learning Capacity" and Factor 9, "Communicating in Writing", Ms. Stroud was rated "Above Average"; on six, Factor 2, "Problem Solving", Factor 3, "Initiative", Factor 4, "Following through on Assignments", Factor 6, "Adaptability", Factor 7, "Planning and Organization", and Factor 10, "Creativity", Ms. Stroud

was rated "Average"; and on one, Factor 11, "Leadership", Ms. Stroud was rated "Less than Average".

3. On March 31, 1977, Ms. Stroud filed a grievance under the parties' negotiated agreement (Jt. Exh. 1). Appendix E to the negotiated agreement, Section B, entitled "Matters excluded from coverage under Article 13, but covered by GSA or CSC procedure", under "Performance Appraisal" refers to Section 12, Chapter 2, Employee Appraisal System and Promotion Plan, OADP 3630.1A, which was made part of the record herein as Joint Exhibit 2.

Section 12b. of Joint Exhibit 2 specifically provides:

"12. Grievances concerning performance ratings

* * * *

b. An employee may seek a change in one or more of the factor ratings ... if it is contended that one or more of the factor ratings assigned is in violation of a negotiated agreement covering a labor unit of which the employee is a member, through the negotiated grievance system." (Jt. Exh. 2, p. 17) Emphasis supplied.)

4. Ms. Stroud, in her grievance, asserted that her performance appraisal for the period ending February 28, 1977, was inaccurate and had not been prepared in accordance with applicable guidelines and standards; that her affiliation with a labor organization had been cited as a factor by her supervisor; and that Section 6 [Jt. Exh. 1, Sec. 6.1] of the general agreement provided that employees may freely associate with such an organization without reprisal.

The relief prayed for by Ms. Stroud in her grievance was that the appraisal, based on the work actually performed, be revised as follows:

Section I - Items 1 through 4 to "Exceptional"
Section II - Items 1 through 7 to "Superior"
 Items 9 through 11 to "Superior"

5. Ms. Stroud's grievance requested no change of her Overall Performance Rating under Section I.

6. On April 1, 1977, Supervisor Jerry Cohen, Ms. Stroud's rating official, denied Ms. Stroud's grievance at Step 1 of the negotiated grievance procedure. Mr. Cohen's denial addressed the contentions asserted by Ms. Stroud.

7. On April 4, 1977, Ms. Stroud appealed the decision to the Second Step of the negotiated procedure and on April 18, 1977, Mr. Dennis J. Keilman, Director, Space Management Division, denied the grievance because:

"... I have concluded that the grievance procedure may not be used to have an overall rating of satisfactory changed."

As noted in Paragraph 5 above, Ms. Stroud's grievance did not request any change of her Overall Performance Rating. Moreover, the Overall Performance Rating was part of Section I and Ms. Stroud's grievance pertained to both Section I and Section II.

It is true, as Mr. Keilman stated in his denial of the grievance at Step 2, that Section 12a. of Joint Exhibit 2, provides:

"a. An employee may not use the GSA grievance system or a negotiated grievance system to have his overall rating of unsatisfactory or satisfactory changed. The procedures described in par. 11 are the only appropriate procedures for seeking such changes."

Although not referred to by Mr. Keilman, Appendix 2-B, Paragraph 10, of Joint Exhibit 2 provides, in part, that:

"An employee who receives an exceptional rating for each factor must be given an overall rating of outstanding; an outstanding rating may not be given if one or more factors are rated less than exceptional."

See, also, Paragraph 7 of Joint Exhibit 2 entitled "Appraising Outstanding performance."

8. On April 19, 1977, Ms. Stroud wrote Mr. Keilman and stated, in relevant part:

"On April 18, 1977 I received what appears to be your adjudication at Step 2 of the

grievance I have filed to compel a correction of certain specific items in the performance appraisal prepared by Mr. Jerry V. Cohen ... your opinion, since it does not treat the issues in the least, is as a minimum elusive and for this reason is wholly unacceptable.

"I have written merely to clarify the relief that will be required i.e., the correction of the specific items cited in the grievance. No change in the overall rating is sought as a part of this action.

"Now if, in view of this fact, you would desire to revise your opinion and speak to the issues, please let me have your revision not later than April 20, 1977. Otherwise, the opinion as submitted will be considered final." (Emphasis in original.)

9. Mr. Keilman did not respond to Ms. Stroud's letter of April 19, and on April 21, 1977, Ms. Stroud appealed to Step 3 of the negotiated procedure. Step 3 provides, in part, as follows:

"The Regional Commissioner shall issue his decision, in writing, within ten (10) working days after receipt of the comments, the appeal, or the meeting, whichever is later. ..."

If not satisfied with the decision of the Regional Commissioner, Step 4 provides for a request for further consideration by the Regional Administrator; the Regional Administrator "shall render his decision in writing within ten (10) working days"; and if dissatisfied with the Regional Administrator's decision,

"... the Union may request arbitration ..." (Jt. Exh. 1, Art. 13, Sec. 13.3, Step 4.)

10. No decision was ever issued by the Regional Commissioner, as required by Step 3 of the negotiated procedure. To the contrary, Mr. E.A. Clark, Chief, Employee Relations Branch, by letter dated April 29, 1977, returned Ms. Stroud's grievance of March 31, 1977. Noting that, as the relief sought would, if granted, change each rating to "Exceptional" and that such a change would automatically require that your

present overall rating become "outstanding", Mr. Clark concluded that:

"I must, therefore, as the technical expert in the grievance procedure for Region 5, return your grievance as being inappropriate for processing under the negotiated procedure."

11. By letter dated April 30, 1977, Ms. Stroud wrote Mr. Clark and, inter alia, stated:

"If management will persist in its efforts to avoid its responsibility for adjudication of grievances, I shall have no alternative but to file a ULP."

12. By letter dated May 5, 1977, addressed to Regional Commissioner W.B. Morrison, Ms. Stroud "returned" her grievance of March 31, 1977, but "in an effort to facilitate the disposal, have revised the 'Relief of Adjustment'" so that Item 3 of Section I would have been revised to "Exceeds Requirement" rather than to "Exceptional".

13. Mr. Clark, by letter dated May 10, 1977, returned Ms. Stroud's "new grievance dated May 5, 1977" as untimely.

14. Section 13.2 of the General Agreement provides, in part, as follows:

"If any matters grieved are not subject to this procedure, it shall be mutually decided which of the procedure(s) available applies." (Jt. Exh. 1, Sec. 13.2, p. 21)

Mr. Robert J. Gorman, President of Local 1300, testified that, although he was fully aware of Ms. Stroud's grievance of March 31, 1977, and had met with Respondent about the grievance after it was filed, he had never asked to meet with Respondent's Employee Labor and Relations Branch to discuss "which procedure shall be used to make a mutual decision which procedure available applies." (Tr. 43-44).

15. Ms. Stroud was no longer employed by Respondent at the time of the hearing.

CONCLUSIONS

It is perfectly clear from the Agreement of the parties, from Respondent's Employee Appraisal System and Merit Promotion Plan (Jt. Exhs. 1 and 2), and from the undisputed testimony of President Gorman that one or more of the rating factors may be grieved under the parties' negotiated grievance procedure. Nor is there any question that: a) Ms. Stroud timely filed a grievance under the negotiated grievance procedure on March 31, 1977; b) that her rating supervisor, Mr. Cohen, on April 1, 1977, denied her grievance; c) that on April 4, 1977, Ms. Stroud appealed Mr. Cohen's Step One decision to Step Two of the negotiated grievance procedure; and d) that on April 8, 1977, Mr. Keilman, without reaching the merits, denied the grievance at Step Two because he had "concluded that the grievance procedure may not be used to have an overall rating of satisfactory changed."

Not professing to be an expert, Paragraph 7 of Joint Exhibit 2, entitled "Appraising Outstanding performance" nevertheless, would appear to preclude an outstanding rating where the rating official, Mr. Cohen in this instance, has not rated the employee outstanding. Thus, Paragraph 7c provides "To support a rating of outstanding, the rating official must prepare a written statement that (1) describes the performance requirement for each significant aspect of the job, (2) describes how the employee has exceeded the performance requirements for each aspect, and (3) states why the performance in each factor is considered to be so exceptional as to deserve special commendation." Paragraph 7 d. provides "If the reviewing official concurs with the the outstanding rating, it shall become official if the reviewing official is at the office head level ... [or] the rating shall be forwarded to that level for final approval ..."

Respondent's position that, because the relief requested, if granted in full, would have required a change of Ms. Stroud's overall rating from satisfactory to outstanding and that the negotiated grievance system may not be used to have an employee's overall rating of satisfactory changed, would have been an arguable construction of the Agreement and the incorporated Employee Appraisal System prior to the decision of the rating official at Step One of the negotiated grievance procedure, and whether it was, or was not, an arguable construction, i.e., a bona fide construction made in good faith, at Step Two, compare Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark, Ohio, A/SLMR No. 677, 6 A/SLMR 362 (1976); Department of Army Watervliet Arsenal Watervliet, New York, A/SLMR No. 624, 6 A/SLMR 128 (1976), is not material here as a party may make absurd and erroneous decisions as well as wise and correct decisions. The objective

of the negotiated grievance procedure was to provide a means for the resolution of disputes concerning the interpretation or application of the parties' agreement. Mr. Keilman's decision at Step Two may have been right or it may have been wrong; but whether it was right or wrong, his decision, without more, was not an unfair labor practice as it was, pursuant to the negotiated procedure, subject to review through the succeeding steps of the negotiated grievance procedure and, ultimately, to impartial arbitration. Ms. Stroud, on April 21, 1977, timely appealed to Step Three of the negotiated grievance procedure. The Regional Commissioner failed and refused to render a decision at Step Three, as the negotiated agreement required, and Respondent on April 29, 1977, by its Chief, Employee Relations Branch, returned Ms. Stroud's grievance asserting that it was "inappropriate for processing under the negotiated procedure." Respondent's unilateral action in refusing to process the grievance to Step Three, and subsequent steps of the negotiated grievance procedure, and the return of the grievance on April 29, 1977, contravened the agreed upon terms of its negotiated agreement. Not only did Respondent's action foreclose review of the Step Two decision at Steps Three and Four, but, because decision of the Regional Commissioner, at Step Three, and of the Regional Administrator, at Step Four, were necessary preconditions to arbitration, Respondent precluded impartial arbitration provided for by the negotiated agreement. In Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87, 1 A/SLMR 401 (1971), where management had failed and refused to comply with the negotiated grievance procedure, the Assistant Secretary stated:

"In the circumstances of this case, I do not view Respondent's contention that its conduct as to these grievances based on a 'good faith' belief that there was no need for further processing of the grievances, is controlling or conclusive. I have stated that,

'... in the processing of grievances pursuant to a negotiated grievance procedure, good faith is not demonstrated where ... an activity informs its exclusive representative that a grievance has been decided not on the basis of the undertakings of the grievance

procedure, but on the activity's own personal judgments.' [United States Army School Training Center, Fort McCellan, Alabama, A/SLMR No. 42, I A/SLMR 226, 229 (1971)].

The foregoing statement would similarly be applicable to an agency or activity which unilaterally determines whether there is need for complying with a request for a grievance meeting which is made pursuant to a negotiated grievance procedure. Quite obviously, granting such privilege to management could render useless the establishment of bilateral grievance and arbitration machinery.

* * * *

"... I view the Respondent's conduct ... to have the inherent effect of interfering with the rights of employees to utilize the grievance procedure negotiated by their exclusive representative.

"Accordingly, ... I find that the Respondent interfered with the Section 1(a) rights of employees in violation of Section 19(a)(1) of the Order. ..." (1 A/SLMR at 404-405)

In Long Beach Naval Shipyard, A/SLMR No. 154, 2 A/SLMR 240 (1971), where the Respondent had unilaterally cancelled a scheduled arbitration hearing, the Hearing Examiner had concluded that Respondent did not violate the Order by its unilateral action; however, the Assistant Secretary rejected the Hearing Examiner's conclusions and recommendations in this respect and in finding a violation of Sections 19(a)(1) and (6) stated:

"... In my view, such an arbitration provision constitutes an invaluable tool for promoting labor relations harmony in the Federal Service. If such arrangement are to be effective, however, they must be honored by the parties to the fullest extent possible. Thus, where an arbitration clause in the negotiated agreement permits either party to seek arbitration, to permit

either party to the agreement to determine the question of arbitrability unilaterally would, in effect, 'render useless the establishment of bilateral grievance and arbitration machinery.'

"In the circumstances here, I find that the Respondent's conduct constituted an improper refusal to consult, confer, or negotiate with the Complainant. Thus, as noted above, the Respondent admittedly did not confer with or even notify the Complainant ... prior to its unilateral cancellation of such proceeding. Instead, after agreeing under the parties' negotiated agreement to submit the matter to arbitration ... Respondent, based on its own judgment and without consultation with the Complainant, chose to cancel the arbitration hearing. ...

* * * *

"In all the circumstances, therefore, I find Respondent's conduct herein to be in derogation of its obligation to consult, confer, or negotiate and therefore violative of Section 19(a)(6) of the Executive Order. Furthermore, I find that Respondent's conduct constitutes a violation of Section 19(a)(1) of the Executive Order ... where an activity engage in a course of conduct which has the effect of evidencing to employees that it can act unilaterally with respect to negotiated terms and conditions of employment without regard to their exclusive representative, I find that the rights of employees established under Section 1(a) of the Order have been interfered with in violation of Section 19(a)(1) of the Order." (2 A/SLMR at 242-243).

In Puget Sound Naval Shipyard, Department of the Navy, Bremerton, Washington, A/SLMR No. 332, 3 A/SLMR 648 (1973), the Respondent refused to process a grievance to the third step of the negotiated grievance procedure asserting that the matter was not subject to the grievance procedure because it constituted a job grading appeal which must be resolved under CSC's Job Grading Appeals System. There, as here, the grievance was returned "as a matter not appropriate for further processing as a grievance." The Administrative Law Judge's finding that

Respondent thereby violated Sections 19(a)(1) and (6) of the Order was adopted by the Assistant Secretary. In concluding that Respondent's unilateral conduct violated Sections 19(a)(1) and (6) the Administrative Law Judge stated:

"... Respondent's refusal to process the grievances herein was based, in large measure, on its unilateral interpretation of the contract and its unilateral determination as to what is grievable (and inferentially arbitrable) under the contract. However, the negotiated agreement does not accord Respondent this broad privilege.

"The Assistant Secretary has previously held, in circumstances similar to those herein, that an agency's unilateral determination of what is arbitrable under a negotiated agreement constitutes a unilateral modification of substantial terms of a contract and thereby violates Section 19(a)(1) and (6) of the Order. The rationale for this holding is equally applicable where an agency unilaterally determines that a dispute is not grievable under a negotiated agreement. Accordingly, I conclude that Respondent's unilateral determination that under the terms of the negotiated agreement the grievances herein were not proper for further processing into the 3rd step of the grievance procedure or advisory arbitration violated Section 19(a)(1) and (6) of the Order." (3 A/SLMR at 659).

See, also, Norfolk Naval Shipyard, A/SLMR No. 290, 3 A/SLMR 389 (1973); Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334, 3 A/SLMR 669, 671 (1973).

I therefore conclude that Respondent's unilateral determination that, under the terms of the negotiated agreement, the grievance herein was not proper for further processing to the Third and Fourth Steps of the negotiated grievance procedure and to arbitration, as provided for by the agreement, violated Sections 19(a)(1) and (6) of the Order. Here, unlike the situation in U.S. Department of Defense, Department

of the Army, U.S. Army Adjutant General, Publication Center, St. Louis, Missouri, A/SLMR No. 455, 4 A/SLMR 800 (1974), there was no provision of the negotiated agreement which clearly removed the grievance herein from the procedures of the negotiated grievance procedure. To the contrary, the incorporated provisions of Respondent's Employee Appraisal System specifically provided that an employee may seek a change "in one or more of the factor ratings" through the negotiated grievance system. The grievance sought a change "in one or more of the factor ratings"; the grievance did not seek any change of Ms. Stroud's overall rating of satisfactory. After the rating official's decision, on the merits at Step One, in which he rejected the grievance and adhered to his original determination as to each of the factor ratings, the decision at Step Two, that "the grievance procedure may not be used to have an overall rating of satisfactory changed which was premised on the assumption that the relief prayed would be granted in full and, therefore, the grievance was, in effect, an attempt to use the negotiated grievance system to have an overall rating changed, was of doubtful good faith in view of the decision of the rating official at Step One and the requirements for an outstanding rating; but in any event Mr. Kielman's decision was, at best, an arguable construction as to which there was a differing arguable construction. Thus, standing alone, the decision at Step Two was not an unfair labor practice and the validity of that decision was, pursuant to the negotiated grievance procedure, to be resolved through the negotiated procedure. But when Respondent refused to process the grievance to Step Three, a timely appeal having been taken to Step Three in accordance with the negotiated grievance procedure, and Respondent returned the grievance, Respondent, on the basis of its own unilateral interpretation of the contract and its own unilateral determination as to what is grievable, and inferentially arbitrable, under the contract, thereby unilaterally modified substantial terms of its collective bargaining agreement with Complainant and thereby violated Sections 19(a)(1) and (6) of the Order.

Moreover, the grievance of March 31, 1977, had related to Section II of the Appraisal, i.e., "Assessment of Abilities and Traits Relevant to Promotion Potential", which had nothing to do with Ms. Stroud's overall performance rating which was part of Section I. As to its unilateral determination to refuse to process this portion of the grievance, Respondent's sole response has been to ignore it. While it would appear that this action alone would constitute a violation of Sections 19(a)(1) and (6) of the Order, in view of my conclusion above, I find it unnecessary to decide whether Respondent's unilateral determination to refuse to

process this portion of the grievance was also a violation of the Order. In like manner, I find it unnecessary, in view of my conclusion above, to treat other contentions raised by Complainant.

Neither the 19(a)(1) nor the 19(a)(6) violation has been rendered moot by the fact that Ms. Stroud is not currently employed by Respondent. The 19(a)(6) violation was a refusal to consult, confer, or negotiate with Complainant Chapter 91, the duly recognized exclusive representative. The 19(a)(1) violation as to Ms. Stroud occurred while she was an employee of Respondent; but, equally important, because Respondent's course of conduct has had the effect of evidencing to all employees of Respondent that it can act unilaterally with respect to negotiated terms and conditions of employment without regard to their exclusive representative, the rights of all unit employees, established under Section 1(a) of the Order, were interfered with in violation of Section 19(a)(1) of the Order, not merely the rights of the individual grievant, Ms. Stroud. Accordingly, the 19(a)(1) violation has not become moot.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the General Services Administration, Region 5, Chicago, Illinois, shall:

1. Cease and desist from:

a. Unilaterally determining the grievability or arbitrability of grievances seeking a change in one or more of the factor ratings of Employee Performance Ratings pursuant to its negotiated agreement, effective July 14, 1975, covering Local 1300, National Federation of Federal Employees.

b. Interfering with, restraining, or coercing its employees by unilaterally determining the grievability of grievances seeking a change in one or more of the factor ratings of Employee Performance Ratings pursuant to its negotiated agreement, effective July 14, 1975, covering Local 1300, National Federation of Federal Employees.

c. In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Executive Order:

a. Upon request, proceed to Step 3, of the negotiated grievance procedure, set forth in the negotiated agreement effective July 14, 1975, on the grievance of March 31, 1977, which sought to change one or more of the factor ratings on an Employee Performance Rating. If this matter is unresolved at Step 3, thereafter, upon request, proceed to Step 4 and to arbitration, as provided in the negotiated agreement effective July 14, 1975.

b. Post at its Chicago, Illinois, Facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Administrator and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Regional Administrator shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

c. Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this Order as to what steps have been taken to comply therewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: August 14, 1978
Washington, D.C.

WBD/mml

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT unilaterally determine the grievability or arbitrability of grievances seeking a change in one or more of the factor ratings of Employee Performance Ratings pursuant to our negotiated agreement, effective July 14, 1975, with Local 1300, National Federation of Federal Employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Executive Order.

WE WILL, upon request, proceed to Step 3 of our negotiated grievance procedure, set forth in our negotiated agreement effective July 14, 1975, on the grievance of March 31, 1977, which sought to change one or more of the factor ratings on an Employee Performance Rating. If this matter is unresolved thereafter, WE WILL, upon request, proceed to Step 4 and to arbitration, as provided in our negotiated grievance procedure.

(Agency or Activity)

Dated:

By

(Signature)
Regional Administrator

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

Appendix (cont'd)

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Federal Building, Room 1060, 230 South Dearborn Street, Chicago, Illinois 60604.

October 18, 1978

A/SLMR No. 1140

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 3, FEDERAL PROTECTIVE SERVICE
DIVISION
A/SLMR No. 1140

GENERAL SERVICES ADMINISTRATION,
REGION 3, FEDERAL PROTECTIVE SERVICE
DIVISION

Respondent

and

Case No. 22-08522(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1733, AFL-CIO

Complainant

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1733, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by engaging in a mass transfer of officers from the Respondent's Tactical Unit to a non-tactical unit, on a non-seniority basis, in disregard of the parties' oral agreement.

DECISION AND ORDER

The Administrative Law Judge found that the Respondent had not violated Section 19(a)(1) and (6) of the Order. In this regard, he found that the parties' oral agreement to use seniority as a basis for transferring Federal Protective Officers from one unit to another did not apply to the Tactical Unit and that transfers to and from this special unit were to be based on performance. Accordingly, he recommended that the complaint be dismissed in its entirety.

On August 16, 1978, Administrative Law Judge Robert G. Mahony issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. 1/

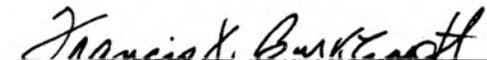
The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in the subject case, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-08522(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
October 18, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1/ The Complainant's request for an extension of time in which to file exceptions was untimely filed and was therefore denied.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



The Activity answered the complaint denying that any agreement was breached because any agreement regarding the reassignment of officers did not apply to the tactical unit. The Activity further contends that any alleged violation in the assignment procedures would be a violation of the negotiated agreement and should be negotiated under the negotiated grievance procedure, rather than through Unfair Labor Practice procedures. The Activity further requests that the complaint be dismissed.

Issue

This dispute centers on whether this oral agreement or understanding applies to the tactical unit of the Federal Protective Service. The union maintains that the agreement applies; management asserts that it does not.

Discussion

The genesis of the complaint was the transfer of seven Federal Protective Service Officers from the Tactical Unit to the Department of Agriculture on July 12, 1977. 2/ This transfer allegedly violated an oral understanding between the union and management that transfers would be first on a voluntary basis, and then on a last-in-first out seniority basis.

The Tactical Unit is comprised of male and female officers and is used primarily for special circumstances such as demonstrations or disturbances or other situations where the routine Federal Protective Service details do not provide sufficient manpower or other requirements. Unit members may be required to work long hours on any shift and to assume responsibilities not found in a routine zone assignment. Assignment to the Tactical Unit is generally regarded by the Officers to be a choice assignment.

2 The names of the transferred officers are contained in a letter with attachment dated May 30, 1978, which was submitted, at the request of the Administrative Law Judge, after the hearing. It is admitted into evidence as Claimant's exhibit 1. The exhibit states that if seniority was used as a criteria in reassignment five of the seven officers would have remained with the Tactical Unit. The record indicates that there were several discussions between union and management representatives during 1975 and 1976 on the issue of transfers in general.

..... :
In the Matter of :
: :
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, Local 1733 : Case No. 22-08522(CA)
Complainant :
: :
vs. :
: :
FEDERAL PROTECTIVE SERVICE :
DIVISION :
Respondent :
..... :

RECOMMENDED DECISION

This proceeding arises under the provisions of Executive Order 11491, as amended (hereinafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter referred to as the Assistant Secretary), a Notice of Hearing on Complaint, as amended, was issued on April 4, 1978, with reference to alleged violations of Section 19(a)(1) and (6) of the Order 1/.

The Complaint was filed on September 9, 1977 by the A.F.G.E., Local 1733. The amended complaint was filed on January 30, 1978. The Complaint, as amended, alleges that the Management and Enforcement Branch, Federal Protective Service Division violated an alleged oral agreement with Local 1733 by engaging in a mass transfer of officers from the Federal Protective Service Tactical Unit to a non-tactical unit, on a non-seniority basis.

1/ 19(a) states: Agency management shall not -

- (1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;
- (6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

The threshold question, and the one on which this case be decided, is whether the oral agreement or understanding applied to the Tactical Unit transfers.

Mr. James H. Maddock, Chief, Operations Branch, Federal Protective Service, testified, as did several union witnesses, that union and management did, in fact, discuss the issue of transfers and reassignments. Maddock verbally agreed to attempt to reassign by seniority if there were no overriding consideration, such as security clearances. Maddock testified however, that this agreement would not apply to the Tactical Unit because of the unique character of its assignments. Maddock asserted that this agreement was restricted to those officers who served in zones. The union witnesses who participated in the discussions felt that it also applied to the Tactical Unit.

Chief Maddock testified that in February or March 1977, due to a lessening of the work for the Tactical Unit, he decided to reduce the number of people assigned to it, and put them back in zones.

At his instruction, the Tactical Unit Commander prepared a list of possible transfers. It was from this list that officers were selected to go to the Department of Agriculture when the Federal Protective Service replaced private security guards.

Chief Maddock testified that he was told by Captain Carter, the Tactical Unit Commander that the individuals on the list were those that the Unit Commander "would like to ship out first, if he had to reduce." the criterion for the selection as Chief Maddock understood it was their performance in the Tactical Unit. Chief Maddock's view on why officers were removed from the Tactical Unit was essentially corroborated by a union witness, officer William Finney.

Officer Finney testified:

"In the past, when transfers were made from our particular unit, it was usually used as a disciplinary action to one that did something wrong in that unit.

"Then, they would actually transfer them back the zone where I went, you know. But other than that, they don't usually have any transfers.

"There wasn't any transfers unless they were taking disciplinary action against someone, you know."

Jerome A. Kaplan, a building management specialist testified that he participated as a management representative in several meetings with the union when the subject of "mass" transfers or reassignments was brought up.

Kaplan testified that Chief Maddock would try to accommodate transfers based on seniority if there were no overriding considerations. He was emphatic, however, that this understanding did not apply to the Tactical Unit.

He stated:

Q. Would this (Maddock's agreement to try to use seniority as a basis for transfer) apply also with respect to reassignments in the Tactical Unit?

A. No, not at all. Not TAC, or what we call the SEU Unit.

They were elitist units, as such, and that flexibility of reassignments in and out of that is definitely required and always used to a great extent.

Q. Is your recollection that TAC & SEU were specifically excluded from this?

A. That's right. We were talking primarily concerning the zones. ^{3/}

Findings of Fact

This evidence in this case establishes that:

(1) The union and management from time to time during 1975 and 1976 discussed the issue of the "mass" transfer of Federal Protective Officers from the units and the criteria that should be considered in making such a transfer.

(2) Management agreed to seek volunteers for transfers and then to use seniority on a last-in-first-out basis.

^{3/} Zones are generally geographic assignment areas, such as the Pentagon.

- (3) This arrangement only applied to Federal Protection Officers working in zones.
- (4) Because of the unique and demanding requirements placed upon the Tactical Unit and other special units, this oral agreement would not apply to them. Transfers to and from these special units would be based on performance

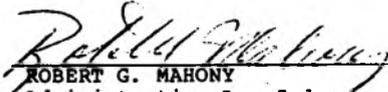
Conclusions of Law

From the foregoing, I conclude that:

- (1) The Activity did not interfere with, restrain, or coerce an employee in the exercise of the rights assured by this order;
- (2) The Activity did not refuse to consult, confer or negotiate with a labor organization as required by this Order.
- (3) The Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of Section 19(a)(1) and (6) of the Order.

Recommendation

Upon the basis of the above findings, conclusions and the entire record, I recommend to the Assistant Secretary that the complaint in Case No. 22-08522(CA) be dismissed in its entirety.


 ROBERT G. MAHONY
 Administrative Law Judge

Dated: August 16, 1978
Washington, D.C.

RGM:hls

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF TRANSPORTATION,
 FEDERAL AVIATION ADMINISTRATION,
 ALASKAN REGION,
 ANCHORAGE, ALASKA
 A/SLMR No. 1141

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3028, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (3) of the Order by its failure to remove posted literature of a labor organization which was not in equivalent status with the Complainant.

In addition to the Complainant's unit at the Respondent's facility, certain of the Respondent's employees were represented exclusively by the Professional Air Traffic Controllers Organization, Pacific Region (PATCO). The Respondent and the PATCO were parties to a negotiated agreement which gave the PATCO the use of bulletin boards and provided that the Respondent would not remove any material posted thereon. Between March and July 1977, several of the Complainant's unit employees noticed literature of the Professional Airways Systems Specialists (PASS), a rival labor organization, posted on the PATCO bulletin boards. The Respondent and the Complainant stipulated that the PASS was not in an equivalent status with the Complainant.

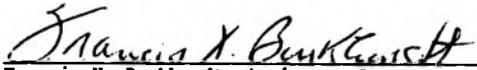
The Administrative Law Judge concluded that the Respondent's conduct was not violative of the Order. In this regard, he noted that the Respondent had taken no affirmative action which was beneficial to the PASS, that the Complainant could have posted counter literature on its bulletin boards, and that because the PASS literature was posted on the PATCO bulletin boards, rather than on the Respondent's bulletin boards, this constituted a sufficient safeguard against the possibility of employees perceiving either the Respondent's support for or opposition to the Complainant. He further noted that the Respondent was contractually prohibited from removing material posted on the PATCO bulletin boards.

The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

IT IS HEREBY ORDERED that the complaint in Case No. 71-4515(CA) be,
and it hereby is, dismissed.

Dated, Washington, D.C.
October 18, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
ALASKAN REGION,
ANCHORAGE, ALASKA

Respondent

and

Case No. 71-4515(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3028, AFL-CIO

Complainant

and

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, PACIFIC REGION

Party-in-Interest

DECISION AND ORDER

On August 25, 1978, Administrative Law Judge Steven E. Halpern issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

San Francisco Regional Office
Suite 600 - 211 Main Street
San Francisco, California 94105



Area Code 415 556-0555

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding under Executive Order 11491, as amended, was initiated by ~~complaint filed November 2, 1977.~~ An amended complaint filed March 15, 1978, was modified by letter of March 17, 1978, whereby an allegation of a section 19(a)(5) violation was withdrawn. Notice of hearing was issued on March 28, 1978, by the Regional Administrator, United States Department of Labor, Labor-Management Services Administration, San Francisco Region, pursuant to which a hearing was held at Anchorage, Alaska, on May 16, 1978. Thereafter, the parties filed briefs, upon the receipt of the last of which (PATCO's post-hearing reply brief) 1/ the record duly closed on July 31, 1978.

The basis for the complaint, in which Respondent is charged with violation of section 19(a)(1) and (3) of the Executive Order, is set forth therein as follows:

"Bulletin boards in air traffic facilities assigned to PATCO units are carrying solicitations for membership in an organization of Airway Facility employees called 'PASS'. The bulletin boards are in areas common to air traffic and airway facility employees. AFGE is the exclusive representative for airway facility employees in the Alaska region. The material on the boards is intended to discourage AFGE membership, gives assistance to an unrecognized organization and refuses proper recognition to the recognized organization...." (Typographical errors corrected)

The parties have been afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses, to make oral argument and to file briefs.^{2/} Based upon the evidence of record, having observed the witnesses and assessed their credibility and

1/ In the absence of any objection I grant the Motion for Leave to File said brief.

2/ I accept Complainants' brief which was not filed until July 14, 1978.

In the Matter of)
DEPARTMENT OF TRANSPORTATION)
FEDERAL AVIATION ADMINISTRATION)
ALASKAN REGION)
ANCHORAGE, ALASKA) Respondent)
and)
AMERICAN FEDERATION OF GOVERNMENT)
EMPLOYEES, LOCAL 3028, AFL-CIO) Complainant)
and)
PROFESSIONAL AIR TRAFFIC CONTROLLERS)
ORGANIZATION, PACIFIC REGION) Party-in-Interest)

CASE NO. 71-4515(CA)

Dean H. Child, Chief
Labor-Management Relations
Branch for FAA, Alaskan Region
632 Sixth Avenue
Anchorage, Alaska 99501
For the Government

James Rosa, Assistant
General Counsel for Litigation
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, N.W.
Washington, D. C. 20005
For the Complainant

Duane Bledsoe, President
Local 601,
Professional Air Traffic
Controllers Organization
7800 DeBarr Drive
#239
Anchorage, Alaska 99504
Party-in-Interest

Before: STEVEN E. HALPERN
Administrative Law Judge

having considered the arguments of the parties, I make the within findings, ^{3/} conclusions and recommendation.

FINDINGS AND CONCLUSIONS

Preliminary Findings And Conclusions

I

AFGE Local 3028 is the exclusive representative of all employees under the supervision of the Chief, Airway Facilities Division, Alaskan Region, Federal Aviation Administration. (This unit includes technicians at the Anchorage Air Route Traffic Control Center located at Elmendorf Air Force Base, and technicians at the Elmendorf Radar Approach Control Tower).

II

PATCO is the exclusive representative of all air traffic control specialists, GS-2152 series, including flow controllers, area specialists, data systems specialists, planning and procedures specialists, and military liaison and security specialists employed at air traffic control towers, air traffic control centers and combined-station-towers.

III

The aforesaid units do not overlap.

IV

The following collective bargaining agreements are material: Agreement between AFGE Local 3028 and the Airway Facilities Division, Alaskan Region, dated May 1977, which is still in effect ... Agreement between the Professional Air Traffic Controllers Organization affiliated with Marine Engineers Beneficial Association, AFL-CIO and the Federal Aviation Administration Department of Transportation dated July 1975, which was in effect when ULP Case No. 71-4515 (CA) was brought.

V

The Professional Airway Systems Specialists (PASS) enjoys no exclusive recognition for FAA employees at the

^{3/} Items I through VIII are based upon stipulations (Joint Exhibit No. 1; TR. 16).

Anchorage ARTCC, located at Elmendorf Air Force Base, or for any other FAA employees within the Alaskan Region of FAA, nor does it have equivalent status with any AFGE or PATCO labor organization within the Alaskan Region.

VI

The materials ^{4/}, the posting of which are at issue herein, were posted upon bulletin boards designated as PATCO union bulletin boards within the Anchorage ARTCC and RAPCON, located at Elmendorf Air Force Base, Alaska. These bulletin boards are the property of the FAA and are described in Article 9 of the aforementioned collective bargaining agreement between FAA and PATCO. The bulletin boards are in areas frequented by AFGE bargaining unit members.

VII

Respondent has never directed PATCO to remove said posted materials.

VIII

Posting of the materials at issue by Respondent on its bulletin boards would constitute a violation of the Order.

IX

The materials posted in April or May 1978, ^{5/} are not the subject matter of the complaint filed herein, the complaint having preceded the posting.

X

PASS is a labor organization which, according to the posted materials (Union Exhibit No. 1), is an autonomous union sponsored by PATCO and intended to be a PATCO affiliate. PASS is competitive with Complainant in regard to representation of FAA's technicians.

XI

Respondent contends that it is precluded from removing the subject materials from PATCO's bulletin boards by

^{4/} Joint Exhibit 1 at C, D and E; Union Exhibit 1.

^{5/} Joint Exhibit 1 at F and G.

Article 9, Section 1 of the FAA-PATCO collective bargaining agreement:

The Employer shall provide bulletin board space for the posting of Union material at air traffic facilities within the unit. This shall apply even if none of the employees at the facility are members of the Union. At facilities where space is adequate for separate bulletin boards, the Union shall be granted a separate bulletin board. There shall be no restriction on the content of publications or announcements placed on the Union's bulletin boards by the Union. Posted materials will not be removed by the Employer. The Parties recognize that the posting of scurrilous and inflammatory material is prohibited. Materials shall be posted during non-work time.

The parties at the hearing presented no factual evidence bearing upon the intent and purpose of said article although the necessity for such was indicated by the Regional Administrator, in his March 28, 1978, pre-hearing letter. The lone witness called at the hearing was Complainant local's President; the parties to the contract at issue presented no witnesses. Afforded the opportunity at a post-hearing conference conducted by telephone on June 27, 1978, all concerned declined to present further evidence; although the question is dealt with on brief, such does not constitute factual evidence.

The contractual language therefore must speak for itself. Thus, the subject materials appearing to be neither inflammatory nor scurrilous I conclude that Article 9, Section 1 constitutes an agreement that they may not be removed by Respondent.

The ultimate conclusion reached hereinbelow in any event renders moot the apparent issue raised by such contractual provision, namely whether or not an activity may by third party contract divest itself of an Executive Order duty owed to the exclusive representative of its employees.

Additional Findings And Conclusions

The thrust of Complainant Union's charge against the Activity is that it was under a duty to censor materials posted by PATCO on PATCO's bulletin boards. Specifically it is alleged that Respondent stands in violation of section 19(a)(1) and (3) of the Order because it failed to

remove from PATCO's bulletin boards material of PASS, a union not in equivalent status with Complainant, which material constituted a solicitation for membership in PASS, was intended to discourage membership in Complainant union, gave assistance to an unrecognized labor organization and constituted a refusal to give proper recognition to Complainant as incumbent exclusive representative.

Any resolution of the issues thus generated must be considered circumscribed by the Federal Labor Relations Council's recent decision in Department of the Air Force, Grissom Air Force Base, and Local 1434, National Federation of Federal Employees and Local 3254 American Federation of Government Employees, AFL-CIO, A/SLMR No. 852, FLRC No. 77A-77 (May 2, 1978). The Grissom decision constitutes a major policy determination as to the interpretation and application of section 19(a)(3) (and section 19(a)(1)) of the Executive Order.

In Grissom the instrumentality in which the objected to publication (a Union advertisement) was made was a weekly unofficial newspaper published by a private publisher under contract with the Air Force Activity.

The news content, headlines, editorials, captions and pictures published in the newspaper all were furnished by the Activity. The editor of the newspaper was an airman detailed by the Activity for such duty. Copies of the newspaper were available free of charge to base personnel at various locations on the base.

The sole source of revenue of the publisher of the newspaper was derived from the sale of advertisements. Pursuant to the contract with the Activity certain types of advertisements were not permissible for publication including those in conflict with the principles of the Air Force character guidance program; those from "off limits" establishments; those of a political nature; those which were unlawful, detrimental to discipline, undermined loyalty or were otherwise contrary to the best interests of the Activity, the Air Force and the United States. In case of disagreement over advertising content the contract provides that the Activity's base commander "shall have the final authority for determination." The Activity, through said airman-editor, who had seen the objected to advertisement in galley proof form, must be considered to have had prior knowledge of the content of said advertisement and made no effort to prevent its publication. Although the advertisement did not make specific reference to the incumbent union it promoted membership in the advertising union.

In accordance with the contract the edition of the newspaper in which the disputed advertisement appeared contained the following statement:

"The Contact is an unofficial newspaper published weekly in the interest of personnel at Grissom AFB of the Strategic Air Command, it is published by James Bannon, an individual, in no way connected with the Air Force. Opinions expressed by publishers and writers are their own and are not to be considered an official expression by the Department of the Air Force. The appearance of advertisements, including supplements and inserts, in this publication does not constitute an endorsement by the Department of the Air Force of products or services advertised. Everything advertised in this publication must be made available for purchase, use or patronage without regard to race, creed, color, national origin or sex of the purchaser, user or patron. A confirmed violation of this policy of equal opportunities by an advertiser will result in the refusal to print advertising from that source."

In both Grissom and this case the Activity provided the vehicle for the disputed publication; in Grissom the newspaper, and in this case the PATCO bulletin board. In both cases the publication of the disputed material was made on the premises of the Activity; in Grissom by newspaper distributed on the base, evidently with the Activity's knowledge and consent and, in this case, by posting on PATCO's bulletin board, with the Activity's knowledge only after the posting. In Grissom a representative of the Activity had advance notice of the publication and the Activity had apparent contractual authority to prevent it, whereas in this case the Activity had no advance notice of the materials to be posted and was prohibited by contract from removing the materials once posted.

In the circumstances of Grissom the Activity was considered to have taken "no affirmative action in any manner beneficial" to the non-incumbent union; nor, under that reasoning, has the Activity in this case taken any such affirmative action.

In Grissom, if it had desired to do so, the incumbent Union could have published a counter advertisement; there is no evidence in this case that AFGE would not

have been provided with its own bulletin board space 6/ upon which to post counter materials, if such had been requested.

In Grissom the publication of the material was "totally free from any hint of management endorsement" and there was no evidence of any other "conduct by agency management which might be perceived by employees as an indication of support "for the non-incumbent union or opposition to the exclusive representative." I find that since the materials at issue here were posted on PATCO bulletin boards and not on Activity bulletin boards there was sufficient safeguard against the possibility that they would "be perceived by employees as an indication of (management's) support for 'Pass' or (management's) opposition to" AFGE.

The Council in Grissom framed the major policy issue to be determined as follows:

"the question is whether the Assistant Secretary's finding of a 19(a)(3) violation is consistent with the purposes of the Order or, to state it alternatively, whether a finding that the activity violated section 19(a)(3) of the Order by permitting the publication of an advertisement by the AFGE in a newspaper which it controls is consistent with the purposes of the Order."

In concluding that it was not the Council delineated the purpose of section 19(a)(3):

"the proscription in section 19(a)(3), namely that agency management shall not sponsor, control or otherwise assist a labor organization, was an adoption of the identical wording of section 3.2(a)(3) of the Code of Fair Labor Practices, the antecedent of the current 19(a)(3) provision. (3 CFR 1959-63, Comp. at 852.) Section 19(a)(3) was clearly intended, as was stated with regard to the Code provision, to prevent agency management from dominating or controlling a labor organization by

6/ The pertinent contract between AFGE and FAA at Article XIX, Section 2 provides only that "Union use of Employer bulletin boards shall be in accordance with the established procedures set forth in FAA Order 7710, 7B.

contributing financial or other support to it and to preserve the independence of such organizations from agency manipulation. In the Council's view, this proscription was not intended to reach the conduct of agency management such as is at issue in the circumstances of the instant case."

In disposing of the "services and facilities" aspect of section 19(a)(3) the Council stated:

"Section 19(a)(3) provides that agency management shall not sponsor, control or otherwise assist a labor organization. The remaining language contained in the section is a proviso to the otherwise absolute ban. That is, an agency may furnish customary and routine services and facilities when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status. In view of our conclusion herein that agency management has not sponsored, controlled or otherwise assisted AFGE in the circumstances of the case, it is unnecessary to apply the proviso permitting the furnishing of customary and routine services and facilities, under described conditions, to organizations having equivalent status."

In ultimate conclusionary remarks it was stated that:

"In the Council's opinion, the proscription that agency management shall not sponsor, control or otherwise assist a labor organization was not intended to cover such circumstances as here involved. That is, a finding of a 19(a)(3) violation based merely on the failure to prevent the publication of the subject advertisement by AFGE is inconsistent with the purposes of the Order."

"Similarly, such conduct plainly does not constitute interference with, restraint or coercion of an employee in the exercise of the rights assured by the Order in violation of section 19(a)(1)."

The Activity's conduct herein rises to no greater level than "failure to prevent the publication" of the posted materials by declining to remove them from PATCO's bulletin board and accordingly falls within the purview of Grissom.

In the final analysis it is the doctrine of Grissom that the purpose of Section 19(a)(3) is to preserve the independence of labor organizations free of management domination or control.

The record before me does not establish that Respondent has engaged in any conduct which may be considered to be in defeat of that purpose. Accordingly, it is concluded that no violation of either Section 19(a)(3) or Section 19(a)(1) has occurred.

RECOMMENDATION

I recommend to the Assistant Secretary that the complaint be dismissed in its entirety.



STEVEN E. HALPERN
Administrative Law Judge

Date: August 25, 1978
San Francisco, California

SEH:tl

October 19, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
AUSTIN SERVICE CENTER,
AUSTIN, TEXAS
A/SIMR No. 1142

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and NTEU Chapter 72 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally converting the status of three reassigned GS-6 Work Leaders from temporary to permanent without notifying the Complainant and affording it the opportunity to bargain over the impact and implementation of such change. The subject reassignments were made permanent after the Respondent had notified the Complainant and certain interested employees about the decision to temporarily reassign three GS-6 Tax Examiners to Work Leader positions for the 1977 tax season, and to fill the same positions competitively for the 1978 tax season. The Respondent contended, among other things, that making such reassignment is a reserved management right under Section 12(b) of the Order, that no request to bargain was ever made by the Complainant, and that, in any event, the Complainant waived its right to bargain over such matters in negotiating the current negotiated agreement.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally making the reassignments permanent without first notifying the Complainant and affording it an opportunity to bargain over the impact of the change. In this regard, he noted that the Work Leader positions were filled competitively for the 1976 tax season.

In adopting the Administrative Law Judge's findings, conclusions and recommendations, the Assistant Secretary noted that a request to bargain over the impact and implementation of a management decision is not necessary to establish a violation of the Order where, as here, management unilaterally made changes in personnel policies, practices or matters affecting working conditions without prior notice to the exclusive representative. Thus, he found that the Respondent was obligated to notify the Complainant and afford it an opportunity to bargain on matters relating to the implementation of the decision to permanently reassign employees to the subject Work Leader positions, whether or not an appropriate request to bargain was made by the Complainant. The Assistant Secretary further found insufficient evidence to establish that the Complainant clearly and unmistakably waived its right under the Order to bargain on the impact and implementation of the Respondent's decision. Accordingly, he ordered that the Respondent cease and desist from the conduct found violative of the Order and take certain affirmative actions.

A/SIMR No. 1142

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
AUSTIN SERVICE CENTER,
AUSTIN, TEXAS

Respondent

and

Case No. 63-7421(CA)

NATIONAL TREASURY EMPLOYEES UNION AND
NTEU CHAPTER 72

Complainant

DECISION AND ORDER

On June 15, 1978, Administrative Law Judge Ben H. Walley issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, both the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, including the exceptions and

1/ Both the Complainant and the Respondent were permitted to file answering briefs to each other's exceptions. However, as the Complainant's answering brief was received untimely, it has not been considered herein. Subsequently, the Complainant moved for permission to file "a cross-answer" to the Respondent's answering brief. The motion is hereby denied.

briefs filed by the parties, I hereby adopt the Administrative Law Judge's findings, 2/ conclusions 3/ and recommendations, only to the extent consistent herewith.

In essence, the Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally making three temporary reassignments permanent without first notifying the Complainant and affording it an opportunity to bargain over the impact of this change in policy. In this regard, he noted that the reassignments were made permanent after the Respondent had notified the Complainant and certain interested employees about its decision to temporarily reassign three GS-6 Tax Examiners to GS-6 Work Leader positions for the 1977 tax season and to fill the same positions competitively for the 1978 tax season, in the same manner they had been filled for the 1976 season.

2/ In its exceptions, the Respondent contended that the Administrative Law Judge's finding that it informed GS-5 and GS-6 level employees at a meeting on January 14, 1977, that the Work Leader positions for the 1977 season only would be filled by the temporary reassignment of the GS-6 Tax Examiners "from another section" is not supported by the evidence presented at the hearing. Upon review of the record, I find that the evidence establishes that the Respondent informed employees at the January 14, 1977, meeting that the Work Leader positions would be filled by the temporary reassignment of GS-6 Tax Examiners in the Error Correction Section, and not by GS-6 Tax Examiners from another section as the Administrative Law Judge inadvertently determined.

3/ The Respondent excepted to the Administrative Law Judge's finding that the Complainant made a proper request to bargain over the impact and implementation of its decision to make the temporary reassignments permanent. While such a request is necessary when an exclusive representative has been afforded prior notice of proposed changes in personnel policies, practices or matters affecting working conditions, where, as here, agency management has unilaterally made changes in these areas without prior notice to the exclusive representative, in my view, it is not necessary for such representative to request bargaining after the fact to establish a violation of the Order. Consequently, whether or not an appropriate request to bargain was made herein was not considered to be determinative with respect to whether a violation occurred herein. Cf. Department of the Treasury, Internal Revenue Service, Jacksonville District, 7 A/SLMR 1038, A/SLMR No. 953 (1977).

- 2 -

In its exceptions, Respondent excepts to the Administrative Law Judge's failure to address its contention that the Complainant, during negotiations for the current collective bargaining agreement, waived its right to notification and bargaining over the impact and implementation of the decision to make the temporary reassignments permanent. The record reveals, in this connection, that during contract negotiations the Complainant submitted a proposal which would have required most vacancies, including reassignments, to be filled competitively. The Respondent rejected the proposal, asserting that it was too expensive and moreover, that it was a management right which could not be relinquished. Subsequently, the Complainant offered contract language that, among other things, excluded lateral reassignments from competitive action where a reassignment occurred prior to the decision and announcement to fill the position involved competitively. Thereafter, Article 6, Section 2B.5. of the parties' negotiated agreement was agreed upon without comment. 4/ The Respondent argues that the Complainant's silence in light of the Respondent's rationale for rejecting the previous proposal indicated that the Complainant had waived its right to notification and negotiation over the subject reassignments.

It is well established that in order to find a waiver of a right granted under the Order, such waiver must be clear and unmistakable. Thus, a waiver will not be found merely from the fact that an agreement omits specific reference to a right granted by the Order or that a party has failed in negotiations to obtain protection with respect to certain of its rights granted by the Order. 5/ As indicated above, Article 6, Section 2B.5. of the parties' negotiated agreement reflects the parties' views as to when a position can be filled by lateral reassignment without competition. In my opinion, however, it does not clearly restrict or limit the Complainant's right to notification and the opportunity to meet and confer with respect to the impact and implementation of lateral reassignments. Under these circumstances, therefore, I find that Article 6, Section 2B.5. does not establish a clear and unmistakable waiver of the Complainant's right to notification and the opportunity to bargain over the impact and implementation of a management decision in this regard.

4/ Article 6, Section 2B.5. states:

B. Exceptions to the coverage of this Article will be as follows:

5. Filling a position by a lateral reassignment prior to a determination and an announcement by the Employer that the vacancy will be filled by a competitive action under the terms of this Article. (If a position has been posted as a vacancy to be filled by competitive action, the Employer may fill the vacancy without competition only if unforeseen circumstances of an extraordinary nature become known to the Employer, subsequent to the time a vacancy is announced and prior to the selection.)

5/ See e.g. NASA, Kennedy Space Center, Kennedy Space Center, Florida, 2 A/SLMR 566, A/SLMR No. 223 (1972), and Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, A/SLMR No. 1045 (1978).

- 3 -

Accordingly, I find that, by changing the classification of employees reassigned as Work Leaders from temporary to permanent without first notifying the Complainant and affording it an opportunity to bargain over the impact and implementation of such change, the Respondent violated Section 19(a)(1) and (6) of the Order.

ORDER 6/

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas, shall:

1. Cease and desist from:

(a) Instituting a change in reassignment policy with respect to employees represented exclusively by the National Treasury Employees Union and NTEU Chapter 72, or any other exclusive representative of its employees, without affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such change and on the impact the change will have on adversely affected unit employees.

6/ In its exceptions, the Complainant contended that the Administrative Law Judge erred in finding only that the Respondent was obligated to bargain over the impact of the permanent reassignments. Thus, the Complainant argued that the Administrative Law Judge should have found that the Respondent was also obligated to bargain over the procedures utilized in implementing the decision to make such reassignments permanent. I agree. Thus, as indicated above, I find that the Respondent was required to bargain over the implementation, as well as the impact, of the permanent reassignments involved herein. Accordingly, I shall modify the remedial order consistent with such finding. The Complainant also excepted to the Administrative Law Judge's failure to order the Respondent to make whole any employee adversely affected by the Respondent's improper conduct. In this regard, it is well established in the Federal sector that in order to make a valid back pay award, it is not only necessary to find that an employee has been adversely affected by an improper action, but also that "but for" the improper action, the employee would not have suffered a loss or reduction in pay, allowances, or differentials. See Mare Island Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO, 4 FLRC 143, FLRC No. 74A-64 (1976). In my view, the evidence adduced in this case does not establish that any employees suffered a loss or reduction in pay, allowances, or differentials which he or she would not have suffered "but for" the Respondent's improper conduct. Under the circumstances, therefore, I find that a "make whole" remedy is unwarranted.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

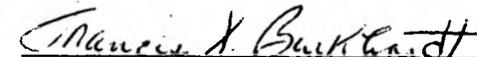
2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request, meet and confer with the National Treasury Employees Union and NTEU Chapter 72, to the extent consonant with law and regulations, concerning the procedures which management observed in reaching the decision as to who was subject to the permanent reassignments announced in January 1977, and the impact the reassignments had on adversely affected employees in the exclusively recognized unit. Any agreement reached by the parties shall be promptly effectuated, including, if consistent with such agreement, the return of any reassigned employees to their prior positions.

(b) Post at its Austin Service Center copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Austin Service Center, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
October 19, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a change in reassignment policy with respect to employees represented exclusively by the National Treasury Employees Union and NTEU Chapter 72, or any other exclusive representative of our employees, without affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such change and on the impact the change will have on adversely affected unit employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, meet and confer with the National Treasury Employees Union and NTEU Chapter 72, to the extent consonant with law and regulations, concerning the procedures which management observed in

reaching the decision as to who was subject to the permanent reassignments announced in January 1977, and the impact the reassignments had on adversely affected employees in the exclusively recognized unit. Any agreement reached by the parties shall be promptly effectuated, including, if consistent with such agreement, the return of any re-assigned employees to their prior positions.

(Agency or Activity)

Dated: _____ By: _____

(Signature)

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 any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 600
San Francisco, California 94105



REPLY TO SAN FRANCISCO
AREA CODE 415 556-0555

In the Matter of

TREASURY-IRS-AUSTIN SERVICE CENTER
Respondent

and

NATIONAL TREASURY EMPLOYEES UNION &
NTEU CHAPTER 72
Complainant

CASE NO. 63-7421(CA)

Stewart Parker, Esquire
General Legal Services
Internal Revenue Service
Federal Office Building
1100 Commerce Street
Room 12D27
Dallas, Texas 75202
For the Respondent

David Van Os
Assistant Counsel
National Treasury Employees Union
3000 E. Huntland Drive, Suite 104
Austin, Texas 78752
For the Complainant

Before: BEN H. WALLEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of The Case

On May 27, 1977, National Treasury Employees Union,
1730 K Street, N.W., Suite 1101, Washington, D.C. 20006,

and Chapter No. 72, Austin, Texas 78752, hereafter referred to as Complainant, filed a complaint against Treasury-Internal Revenue Service, Billy Brown, Director, Personnel Division, 1111 Constitution Avenue, N.W., Washington, D.C. 20224, and IRS Austin Service Center, Austin, Texas 78752, hereafter referred to as Respondent, said complaint alleging an unfair labor practice because of conduct allegedly violative of Executive Order 11491, as amended, Section 19(a) subsections (1) and (6), hereafter referred to as the Order.

Upon failing to resolve the differences between the parties growing out of the allegedly violative conduct and filing of the complaint, the Regional Administrator issued Notice of Hearing to be held in Austin, Texas, on October 26, 1977.

In referring this complaint for hearing and disposition, the Office of the Regional Administrator, LMSA, Kansas City Region, requested evidence and testimony be adduced on the following issues:

1. To what extent, if any, was the Respondent obligated under the Order to negotiate with the Complainant concerning the change from temporary work leader to permanent work leader of the three GS-592-6 tax examiners in the Error Correction Section: If so, did it fail to do so in violation of Section 19(a)(6) of the Order.

2. Further, can the Respondent's activities be construed as interference with the rights assured employees by Section (1)(a) of the Order and therefore in violation of Section 19(a)(1) of the Order?

Further, the parties were permitted to develop and offer any evidence relevant to the allegations contained in the complaint.

On May 27, 1977, as aforesaid, the complaint herein was filed. (ALJ Exh. D). Pursuant to the provisions of 29 C.F.R. § 203.5(a)(2), and on June 20, 1977, Respondent filed its response thereto (Res. Exh. 2), urging a dismissal because it fails to "raise even a reasonable belief that the Order has been violated." On July 15, 1977, Complainant filed a Reply to the Response of Respondent to the complaint (Res. Exh. 3). On August 4, 1977, Respondent filed a protest to the consideration of the Reply filed by Complainant (Res. Exh. 1), insisting that without the "reply" Complainant has not "raised a doubt" as to an unfair labor complaint, and the complaint should,

therefore, be dismissed. Nevertheless, on September 6, 1977, the Office of the Regional Administrator observed that; "Inasmuch as it appears there is a reasonable basis for the complaint ... Notice of Hearing" is being issued.

At the outset of the hearing, Respondent renewed its efforts, by Motion ore tenus, to have the complaint dismissed. For reasons hereafter set out in the Findings of Fact and Conclusions of Law, the Motion was denied.

At the hearing held, the parties were afforded full opportunity to be heard, to offer, examine, and cross-examine witnesses and to introduce evidence considered relevant to the aforesaid issues and other issues considered by them to be relevant to their position in the premises. After hearing the testimony of the witnesses and observing their demeanor, having received the exhibits and the transcripts, having considered the post-hearing briefs filed herein, and based upon the entire record, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

1. An agreement was negotiated and entered into on July 18, 1975, between the parties hereto under the provisions of Executive Order 11491, as amended, (Res. Exh. 9), and at all times material to the issues here involved said agreement was in full force and effect.

2. At the beginning of the hearing, the parties hereto agreed to certain facts, which I accept, and entered them into the record, by stipulations, as follows:

(a) At all times relevant to the complaint, National Treasury Employees Union, Chapter No. 72, was the recognized exclusive representative for bargaining unit employees at the Austin Service Center.

(b) A work unit at the Austin Service Center is the Input Perfection Branch, and a section of this branch is the Error Correction Section.

(c) As of January 1977, four positions of "Work Leader" or "Senior Tax Examiner" were within the Error Correction Section, Night Shift; of these four, three had for the 1976 tax season, been temporary positions, i.e., they endured only for a single tax season and hence were not filled with permanent incumbents who went into the positions every recurring tax season.

(d) The normal tax season starts around January and lasts until May or June. This is the period during which the Error Correction, Night Shift, was and normally is in operation.

(e) For the 1976 tax season, three of the four work leader positions in the Error Correction Section, Night Shift, were filled by temporary promotions using competitive procedures, and the fourth had been previously filled with a permanent incumbent.

(f) On January 14, 1977, or thereabouts, Respondent announced to Bargaining Unit employees in the Error Correction Section that for the coming tax season only the Work Leader positions would not be filled by temporary promotions, but rather by temporary reassignment of Grade-6 Tax Examiners from the Error Correction, Night Shift.

(g) The union had been notified of the decision to fill the positions by temporary reassignment at the Grade GS-6 level and did not request bargaining.

(h) At the same time Respondent announced for the 1978 tax season the Work Leader positions in the Night Shift of Error Correction would be filled competitively.

(i) Only Grade GS-6 employees of The Error Correction, Night Shift, were considered for the temporary reassignments to Work Leader.

(j) Sometime during mid to late January, 1977, Respondent reassigned three Grade-6 Tax Examiners of the Error Correction Night Shift into the positions of temporary non-recurring Work Leaders for the 1977 tax season.

(k) Subsequently, later in January of 1977, Respondent converted the three temporary, non-recurring, Work Leaders to permanent Recurring Work Leaders. The grade level continued at GS-6. The union was not given advance notification.

(l) The actions referred to in stipulation number (k) was effectuated and the three work leaders were so informed directly by management.

(m) The union, after learning by rumor on or about February 1, 1977, of the action referred to in stipulation number (k), charged the Respondent with an unfair labor practice on February 22, 1977. In the charge, the Complainant did not assert a right to negotiate

the basic management action referred to in stipulation number (k). It did assert the right to be notified so that it could negotiate the impact and implementation of that action.

3. In addition to the stipulated facts set out above, the records reflect and I find that the "work leader" positions, although temporary, were available to and filled from GS-5 and GS-6 grade employees, competitively, for the 1976 season, and both GS-5 and GS-6 level employees were invited to and did attend the meeting on January 14, 1977, at which time they were informed that the "work leader" positions for the 1977 season only would be filled by temporary reassignment of GS-6 Tax Examiners from another section. Also, the records reflect and I so find that the decision to convert these "temporary reassignments" to "permanent reassignments" was made on or about January 24, 1977; that this decision was not directed by Civil Service, by personnel manuals, nor any other higher authority, but was wholly of management; that this conversion from "temporary" to "permanent" status effectively removed from all other interested GS-6 and GS-5 level employees the chance to compete for a temporary promotion as "work leader," which is obviously helpful to, if not necessary for progression in the civil service. Clearly, this was a matter of concern to all interested employees and Complainant had a responsibility therein.

4. Proper request was made to negotiate the "impact" of the action but Respondent refused, contending that the action was (1) non-negotiable, and (2) that there was no "impact." Neither of these contentions are tenable.

Conclusions of Law

Exception has been taken to the complaint filed by Motion to Dismiss, ore tenus, because it is alleged that the Area Director had no reasonable basis for referral without consideration of a "reply" filed by Complainant to the "response" made by Respondent pursuant to Section 203.5(a)(2) of the Rules and Regulations promulgated pursuant to the Order (E.O. 11491, as amended, Section 6(d)).

Section 203.6 of the aforesaid Rules and Regulations requires the Area Director to "conduct such independent investigation of the complaint as he deems necessary." Also, it authorizes the parties to request such investigation as circumstances may dictate. Once the investigation has been made and its results made known to the Assistant Regional Director he may take such action as

the information supports. If, in the opinion of the Regional Administrator, a reasonable basis for the complaint exists and no settlement is reached, a Notice of Hearing may be issued. If the Notice is issued, the decision to "issue a Notice of Hearing shall not be subject to review by the Assistant Secretary." (29 C.F.R., Chapter II, § 203.9). For this reason, the Motion to Dismiss is denied.

Those portions of Section 19(a) of the Order which are pertinent to the issues raised herein provide that Agency management shall not (1) interfere with, restrain, or coerce an employee in the exercise of the rights as assured by the Order, or (6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

Section 11(a) of the Order creates a mutual duty upon an agency and a union to negotiate in good faith in respect to personnel policies, practices and matters affecting working conditions so far as may be appropriate under applicable laws and regulations, including "impact" caused by implementation of "policies and practices" duly made and put into effect.

Section 11(b) provides that in prescribing regulations relating to personnel policies, practices and working conditions an agency shall have due regard for the obligation imposed by paragraph (a) of this section. In addition, Section 12(a) establishes that any agreement between an agency and a labor organization is subject to existing or future laws and regulations, by published agency policies and regulations in existence at the time the agreement was approved. Under Section 12(b) management officials retain the right in accordance with applicable law and regulation "... (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;"

However, it is well established that even as to accepted or reserved areas of management, there is an obligation to bargain regarding the implementing procedures which it employs in respect to these areas. United Air Force Electronics Systems Division (AFSC)-and-Local 975, National Federation of Federal Employees, A/SLMR No. 571; Department of Navy, Dallas Naval Air Station-and-American Federation of Government Employees Local Union-2427, AFL-CIO, A/SLMR No. 510. However, the requirement of negotiation as to the implementation and impact of personnel policies and practices and matters affecting working conditions relates only to changes therein.

(Department of the Navy, Mare Island Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO, A/SLMR No. 736) or additions thereto. (Section 11(d) of the Order). Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 451; Federal Railroad Administration, A/SLMR No. 418.

In the instant case, it is uncontradicted that the Respondent had selected "work leaders" for the 1976 season, competitively, from eligible GS-6 and GS-5 employees, and gave them "temporary promotions" as such. It is equally clear that Respondent intended to follow the same methods for the 1977 season, and in early January conducted a series of training classes in preparation therefor. But, on January 14, 1977, Respondent announced that the "work leader" positions for the coming season only (1977) would be filled by "temporary reassignment" of GS-6 Tax Examiners, which it had a "reserved right" to do. Subsequently, however, Respondent converted the "temporary reassignment" (promotion) into a "permanent reassignment", without notice to Complainant, and this constituted a change in "personnel policies and practices" affecting employees not retained by management. Therefore, the failure to meet and negotiate with Complainant on the "impact" of this unilateral action constituted a violation of Section 19(a)(6) and, derivatively, a violation of Section 19(a)(1) of the Order. Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 451; Federal Railroad Administration, A/SLMR No. 418; and Department of Agriculture and Office of Investigation, A/SLMR No. 555.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.23 of the Rules and Regulations, I recommend that the Assistant Secretary of Labor for Labor Management Relations adopt the following Order designed to effectuate the policies of Executive Order 11491, as amended.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 102.16(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Treasury Department, Internal Revenue Service, Austin Service Center, Austin, Texas, shall:

1. Cease and desist from:

(a) Unilaterally changing the promotion, re-assignment or appointment practices in effect or any other condition of employment without first conferring or negotiating with Local Chapter 72, National Treasury Employees Union, or any other exclusive representative of its employees.

In any like or related manner interfering with, restraining or coercing employees in the exercise of rights assured them by the Executive Order.

2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Upon request, consult, confer, or negotiate with Local Chapter 72, National Treasury Employees Union, or any other exclusive representative of its employees with respect to changes in the promotion, reassignment or appointment practices.

(b) Post at its Austin Service Center copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Austin Service Center and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations notify the Assistant Secretary in writing, within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Ben H. Walley

BEN H. WALLEY
Administrative Law Judge

Dated: June 15, 1978
San Francisco, California

BHW:scm

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT implement unilaterally any changes in the promotion, reassignment, or appointment practices without affording Local Chapter 72, National Treasury Employees Union, or any other exclusive representative of our employees the opportunity to meet, confer and negotiate on such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights assured them by the Executive Order.

WE WILL, upon request, meet and confer with any labor organization determined to be the exclusive representative of our employees with respect to any proposed changes in the promotion, reassignment, or appointment practices.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 question concerning this Notice of compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

October 19, 1978

A/SLMR No. 1143

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL LABOR RELATIONS BOARD AND
ITS GENERAL COUNSEL AND NATIONAL
LABOR RELATIONS BOARD, REGION 29
A/SLMR No. 1143

NATIONAL LABOR RELATIONS BOARD AND
ITS GENERAL COUNSEL AND NATIONAL
LABOR RELATIONS BOARD, REGION 29

This case involved an unfair labor practice complaint filed by the National Labor Relations Board Union (Ind.), Local 29 (Complainant) alleging that the Respondent violated Section 19(a)(1) of the Order by the interrogation of a union officer regarding his reasons for signing a letter sent by the Complainant to the General Counsel of the Respondent.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) of the Order by virtue of its supervisor's interrogation of a union officer, an employee of the Respondent, regarding his reasons for signing a letter to the Respondent's National Office, an act which the Administrative Law Judge found to be protected union activity under the Order. It was noted that the letter was sent under the Complainant's letterhead and the employee signed it in his capacity as a officer of the Complainant.

The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge noting that, under the circumstances of this case, the interrogation could reasonably be construed by the employee to reflect an intention by the Respondent to discourage him from engaging in protected union activity. Accordingly, he ordered that the Respondent Region 29 cease and desist from engaging in the conduct found violative of the Order and that it take certain affirmative actions.

Respondent

and

Case No. 30-07757(CA)

NATIONAL LABOR RELATIONS BOARD
UNION (IND.), LOCAL 29

Complainant

DECISION AND ORDER

On July 28, 1978, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practice alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. 1/ Upon consideration of

1/ During the course of the hearing in this case, the Administrative Law Judge refused to allow testimony regarding discussions between the parties which occurred subsequent to the filing of the pre-complaint charge that he deemed related to settlement efforts. I agree with his ruling. It has been held previously that in order to foster and afford an atmosphere conducive to the settlement of unfair labor practice allegations, matters raised in connection with settlement deliberations will not be admitted into evidence. See, in this regard, General Services Administration, National Archives and Records Service, A/SLMR No. 1113 (1978), Directorate of Facility Engineers, Fort Richardson, Alaska, 7 A/SLMR 1046, A/SLMR No. 946 (1977), and U.S. Department of Air Force, Norton Air Force Base, 3 A/SLMR 175, A/SLMR No. 261 (1973).

the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions 2/ and recommendation.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the National Labor Relations Board, Region 29, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their membership in, or activities on behalf of, the National Labor Relations Board Union (Ind.), Local 29, or any other labor organization.

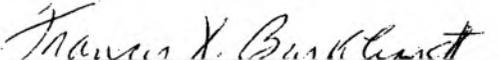
(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Post in the office of National Labor Relations Board, Region 29, Brooklyn, New York, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Director of Region 29 and shall be posted and maintained by the Regional Director for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
October 19, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

2/ In my view, the interrogation which occurred in the instant case, wherein an employee was questioned by a supervisor with respect to the employee's reasons for his participation in union activity, could reasonably be construed by the latter to reflect an intention by the Respondent to discourage him from engaging in protected union activity. Consequently, I agree with the Administrative Law Judge's conclusion that the conduct by the Respondent's supervisor, under the circumstances of this case, was violative of Section 19(a)(1) of the Order.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interrogate our employees concerning their membership in, or activities on behalf of, the National Labor Relations Board Union (Ind.), Local 29, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Suite 3515, 1515 Broadway, New York, New York 10036.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



The complaint alleges that the Respondent violated Section 19(a)(1) of the Executive Order by virtue of a supervisor's action in interrogating a union officer concerning his participation in a letter sent by the Union to the General Counsel of the Respondent.

A hearing was held in the captioned matter on May 16, 1978, in New York, New York. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. 1/

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

On or about January 27, 1977, the Union, which is the exclusive representative of both the professional and non-professional employees in the New York office of the Respondent, held a meeting for purposes of discussing the impending promotion of Mrs. Beatrice Kornbluh to the position of Supervisory Attorney in Region 29. 2/ Following the meeting the Union sent a letter dated February 1, 1977, to the General Counsel of the Respondent, Mr. John Irving, requesting that the promotion of Mrs. Kornbluh be delayed pending further

1/ During the course of the hearing, Counsel for the Respondent attempted to submit evidence concerning discussions between the Respondent and Union representatives occurring subsequent to the filing of the charge. Inasmuch as the undersigned deemed the discussions to constitute and/or be related to settlement efforts Respondent was not allowed to submit same. In his post hearing brief, Counsel for Respondent requests reopening of the hearing for the submission of such evidence in the event that I should find in favor of the Complainant on the basis of the current record. Although, as evidenced *infra*, I have found merit in the complaint, I still adhere to my original decision on the post charge discussions and, accordingly, hereby deny Respondent's request to reopen the record.

2/ During the middle of January 1977, Regional Director Kaynard had announced to the staff that he was recommending to Washington that acting supervisory attorney Kornbluh and two other individuals be promoted to permanent supervisory positions.

.....
In the Matter of :
:
NATIONAL LABOR RELATIONS BOARD AND :
ITS GENERAL COUNSEL AND NATIONAL :
LABOR RELATIONS BOARD, REGION 29 :
Respondent :
:
and :
:
NATIONAL LABOR RELATIONS BOARD :
UNION (IND.) LOCAL 29 :
Complainant :
.....

Case No. 30-07757(CA)

BRUCE D. ROSENSTEIN, ESQUIRE
Office of the General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570
For the Respondent

WILLIAM G. KOCOL, ESQUIRE
National Labor Relations Board
Union, Ind.
219 South Dearborn Street
Chicago, Illinois 60604
For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on May 12, 1977, under Executive Order 11491, as amended, by Local 29, National Labor Relations Board Union, (Ind.), (hereinafter called the Union or Complainant), against the National Labor Relations Board and its General Counsel and National Labor Relations Board, Region 29, (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Acting Regional Administrator for New York, N.Y. Region on March 20, 1978.

evaluation. 3/ In support of its request, the Union alleged, among other things, in the letter that:

....Mrs. Kornbluh is unqualified to hold a supervisory position, in that during the periods of time in which she has acted in the capacity of Acting Supervisor, she has been offensive, demeaning, and abusive to professionals and clericals under her supervision. She has also, over the years expressed opinions of prejudice against field examiners and professionals. . . .

....In connection with field examiners, we understand that she has advocated and urged others to support measures to prevent field examiners from being considered for supervisory positions, including that of Assistant to the Regional Director. She has consistently maintained, in discussions with field attorneys, that field examiners are not qualified professional employees, and that they perform inferior work.

On or about February 1, 1977, Mr. Appell, Union president, engaged in separate conversations with Regional Director Kaynard and Assistant General Counsel Silverman concerning the appointment of Mrs. Kornbluh as a permanent supervisor. Both Mr. Kaynard and Mr. Silverman informed Mr. Appell that nothing could be done since the appointment had already been made. 4/

On Friday, February 4, 1977, Regional Director Kaynard gave Mrs. Kornbluh a copy of the February 1st letter sent by the Union. According to Mrs. Kornbluh, she inadvertently left the letter in the office and did not have an opportunity to read it over the weekend. On February 7 or 8, 1977, Mrs. Kornbluh informed Regional Director Kaynard that she had misplaced her copy of the letter and asked for, and received, another copy of the letter which she apparently proceeded

3/ The letter was signed individually by the members of Local 29's Executive Committee, consisting of four officers and two chairpersons. Steven Goodman signed the letter in his capacity as Treasurer and Stephen Appell signed as President.

4/ Respondent stipulated that Mrs. Kornbluh was officially appointed to the position of permanent supervisor effective January 30 or 31, 1977.

to read for the first time.

On February 8, 1977, Union Treasurer Goodman, who was employed by Respondent as a field examiner, stopped at the water fountain located outside the door to Mrs. Kornbluh's office. Upon subsequently entering Mrs. Kornbluh's office, Mr. Goodman was informed by Mrs. Kornbluh, who at the time was holding a copy of the Union's February 1st letter to the General Counsel, that she was hurt and surprised and then asked if he had seen a television program about Joseph McCarthy that had been on the Sunday before. Upon receiving a negative reply from Mr. Goodman, Mrs. Kornbluh then asked Mr. Goodman why he had signed the letter. Mr. Goodman replied that it was something voted by the union membership and that he had signed it because the union membership had voted to have the letter signed by the Union's executive committee of which he was a member. Thereafter a discussion was had between Mr. Goodman and Mrs. Kornbluh with respect to why Mrs. Kornbluh had a reputation for disliking field examiners. Mr. Goodman, who acknowledged during the conversation that he had always enjoyed a good working relationship with Mrs. Kornbluh, made it clear that he had signed the letter not as a personal thing but rather as a member of the executive committee pursuant to a vote of the union membership.

In support of the position set forth in its opening statement that a broad cease and desist order is the proper remedy for the alleged coercive interrogation of Mr. Goodman, the Union presented evidence of (1) a discussion occurring on January 13, 1977, between Union President Appell and Regional Attorney Richman, and (2) a conversation occurring on March 3, 1977, between Mrs. Kornbluh and field attorney Weinrich wherein a second illegal interrogation allegedly occurred. 5/

With regard to the January 13, 1977, incident involving Mr. Appell and Mr. Richman the record reveals that Mr. Appell in his capacity as president of the Union approached Mr. Richman for purposes of discussing the reprimand of a clerical employee for arriving late. During the course of the conversation Mr. Appell accused Mr. Richman of arriving later than the employee on many days and indicated that the Union would monitor Mr. Richman's arrival times. Mr. Richman retorted that if he was monitored he in turn would

5/ Neither of the two events were alleged as violations of the Executive Order in the outstanding complaint. The evidence submitted by the Union with regard to the conversation between Mrs. Kornbluh and Mr. Weinrich consisted of the (continued on next page)

monitor Mr. Appell.

On March 3, 1977, approximately three weeks after the incident involving Mr. Goodman, Mrs. Kornbluh called Mr. Weinrich, who was employed as a field examiner by Respondent, into her office. Mrs. Kornbluh stated that since it was Mr. Weinrich's last day of employment it would not constitute a violation of Section 8(a)(1) of the National Labor Relations Act to interrogate him. 6/ Mrs. Kornbluh asked Mr. Weinrich what was all the business about her becoming a supervisor and if Mr. Weinrich did not like her or had a problem with her supervision why did he not come talk to her personally. Mrs. Kornbluh asked for specifics and also inquired why Mr. Weinrich's wife, who was also an employee of the Respondent, did not speak to her.

Discussion and Conclusions

The Assistant Secretary has made it clear that the interrogation of an employee by a member of the supervisory staff of an activity concerning the employee's union affiliation or activity is violative of Section 19(a)(1) of the Executive Order. United States Air Force, Vandenberg Air Force Base, A/SLMR No. 786; Federal Energy Administration, A/SLMR No. 541; Office of Economic Opportunity, A/SLMR No. 477; Vandenberg Air Force Base, A/SLMR No. 383.

In the instant case, Mrs. Kornbluh asked Mr. Goodman the reasons for his action in affixing his signature to the February 1, 1977, letter to the General Counsel of the National Labor Relations Board. Inasmuch as the letter was sent under the Union letterhead and signed by Mr. Goodman in his capacity as Union Treasurer and a member of the Union's Executive Committee, I find that the interrogation concerned Mr. Goodman's union activity and was accordingly in violation of Section 19(a)(1) of the Order.

5/ - continued

verbatim notes of a telephone conversation between Field Attorney Edelman and Mr. Weinrich. Mr. Weinrich, who is now affiliated with a labor law firm which has a considerable practice before the NLRB refused to testify.

6/ Mr. Weinrich was scheduled to leave the National Labor Relations Board and commence employment with a private concern the next day.

Contrary to the contention of Respondent's counsel in his post hearing brief, I find that it is unnecessary to establish that the interrogation was accompanied by a threat, open or veiled, which could interfere or coerce an employee in the exercise of the rights assured by Section 1(a) of the Order. The mere interrogation of an employee concerning his union related activities tends to discourage such activities since the employee would always be faced with the distasteful possibility of having to justify or explain his actions at a future date to management.

In reaching the conclusion that the interrogation was violative of Section 19(a)(1) of the Order I am not unmindful of the fact that the person interrogated was a union officer who was one of the signatories to the union sponsored letter. However, in the absence of any evidence of a prior delegation to Mrs. Kornbluh from either the Regional Director or the General Counsel authorizing Mrs. Kornbluh to speak on behalf of Respondent with respect to the subject matter of the union sponsored letter, the interrogation is not privileged.

Having found that the Respondent has violated Section 19(a)(1) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following order: 7/

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(a) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the National Labor Relations Board, Region 29, shall

1. Cease and desist from

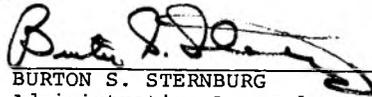
(a) Interrogating employees concerning their membership in, or activities on behalf of the National Labor Relations Board Union (Ind.) Local 29, or any other labor organization.

7/ After reviewing the record as a whole, including the circumstances surrounding the discussions of January 1, and March 3, 1977, involving Mr. Appell and Weinrich, respectively, as well as the content of same, and the character of the Agency's past history in the field of employer-employee relations, I am of the opinion, contrary to the contention of Complainant, that a broad cease and desist order is inappropriate.

2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended.

(a) Post in the office of Region 29, New York, New York, copies of the attached Notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor Management Relations. Upon receipt of such forms, they shall be signed by the Regional Director of Region 29 and shall be posted and maintained by the Regional Director for 60 consecutive days thereafter, in conspicuous places including all bulletin boards and other places where notices to Regional personnel are customarily posted. The Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order as to what steps have been taken to comply herewith.


BURTON S. STERNBURG
Administrative Law Judge

Dated: July 28, 1978
Washington, D.C.

BSS:hjc

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interrogate employees concerning their membership in, or activities on behalf of the National Labor Relations Board Union (Ind.) Local 29, or any other labor organization.

(Agency or 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 of compliance with its provisions, they may communicate directly with the Regional Administrator, Labor Management Services Administration, United States Department of Labor whose address is: Suite 3515, 1515 Broadway, New York, New York, 10036.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
SOUTHWEST REGION,
DALLAS, TEXAS
A/SLMR No. 1144

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
SOUTHWEST REGION,
DALLAS, TEXAS

Respondent

and

Case No. 64-3700(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 91

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 91 alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to give adequate notice and bargain about the impact and implementation of a temporary word processing study conducted in the Respondent's New Orleans Appellate Branch Office.

On July 25, 1978, Administrative Law Judge Garvin Lee Oliver issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to negotiate over the implementation and impact of the study. In reaching this conclusion, he found that the Respondent failed to notify the NTEU of the word processing study in time to afford it an opportunity to fully explore the matters involved, to request bargaining, and to negotiate prior to management's implementation of the study. The Administrative Law Judge noted that there was no showing of an emergency demanding the study's immediate implementation, and that the conversations concerning the study prior to its implementation could not be construed as a substitute for impact and implementation bargaining. Accordingly, he concluded that the Respondent's refusal to bargain on the impact and implementation of the word processing study in the New Orleans Appellate Branch Office constituted a violation of Section 19(a)(1) and (6) of the Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge. Accordingly, he ordered that the Respondent cease and desist from engaging in the conduct found violative of the Order and that it take certain affirmative actions.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Southwest Region, Dallas, Texas, shall:

1. Cease and desist from:

(a) Instituting a word processing study in the New Orleans Appellate Branch Office involving employees exclusively represented by the National Treasury Employees Union, Chapter 91, without first notifying the National Treasury Employees Union, Chapter 91, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating such study, and on the impact of such study on adversely affected employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

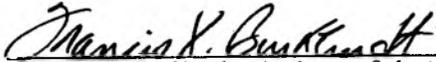
(a) Upon request by the National Treasury Employees Union, Chapter 91, meet and confer, to the extent consonant with law and regulations, on the procedures used in implementing any word processing studies involving employees exclusively represented by the National Treasury Employees Union, Chapter 91, and on the impact of such studies on adversely affected employees.

(b) Post at all Department of Treasury, Internal Revenue Service, Southwest Region, facilities and installations 1/ copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Commissioner of the Southwest Region and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

1/ The Respondent excepted to the Administrative Law Judge's recommendation that the remedial notice required herein be posted at all facilities and installations of the Southwest Region of the Respondent, arguing that the events which led to the instant unfair labor practice complaint occurred only within the New Orleans Appellate Branch Office. Under the circumstances of this case, including the fact that the unit of exclusive recognition includes all of the employees of the Southwest Region, and that the Regional Office of the Respondent took an active role in rejecting the Complainant's bargaining request herein, I find that the Administrative Law Judge's recommendation with respect to the posting of the remedial notice is appropriate and, therefore, it is hereby adopted. Cf. Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, Midwest Region, Chicago, Illinois, A/SLMR No. 1070 (1978).

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
October 20, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

The complaint alleged, in substance, that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by unilaterally implementing a word processing study in the New Orleans appellate office without notifying the Union or giving the Union an opportunity to bargain with respect to the impact and implementation of this study.

A hearing was held in this matter before the undersigned in New Orleans, Louisiana. Both parties were represented by counsel and afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Post-hearing briefs have been received from both parties and given due consideration.

Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

Complainant is the exclusive bargaining representative for a unit comprised of federal employees working in the IRS' Southwest Regional Office and each of the Region's five Appellate Branch Offices. Respondent is one of seven IRS Regional Offices and has branch offices in Dallas, Houston, Oklahoma City, Denver, and New Orleans. As of February 1977, the New Orleans Appellate Branch Office employed ten Appeals Officers and four Appellate Aides. Appeals Officers are high grade (GS-13 and -14), quasi-judicial officials who recommend whether disputed tax cases should be settled by the IRS. Appellate Aides are analogous to secretaries for the Appeals Officers: each Aide handles telephone calls and types correspondence and decision for two or three Appeals Officers. Both Appeals Officers and Appellate Aides are included within the bargaining unit represented by Complainant.

On June 9, 1975 the General Services Administration issued Federal Property Management Regulations Amendment B-26 which amended 41 CFR Part 101-11 by adding a new subpart 101-11.9. Among other things, the new subpart required federal agencies to review existing and proposed word processing systems to determine cost-effectiveness. Pursuant to this mandate word processing studies were conducted in Respondent's Houston and Dallas branch offices in February and March 1976. The purpose of these studies was to deter-

mine the cost-effectiveness of existing automatic word processing systems. This study lasted four weeks; however, due to inaccuracies in the data accumulated, a second study was necessary. This study was conducted in the same branch offices in November and December 1976.

On February 3, 1977, Mr. George Fritz, Executive Assistant, ARC-Appellate, sent a memo to Mr. Robert J. McCoy, Chief of the New Orleans Appellate Branch Office, announcing that a word processing study would be conducted in that office February 14 to March 25. The Dallas and Houston studies had demonstrated that automatic systems were cost-effective; the New Orleans study was being conducted to determine if the use of automatic equipment could be cost-effective in one of the smaller branch offices.

On February 8, 1977, Mr. McCoy notified Mr. J.M. Pilie that a word processing study would be conducted at the New Orleans office beginning February 14. Mr. Pilie is an Appeals Officer in the New Orleans office and also President of NTEU Chapter 91. Mr. McCoy gave Mr. Pilie a copy of Mr. Fritz' memorandum and other information concerning the study. Mr. Pilie raised two questions regarding the need for the study and the Appeals Officers' role therein but at this time did not formally demand to negotiate. The other employees at the New Orleans office were officially notified of the study the following day.

On February 11, 1977, Mr. Fritz telephoned Mr. Pilie regarding the two questions he had raised to Mr. McCoy. Mr. Pilie's questions were discussed as well as his concern over the amount of additional time the study would require and the adequacy of employee instructions. At no time during this conversation did the Union specifically request to negotiate the study's impact and implementation; however, Mr. Pilie did ask that the study be delayed a week in order for the Union to better evaluate its position. Mr. Fritz refused to delay the study, and on February 14, 1977, the study was implemented.

Mr. Pilie wrote a letter to Mr. Walter T. Coppinger, Regional Commissioner for the Southwest Region, on February 15, 1977, formally demanding to negotiate the impact and implementation of the New Orleans word processing study. In this letter the Union also requested the immediate cessation of the study and its postponement pending the outcome of negotiation. Mr. Pilie's demand to negotiate was refused by Roy J. Ellis, Chief, Regional Personnel Branch for the Southwest Region. In a letter to Mr. Pilie dated February 25,

1977, Mr. Ellis took the position that the study effected no change in policies, practices or other matters affecting the general working conditions of unit employees. Accordingly he informed Mr. Pilie that management intended to proceed with the study. In a letter to Mr. Coppinger dated March 14, 1977, the Union formally charged Respondent with violations of Sections 19(a)(1) and (6) of the Order. Subsequent failure to resolve this matter led to initiation of the instant proceeding.

As implemented in the New Orleans Branch Office, the word processing study required Appellate Officers to fill out a form called the "Originator's Log" for each document submitted for typing. On these forms officers were required to note the date, the document type, the actual preparation time (in minutes), the number of typed pages, and whether the document was handwritten or typed. Appellate Aides were required to fill out a much more detailed form (called the "Typist's Log") naming the originator, the document type, the date the original was typed, the number of handwritten pages or minutes on tape, the number of pages typed and the typing time (in minutes), the total number of revisions and the actual revision typing time (in minutes), the total number of times typed, and the number of pages in final. A separate log was kept for each week of the six-week study.

At the hearing Mr. Pilie testified that he received many complaints from unit employees concerning the study's implementation and continued to receive complaints during the study's entire six-week duration. For one thing, it is undisputed that management at this time was attempting to reduce the amount of time spent processing cases. Appellate Officers and Aides were concerned that the time spent on the study would increase case time and adversely affect performance evaluations. In actuality the study did not significantly increase or delay the time spent processing cases, and the study's results did not affect the work performance ratings of unit employees.

The record indicates that the study's impact on the daily work patterns of Appeals Officers was not as great as that on Appellate Aides. Appeals Officers previously were required to fill out a Monthly Report wherein they noted the number of hours they devoted to each case. The study's requirements were similar, except that forms had to be compiled each week and recordkeeping had to be more precise.

Because case time had to be computed in minutes rather than hours, testimony indicated Appeals Officers performed their activities "in a little more structured manner" than previously. The study's recordkeeping requirements took the most time; actual time spent filling out weekly logs was small.

The study was more disruptive of the work patterns of Appellate Aides. In addition to having a much more detailed form to fill out, Aides performed a greater variety of functions than Appeals Officers. There were more disruptions in their work and strict study accuracy required that each interruption be noted. Testimony indicated that the effect of these changes was demoralizing on unit employees. While there was no change in the substantive work or weekly work hours of employees, the record indicates the study occasioned a definite and substantial impact on the means by which this work was accomplished.

Discussion, Conclusions and Recommendations 1/

Under Section 11(a) of the Order an Activity is required to meet at reasonable times and confer in good faith with respect to personnel policies, practices, and matters affecting working conditions of unit employees. However, Section 11(b) states that this bargaining obligation does not apply with respect to matters affecting the technology of performing its work. Further, under Sections 12(b)(1), (4) and (5), management retains the exclusive right to direct Agency employees; to maintain the efficiency of the Government operations entrusted to them; and to determine the methods, means, and personnel by which these operations are to be conducted. Therefore, since the study conducted in the New Orleans Appellate Branch Office was designed to determine the efficiency of that office's word processing systems, I conclude that the decision to implement this study was a valid exercise of reserved management rights and, as such, non-negotiable under the Order.

Notwithstanding the fact that a particular management decision is non-negotiable, the Agency or Activity is required to bargain with respect to the impact and implementation of this decision, providing such bargaining does not unreasonably interfere with the exercise of the right itself. Tidewater Virginia Federal Employees Metal Trades

1/ Both parties submitted motions to correct the transcript herein. Those motions are hereby granted, and the transcript shall be corrected as set forth in Appendix A, attached hereto.

Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56, 1 FLRC 431 (1973). This means that management must notify the exclusive representative in sufficient time to afford it an ample opportunity to explore fully the matters involved, and to request bargaining, and to bargain prior to management's implementation of the decision. Department of the Treasury, IRS, Manhattan District, A/SLMR No. 841; Federal Railroad Administration, A/SLMR No. 418; U.S. Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289.

The facts belie the existence of any such adequate opportunity in the instant case. Thus, the record indicates that the Union was informed on Tuesday, February 8, that a study was going to be implemented in New Orleans the following Monday. This time frame is similar to that in IRS, Manhattan District, supra, wherein it was stated:

"by advising the Union on June 27 of a change which was to become effective some 4 or 5 days later, the Activity did not give the Union adequate notice and time to permit the Union to consider the change, the procedures for its implementation and its possible and probable impact and to request to bargain and to bargain about the implementation procedures and impact." ALJ's decision at 8.

In the instant case the Union's president had an opportunity to raise several preliminary questions which were then discussed with management during a telephone conversation on Friday. However the Union still felt it needed more time to intelligently determine if negotiations were, in fact, necessary. More time was needed to examine the study's impact and to discuss the study with unit employees.

Complainant's concerns were expressed to management in the form of a request for a week's delay. This request was flatly rejected. The record indicates no emergency demanding the study's immediate implementation; no evidence that a delay would somehow damage the study's results. To the contrary, management's action was predicated solely on the mistaken belief that it was under no duty to negotiate with Complainant on this issue.

Respondent contends it has not violated its obligations under the Order because no bargaining demand was ever made; the study had no substantial impact on unit employees; Mr. Pilie's conversations with management during the week of February 7-11 constituted impact and implementation bargaining;

and the Union's failure to request bargaining with respect to prior word processing studies relieved management of any obligation to bargain with respect to this study.

With respect to Respondent's first contention, it must be noted that the Union first requested a delay and then formally submitted a bargaining request on the first day after the initial implementation of the study, and only a week after being informed of the decision to implement. Whether a bargaining request is timely depends on the facts and circumstances of the particular case. SSA, Branch Office, Angleton, Texas, A/SLMR No. 982. Jacksonville District, IRS, Jacksonville, Florida, A/SLMR No. 893. Here, the Union made it clear prior to the study's initiation that they needed more time to determine if negotiations were, in fact, necessary. This fact, coupled with the shortness of the notice to the Union in general, lead me to conclude that Complainant's formal bargaining request was timely made in the circumstances of this case.

Respondent next contends that the study had no substantial impact on unit employees. However the evidence is undisputed that for six weeks employees were required to keep precise and detailed records of the time spent processing manuscripts. Study accuracy required that all interruptions be noted so that only actual processing time was recorded. Similarly precise records were never before required in the New Orleans branch office. Testimony indicated that the study substantially disrupted the daily work patterns of office personnel. In these circumstances, I conclude that the change in working conditions as a result of the study's implementation was sufficiently great to give rise to a duty to bargain over this impact. See, e.g. GSA, Region 2, A/SLMR No. 916; IRS, Manhattan District, supra; Department of the Treasury, IRS, Philadelphia Service Center, A/SLMR No. 771.

Next, I conclude that Mr. Pilie's conversations with management during the week of February 7-11 cannot be construed as a substitute for impact and implementation bargaining. The only substantive discussions between union and management prior to the study's implementation occurred in connection with Mr. Fritz's phone call on February 11. However during this conversation Mr. Pilie made it clear that the Union needed more time to investigate potential topics for negotiation. To conclude that management

exhausted its bargaining obligation with this phone call would permit management to unilaterally circumscribe the issues subject to negotiation. Accordingly, I conclude that Respondent's third contention is also without merit.

Finally, Respondent contends that Complainant's failure to request bargaining with respect to prior studies in the Houston and Dallas branch offices absolves management of any bargaining obligation it might have had with respect to the instant study. However, a right to bargain granted pursuant to the Order need not be exercised at every opportunity: it exists unless explicitly waived by the parties. The Assistant Secretary has been reluctant to find a waiver unless the evidence is clear and unmistakable. See U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, Indianapolis, Indiana, A/SLMR No. 651; United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400. In the circumstances of the present case, I conclude that Complainant's failure to request bargaining in connection with the Houston and Dallas studies did not constitute a clear and unmistakable waiver of its right to request bargaining in connection with a study in New Orleans.

Accordingly, I conclude that Respondent's refusal to bargain on the impact and implementation of a word processing study in the New Orleans Appellate Branch Office constituted a violation of its obligations under Section 19(a)(6) of the Order. Further, such refusal necessarily tends to interfere with restrain, or coerce employees in the exercise of rights assured by the Order, in violation of Section 19(a)(1) of the Order.

Recommendations

Upon the basis of the aforementioned findings, conclusions, and the entire record, I recommend that the Assistant Secretary adopt the following Order:

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26 (b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Southwest Region, Dallas, Texas, shall:

1. Cease and desist from:

(a) Instituting a word processing study in the New Orleans Appellate Branch Office involving employees exclusively represented by the National Treasury Employees Union, Chapter 91, without first notifying the National Treasury Employees Union, Chapter 91, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating such study, and on the impact of such study on adversely affected employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request by the National Treasury Employees Union, Chapter 91, meet and confer, to the extent consonant with law and regulations, concerning the procedures used in implementing any word processing studies involving employees exclusively represented by National Treasury Employees Union, Chapter 91; and the impact of such studies on adversely affected employees.

(b) Post at all Department of Treasury, Internal Revenue Service, Southwest Region, facilities and installations copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Commissioner of the Southwest Region and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.


GARVIN LEE OLIVER
Administrative Law Judge

Dated: 25 JUL 1978
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a word processing study in the New Orleans Appellate Branch Office involving employees exclusively represented by the National Treasury Employees Union, Chapter 91, without first notifying the National Treasury Employees Union, Chapter 91, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating such study, and on the impact of such study on adversely affected employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Executive Order.

WE WILL, upon request by the National Treasury Employees Union, Chapter 91, meet and confer, to the extent consonant with law and regulations, concerning the procedures used in implementing any word processing studies involving employees exclusively represented by National Treasury Employees Union, Chapter 91, and the impact of such studies on adversely affected employees.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

October 20, 1978

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, OFFICE OF THE SECRETARY,
OFFICE FOR CIVIL RIGHTS
A/SLMR No. 1145

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 41 (AFGE) alleging, in substance, that the Respondent violated Section 19(a)(1) of the Order by failing to provide the AFGE's representative with an opportunity to participate in a meeting dealing with an office reorganization and personnel reassignment. The AFGE contended that the meeting involved was a formal discussion within the meaning of Section 10(e) of the Order, and that the union representative was attempting to represent unit employees when he was improperly silenced by the Respondent. The Respondent, on the other hand, maintained that any requirement imposed by Section 10(e) was met when it invited the union representative to attend the meeting and allowed other union members to speak in the course thereof. It also argued that even if its conduct constituted a technical violation of the Order, such violation was remedied when it issued a written apology to the union representative and distributed copies of the apology to all unit employees.

The Assistant Secretary concluded that the Respondent's conduct was violative of the Order. In reaching this conclusion, he found that because the meeting in question concerned personnel policies and practices, or other matters affecting the general working conditions of unit employees, it constituted a formal discussion within the meaning of Section 10(e) of the Order at which the AFGE had a right to be represented. In this regard, the Assistant Secretary found that the Respondent's treatment of the AFGE's representative disparaged the AFGE and thereby had a dual effect on unit employees. Thus, in his view, such conduct tended to restrain employees from exercising their right to act as representatives of a labor organization and present their views to management. Further, with knowledge that their Vice President had been told by the Respondent not to express himself on their behalf, employees in the bargaining unit reasonably would tend to believe that management viewed their exclusive representative with disdain and the employees thereby would be discouraged from exercising their rights under Section 1(a) of the Order. Finally, the Assistant Secretary found that, under the circumstances of this case, the written apology to the union representative and unit employees, delivered some three weeks after the violation, did not cure or mitigate the Respondent's failure to meet its obligation under Section 10(e), particularly where, as here, the Respondent did not concede that its conduct was violative of the Executive Order.

Accordingly, the Assistant Secretary issued an appropriate remedial order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, OFFICE OF THE SECRETARY,
OFFICE FOR CIVIL RIGHTS

Respondent

and

Case No. 22-08613(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 41

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator Hilary M. Sheply's Order Transferring Case to the Assistant Secretary of Labor in accordance with Sections 203.5(b), 203.7(a)(4) and 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts and accompanying exhibits, and the brief filed by the Respondent, the Assistant Secretary finds:

The amended complaint herein alleges, in substance, that the Department of Health, Education and Welfare, Office of the Secretary, Office for Civil Rights, hereinafter called Respondent, violated Section 19(a)(1) of the Order 1/ by failing to provide a representative of the American Federation of Government Employees, AFL-CIO, Local 41, hereinafter called AFGE, with an opportunity to participate in a meeting dealing with an office reorganization and personnel reassignment. The AFGE contends that this meeting

1/ Prior to transferring this matter to the Assistant Secretary, the Regional Administrator issued a Notice of Hearing which inadvertently indicated that an alleged violation of Section 19(a)(6) of the Order was still outstanding and at issue in this case. However, the Section 19(a)(6) violation alleged in the amended complaint was based on facts unrelated to those stipulated by the parties herein and was dismissed by the Regional Administrator at an earlier stage in these proceedings. The Regional Administrator's inadvertence is hereby corrected.

constituted a formal discussion within the meaning of Section 10(e) of the Order, 2/ and that the union representative was attempting to represent unit employees when he was improperly silenced by the Respondent. The Respondent, on the other hand, maintains that any requirement imposed by Section 10(e) was met when it invited the union representative to attend the meeting and allowed other union members to speak in the course thereof. It also argues that even if its conduct constituted a technical violation of the Order, such violation was remedied when it issued a written apology to the union representative and distributed copies of the apology to all unit employees.

The undisputed facts, as stipulated by the parties, are essentially as follows:

On January 24, 1973, the AFGE gained recognition as the exclusive representative of a unit of all nonprofessional General Schedule and Wage Grade employees of the Office of the Secretary, Department of Health, Education and Welfare, located in the Washington, D.C. Metropolitan Area. The Office for Civil Rights (OCR) is a part of the Office of the Secretary. A negotiated agreement between the parties became effective on June 24, 1977.

On September 15, 1977, a memorandum was distributed by the Respondent to all OCR employees calling for an employee meeting on September 19, 1977, to announce implementation of an OCR reorganization. Joseph E. Cook, Jr., AFGE Local 41 Vice President and Chief Negotiator for the AFGE in the OCR reorganization negotiations, was orally invited to attend the meeting as the official representative of the union.

At the September 19, 1977, meeting, OCR Director David Tatel made opening remarks and discussed the general reorganization. He then solicited questions from the assembled employees. A number of employees asked questions covering a range of subjects related to the reorganization. Among them were two employees who had served on the AFGE's negotiating team, and at least one individual who specifically identified herself with AFGE Local 41.

During this question and answer period, Cook was called upon and, after identifying himself as the Local 41 Vice President, proceeded to ask a question concerning the reorganization. Tatel interrupted him, stating that this was a meeting of OCR employees and not a union meeting, and that he would discuss the matter with him later. Cook responded by asserting that he had been invited to the meeting as a representative of employees under the Executive Order and that he had a right to speak. Tatel ignored him and proceeded to call on other employees.

On September 20, 1977, the AFGE filed an unfair labor practice charge with respect to this incident.

2/ Section 10(e) states, in pertinent part, that an exclusive collective bargaining representative "...shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

On October 11, 1977, Cook and two other AFGE representatives met with Tatel and OCR Executive Officer Walker to discuss the charge. At that time, Tatel stated that, in his opinion, there had been no violation of union rights under the Executive Order. However, he presented Cook with a copy of a memorandum dated October 11, 1977, in which he apologized for not allowing Cook to speak at the September 19 meeting. The memorandum had been distributed earlier to all OCR employees through the internal mail system.

FINDINGS AND CONCLUSIONS

Under the particular circumstances of this case, I conclude that the Respondent's conduct in failing to provide the AFGE's representative with an opportunity to participate in the meeting at issue interfered with, restrained, or coerced employees in the exercise of their rights assured by the Order in violation of Section 19(a)(1). In reaching this conclusion, I find that because the meeting concerned personnel policies and practices, or other matters affecting the general working conditions of unit employees, it constituted a formal discussion within the meaning of Section 10(e) of the Order at which the AFGE had a right to be represented. In this context, I find that the Respondent's treatment of the AFGE's representative disparaged the AFGE and thereby had a dual effect on unit employees. Thus, in my view, such conduct by the Respondent tended to restrain employees, such as Cook, from exercising their right to act as representatives of a labor organization and present their views to management. 3/ Further, with knowledge that their Vice President had been told by management not to express himself on their behalf, employees in the bargaining unit reasonably would tend to believe that management viewed their exclusive representative with disdain, and thereby would be discouraged from exercising their rights granted under Section 1(a) of the Order. 4/ Finally, I find that, under the circumstances of this case, the written apology to the union representative and unit employees, delivered some three weeks after the violation, did not cure or mitigate the Respondent's failure to meet its obligation

3/ See Internal Revenue Service, Ogden Service Center, 7 A/SLMR 1032, A/SLMR No. 944 (1977). Compare Department of the Treasury, Internal Revenue Service and IRS Chicago District, Chicago, Illinois, A/SLMR No. 987 (1978), which was considered factually distinguishable since there the Respondent limited the union representative's participation only in that his remarks were clearly extraneous to the subject matter of the meeting involved and the evidence did not reflect that he was prevented from either representing the employee's interests or stating the union's position regarding the subject matter of the meeting.

4/ See U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, 3 A/SLMR 60, A/SLMR No. 242 (1973).

under Section 10(e) particularly where, as here, the Respondent did not concede that its conduct was violative of the Executive Order. 5/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education and Welfare, Office of the Secretary, Office for Civil Rights, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees in the exercise of their rights assured by the Order by failing to afford the American Federation of Government Employees, AFL-CIO, Local 41, the employees' exclusive representative, the opportunity to be represented at formal discussions between management and employees or employee representatives concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

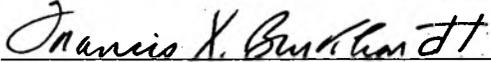
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Executive Order:

(a) Post at its facility at the Department of Health, Education and Welfare, Office of the Secretary, Office for Civil Rights, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, Office for Civil Rights and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that said notices are not altered, defaced or covered by any other material.

5/ Compare Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, A/SLMR No. 967 (1978), where the complaint was dismissed partly as a result of the Respondent's "swift and effective action" with regard to a personnel evaluation to remedy all possibility of prejudice to the offended employee and to foreclose any repetition of the violative conduct in the future.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
October 20, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Order by failing to afford the American Federation of Government Employees, AFL-CIO, Local 41, our employees' exclusive representative, the opportunity to be represented at formal discussions between management and employees or employee representatives concerning personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Agency or Activity)

Dated: _____ by: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

November 15, 1978

A/SLMR No. 1146

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION ON CHALLENGED BALLOT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, PUBLIC HEALTH SERVICE,
NAVAJO AREA INDIAN HEALTH SERVICE,
TUBA CITY, ARIZONA
A/SLMR No. 1146

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, PUBLIC HEALTH SERVICE,
NAVAJO AREA INDIAN HEALTH SERVICE,
TUBA CITY, ARIZONA

Activity

and

Case No. 72-6513(RO)

This case involved a challenged ballot which was sufficient to affect the results of a runoff election in a unit of nonprofessional employees of the Activity. The issue involved was whether or not a Community Health Educator was a professional employee within the meaning of the Executive Order.

NAVAJO NATION INDIAN HEALTH CARE EMPLOYEES,
LOCAL 1376, LABORERS INTERNATIONAL UNION,
AFL-CIO

Petitioner

DECISION ON CHALLENGED BALLOT

Contrary to the Administrative Law Judge, the Assistant Secretary concluded that the employee was a professional employee within the meaning of the Order. In this regard, he noted, among other things, that the employee involved presents lectures on health care subjects to Navajo and Hopi Indians and in performing such work she travels to clinics where she provides instruction and answers questions. He noted also that the employee receives no daily supervision and that she is able to provide suitable information on health care to the Indian people because of her specialized education and unique cultural background. Additionally, she consistently exercises discretion and independent judgment in the performance of her work.

On August 22, 1978, Administrative Law Judge Steven E. Halpern issued his Recommended Decision and Order in the above-entitled proceeding, ^{1/} recommending that the challenge to the ballot of Rosemary Goldtooth be overruled and that her ballot be opened and counted. Thereafter, the Petitioner filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order.

Under these circumstances, the Assistant Secretary ordered that the challenged ballot not be opened and counted and that the appropriate Regional Administrator cause an appropriate certification to be issued.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions and supporting briefs by the Petitioner, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations, only to the extent consistent herewith.

The Administrative Law Judge concluded that Rosemary Goldtooth was not a professional employee within the meaning of the Order and recommended that the challenged ballot of Mrs. Goldtooth be opened and counted. I disagree.

^{1/} At the hearing, the Navajo Tribe, Window Rock, Arizona, was, without objection, permitted to intervene as Amicus Curiae in this matter.

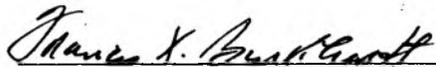
Under the particular circumstances of this case, I find that Mrs. Goldtooth is a professional employee within the meaning of the Order. Thus, the record shows that at the time of the election in this matter Mrs. Goldtooth was a Community Health Educator and that her work entails presenting lectures on health care subjects to Navajo and Hopi Indians at various Public Health Service clinics. In performing her work, Goldtooth travels to the clinics where she conducts lectures, provides instruction and answers questions. In the preparation and performance of this work Goldtooth receives no daily supervision. In this regard, she decides what complex medical concerns should be relayed to appropriate Public Health Service personnel. The record indicates that she is able to provide suitable information on health care needs to the Indian people because of her specialized educational training and unique cultural background. In addition to providing health care information, Goldtooth serves as a cross cultural advisor and liaison to Public Health Service officials and assists in orientation programs and in service training activities where she makes presentations to employees, again utilizing her specialized educational training in a manner consistent with the cultural needs of the Indian people.

Under these circumstances, and as the evidence establishes that Mrs. Goldtooth's work is of an intellectual and unique nature, requiring the consistent exercise of discretion and independent judgment, I find that she is a professional employee within the meaning of the Order. Therefore, I shall order that her ballot not be opened and counted.

ORDER

IT IS HEREBY ORDERED that the challenge to the ballot of Rosemary Goldtooth be sustained and that her ballot not be opened and counted in the above-entitled proceeding. I hereby direct that Case No. 72-6513(RO) be returned to the appropriate Regional Administrator who is directed to cause an appropriate certification to be issued.

Dated, Washington, D.C.
November 15, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
San Francisco Regional Office
Suite 600 - 211 Main Street
San Francisco, California 94105



Area Code 415 556-0555

In the Matter of

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, PUBLIC HEALTH SERVICE
NAVAJO AREA INDIAN HEALTH SERVICE
TUBA CITY, ARIZONA

Activity

and

NAVAJO NATION HEALTH CARE EMPLOYEES,
LOCAL 1376, LABORERS INTERNATIONAL
UNION

Petitioner

and

NAVAJO TRIBE, WINDOW ROCK, ARIZONA
Amicus Curiae

CASE NO. 72-6513(RO)

John Egon, Labor Relations Specialist
U. S. Public Health Service
Labor-Relations Staff, Parklawn Building
Room 18A31, 5600 Fishers Lane
Rockville, Maryland 20852
For the Activity

Robert J. Connerton, Esquire, and
James S. Ray, Esquire
Connerton & Schulman
Suite 300, 1000 Connecticut Ave., N.W.
Washington, D. C. 20036
For the Petitioner

Thomas H. Brose, Director
Office of Navajo Labor Relations
Office of the Chairman
Navajo Tribe, Window Rock, Arizona 86515
For the Amicus

Before: STEVEN E. HALPERN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Procedural History

This proceeding under Executive Order 11491, as amended, arises as the result of a challenged ballot cast in a runoff election conducted under the supervision of the Area Administrator, Los Angeles, California, on September 1, 1977.

The Regional Administrator, United States Department of Labor, Labor-Management Services Administration, San Francisco Region, on December 29, 1977, issued his Report and Findings on Challenged Ballots in which he determined there to be a relevant issue of fact concerning the challenged ballot. From said Report it appeared that issues existed with regard to: the professional/non-professional status of the individual whose ballot was challenged; denial of opportunity to Petitioner to solicit the vote of said employee; estoppel of the Activity from asserting the non-professional status of said employee as a result of an eligibility agreement allegedly entered into between Petitioner and the Activity.

Intervention of Amicus Curiae

At the hearing the Navajo Tribe moved for leave to intervene, asserting inter alia a material interest in the question of the professional vs. non-professional status of the Navajo Indian whose ballot was challenged.

Counsel for Petitioner, made no objection to the intervention. Counsel for the Activity in raising no objection stated the following:

Your Honor, the Activity, we do not object at this time. The Activity feels that if the representative of the Navajo Nation could put light on an issue material here, that it would welcome it.

From the character of remarks of counsel for the Union and of the Navajo Nation, it would appear to the Activity at this time that their intent is to introduce into the record matters that go beyond the issue that's before the Court. If it happens that such takes place, the Activity would like to reserve the right to object on that ground at a later time.

Accordingly, in the absence of any objection and there appearing to be at least a colorable interest I allowed the intervention of the Navajo Tribe as Amicus. In so doing I stated to its counsel inter alia (Tr. p. 8):

THE COURT: You understand, do you not, ... that the issue in this case is a determination of whether or not Mrs. Goldtooth's ballot should or should not be counted? ...

There are peripheral matters which will go into the determination of that issue, but that is the issue with which I am confronted. Now, to the extent that you are able and intend to participate with regard to the resolution of that issue, I will permit the intervention, but apparently there are matters beyond that with which you are concerned, if I understand correctly what it is you have already said to me.

As to the extent that those concerns, which are certainly perfectly legitimate concerns, go beyond the scope of this hearing, it would not be appropriate for me to receive that sort of evidence in this case.

Notwithstanding the foregoing comments and repeated rulings in accordance therewith Petitioner and Amicus, displaying a community of interest, persisted in pursuing issues not relevant to this matter and I am constrained to observe that the record is unduly burdened thereby. I shall give no further emphasis to such irrelevant issues by any discussion herein, and accordingly my findings and conclusions are limited to the issues outlined above and such ancillary matters as are required to be resolved in the determination of said issues.

Motion To Produce Records

Petitioner at the hearing moved to require the Activity to produce the personnel records of the employee whose challenged ballot is at issue herein. At no time prior thereto had Petitioner so moved; nor, at any time had Petitioner sought to obtain said records through established agency procedures or otherwise. Under the circumstances I ruled that the motion was untimely made.

Petitioner some eight weeks post-hearing filed a written motion to compel the production of said records. Notwithstanding its untimeliness, upon Petitioner's

continuing representation that said records were crucial to its case, I entertained the motion. Through a series of Orders issued in consideration of the employee's privacy rights I reviewed the records in camera and directed their sanitization; by Order of June 7, 1978, I caused to be served upon the employee a copy of her records as sanitized, so as to afford her the opportunity to take appropriate legal action to prevent their disclosure; and, by said Order directed that said records be served upon the parties on July 3, 1978, in the absence of such action on her part. No such action having been taken, pursuant to the June 7 Order disclosure of the sanitized records was automatically made on July 3, all parties being given until July 24, to comment or otherwise act.

By letter dated June 30, and received in my office on July 3, Petitioner, not yet having received the records it had so vigorously demanded, waived any further comment or action thereon other than to request that I consider them. No comment having been made by the Activity or Amicus, the record duly closed on July 24, 1978.

The parties have been afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses, to make oral argument and to file briefs 1/. Based upon the evidence of record, having observed the witnesses and assessed their credibility and having considered the arguments of the parties, I make the within Findings, Conclusions and Recommendation.

Findings and Conclusions

I

The Activity--the Tuba City Service Unit--is one of eight service units under the administrative control of the Navajo Area Indian Health Service, DHEW, headquartered at Window Rock, Arizona. The mission of said Service is to provide direct and indirect health care to Navajo Indians and to other eligible Indians within the area.

II

On August 4, 1977 (herein referred to as the original election), a representation election was held at the

1/ Briefs were filed by Petitioner and by the Activity. Although Amicus requested and was granted an extension of time within which to file a brief, none has been forthcoming.

Activity, in which those employees of the Activity as of the pay period ending July 16, 1977, were eligible to vote. The further conditions of the election were as follows:

Voting Group (a): All General Schedule and Wage Grade professional employees of the Tuba City Service Unit, Navajo Area Indian Health Service, Tuba City, Arizona, excluding all nonprofessional employees, temporary, part-time, and intermittent employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

Voting Group (b): All General Schedule and Wage Grade nonprofessional employees of the Tuba City Service Unit, Navajo Area Indian Health Service, Tuba City, Arizona, excluding all professional employees, temporary, part-time, and intermittent employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether they desire to be represented by the NFFE, the Laborers or neither.

The employees in the professional voting group (a) will be asked two questions on their ballot: (1) whether or not they wish to be included with the nonprofessional employees for the purpose of exclusive recognition; and (2) whether they wish to be represented for the purpose of exclusive recognition by the NFFE, the Laborers, or neither. In the event that a majority of the valid votes of voting group (a) is cast in favor of inclusion in the same unit as nonprofessional employees, the ballots of voting group (a) shall be combined with those of voting group (b).

Unless a majority of the valid votes of voting group (a) is cast for inclusion in the same unit as nonprofessional employees, they will be taken to have indicated their desire

to constitute a separate unit, and an appropriate certification will be issued by the appropriate Area Administrator indicating whether the NFFE, the Laborers or no labor organization was selected by the professional employee unit. An appropriate certification will be issued also, after counting the ballots cast in voting group (b), indicating whether the NFFE, the Laborers, or no labor organization was selected as the exclusive representative of the nonprofessional unit.

III

In said election the professional employees voted both against inclusion with the nonprofessional employees and against exclusive recognition. As to the non-professional employees a runoff election was required and was duly conducted on September 1, 1977.

IV

In the runoff election (in which the non-professional ballot of employee Rosemary Goldtooth was challenged) the following described individuals who, as in the original election, were employees of the Activity as of the payroll period ending on July 16, 1977, were eligible to vote:

All General Schedule and Wage Grade nonprofessional employees of the Tuba City Service Unit, Navajo Area Indian Health Service, Tuba City, Arizona, excluding all professional employees; temporary, part-time, and intermittent employees who are employed for 90 days or less; employees engaged in Federal personnel work in other than a purely clerical capacity; management officials, and supervisors as defined in the Order.

V

The voting list as prepared by the Activity for the original election listed Rosemary Goldtooth as a professional employee. However, on the day of that election, shortly before the polls opened, a representative of the Activity advised Hugo Rossiter, the Department of Labor Compliance Officer who supervised the election, that the voting list was in error and that Rosemary Goldtooth "should be included in the non-professional list" (Tr. 597); Rossiter thereupon informed Petitioner's representatives "across the room" that: "Hey, you guys, I am changing Rosemary Goldtooth to the nonprofessionals. Is there any

agreement?" 2/ (Tr. 598). Apparently present "across the room" among others, were: Frank Gillis, International Representative for the Laborers International Union of North America, representing Local Union 1376 as organizer and negotiator; Frank Gillis, Jr., employed by and representing the Navajo Nation Health Care Employees Local No. 1376 as business manager; and, Petitioner's election observer Joann Seger.

Mr. Rossiter did not appear as a witness nor did Ms. Seger. Neither Frank Gillis, nor Frank Gillis, Jr., recall Mr. Rossiter's "across the room" remarks directed to the Union's representatives. According to the testimony of Frank Gillis, Jr., however, Ms. Seger admittedly heard said remarks (Tr. 598, 601). Further, according to Mr. Gillis, Jr.'s testimony, she heard no response from any Union representative nor did she make any response. In the absence of a satisfactory explanation of why Ms. Seger heard Mr. Rossiter's remarks but the Gillis', who apparently were similarly situated in the room did not, I reject their testimony in that regard.

The Union, through its representatives then present, having been advised of Mr. Rossiter's intention to change Mrs. Goldtooth's status on the voting list, and no objection having been voiced, Mr. Rossiter proceeded to make the change by inscribing beside Mrs. Goldtooth's name on the list the letters "NP" (Non-Professional). Accordingly, presumably with the knowledge of Petitioner's observers, Mrs. Goldtooth cast a non-professional ballot. No challenge was made thereto nor did Petitioner file an objection to the election.

Thus, not only does the record not establish the existence of the "binding eligibility agreement" as to Rosemary Goldtooth's status which Petitioner has contended estoppes the Activity from asserting her non-professional status but, on the contrary, it establishes that she was listed as and voted as a non-professional in the original election with the knowledge and acquiescence of Petitioner acting through its election observers and other representatives.

The record further reveals that there was no change in Mrs. Goldtooth's job duties between elections and she

2/ The quoted statement came into the record as hearsay testimony. There is no guarantee that it is precise. Speculatively the word "agreement" could have been "disagreement."

remained in the same status for voting purposes in the runoff as in the original election. Section 202.21(b) of the Rules and Regulations of the Assistant Secretary speaks to this situation in providing that "Employees who were eligible to vote in the original election and who also are in an eligible category on the date of the runoff election shall be eligible to vote in the runoff election."

VI

The voting list utilized in the runoff election was a copy of the voting list as originally prepared for the first election, or was derived therefrom, and did not reflect the correction of Rosemary Goldtooth's status as made on the voting list actually used at the polls in the first election. The Area Administrator's election official at the runoff election was not the same individual who had presided over the original election; and, noting that Rosemary Goldtooth appeared on the voting list as a professional he appropriately challenged the non-professional ballot cast by her.

VII

In the runoff election, 68 votes were cast for Petitioner and 67 votes were cast against exclusive recognition, the impounded challenged ballot thus being sufficient to affect the results of the election; Petitioner and Amicus support the challenge.

VIII

In its brief Petitioner asserts that it was "not aware until well after the runoff election was completed that Rosemary Goldtooth's status had been changed from professional to non-professional by the Activity and the Area Administrator's agent at the polls for the first election" and argues that it "justifiably presumed that Mrs. Goldtooth voted as a professional in the first election, that she continued in that status and that she was ineligible to vote in the runoff." The premise underlying such contention, of course, (since Petitioner relies on the herein rejected testimony of the Gillis' that they were not aware at the original election of the change made on the voting list) is that Petitioner is not bound by the knowledge and acts of its official election observers. Noting the importance attached to the function

of election observers by the Assistant Secretary 3/ I would reject the premise and along with it the argument, even if I had not found that Petitioner's other representatives, were aware of the change at the time it was made.

Noting further that the uncorrected list utilized at the runoff election was not furnished until shortly before the runoff election and that almost a month intervened between the original and runoff elections, during which period Petitioner had the opportunity to campaign for Rosemary Goldtooth's non-professional vote, I find and conclude, contrary to Petitioner's contention, that it was not deprived of the opportunity to solicit her vote.

IX

The prime substantive issue here presented is the professional vs. non-professional status for unit/voting purposes of Rosemary Goldtooth, who at all times was a Community Health Educator GS-1702 series. The Civil Service Commission's Qualification Standards for said series (Ex. M-23) describes employees performing therein as non-professionals; and, the Activity considers her to be a non-professional employee.

That such is not determinative of the issue, however, is made clear by the Assistant Secretary in Department of Interior, Bureau of Land Management, Riverside District and Land Office and National Federation of Federal Employees, Local 119, A/SLMR No. 170.

The Civil Service Commission has the responsibility under the Classification Act for the classification of positions. However, neither the Study Committee's Report and Recommendations nor the Order indicate that the Civil Service Commission's classification of a position as 'professional' would be determinative for labor relations purposes under the provisions of Executive Order 11491. Similarly, there is no indication that an

3/ Department of the Treasury, IRS, Fresno Service Center and National Association of Internal Revenue Employees (NAIRE) and Chapter 97, NAIRE, A/SLMR No. 309.

agency's characterization of a position as 'professional' would be determinative under the Order.

The criteria for determining whether or not an employee is a "professional" employee within the meaning of the Executive Order for the purpose of unit placement were delineated by the Assistant Secretary in the aforesaid case as follows:

(A) Any employee engaged in the performance of work; (1) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, or physical processes; (2) requiring the consistent exercise of discretion and judgment in its performance; (3) which is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work); and (4) which is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; or

(B) Any employee who has completed the courses of specialized intellectual instruction and study described in clause (A) above and is performing related work under the direction or guidance of a professional person to qualify himself to become a professional employee as defined in clause (A) above.

X

The record reveals the following: Mrs. Goldtooth is a Navajo Indian; she is fluent in both the English and Navajo languages and such is a requirement of her job; evidently she has been bilingual since childhood; she has a thorough understanding of the Navajo culture; in the course of her work she renders services principally to Navajos on a Navajo reservation. Approximately 60 percent of the Navajos with whom she deals are women and 40 percent are men; the fact that she is a Navajo woman facilitates her work with Navajo women "but for me

to talk to a (Navajo) male it would be a little awkward for me" (Tr. 102). There is no specific academic requirement for her job. She has a high school education and has worked for the public health service since 1958 (Tr. 139). She first worked for one year as a dental assistant; she then worked as a nursing assistant before becoming an Education Technician in 1960. At that time, under a pilot project involving the University of North Carolina and the University of California, the position of Health Educator was being established and she was given one year of on-the-job training into that position. Included in that training were "very basic" courses in anatomy and physiology (Tr. 141). Over the years she has also had several additional short courses including upward mobility training (5 days); a health education skills training course (15 days) ^{4/}; EEO training (3 days); and, EEO counseling (3 days).

According to her testimony her duties in general include the following: She demonstrates the preparation of infant formula at the obstetrics and maternity ward in hospital; the demonstration follows an outline, formulated by the Area nutritionist, which she follows step by step; included also is a discussion of the method of feeding babies and the various types of formula available; she does not cover material not included in the outline; if questions come up that are not on the outline, "then I get someone who is professional to answer the questions; a doctor or a nurse" (Tr. 70).

In connection with the care of newborn children, she advises of the existence of available clinic facilities and encourages the mothers to bring their children to such facilities; she advises that immunizations should be had, but does not herself perform such nor does she determine what immunizations or other shots should be administered.

In connection with the Activity's outpatient field clinics, she presents "some kind of health education to the people in the waiting room ... that would be films, slide presentations, charts, or health pamphlets and I've also done formula demonstrations to the mothers in the waiting room." In connection with such, she conducts a discussion and question and answer session. Normally,

^{4/} Designed for health education technicians or beginning community health educators with minimum experience.

the determination of what visual aids and other reading materials are to be utilized is not made by her. She is responsible for setting up displays of various kinds in hospital; with regard to who makes the determination as to the contents of the displays she stated, "we are coordinated from our health education office; we can make suggestions or supply material if needed, but the departments have come up with their own ideas."

She acts as liaison between the Navajo tribe and the service unit for which she works and on occasion, discusses health matters with tribal officials. She is also a non-voting member of the hospital board. Additionally, she is a member of the EEO council but does not perform any counseling services. She is a member of the hospital Employees Training Committee which "helps employees to obtain training that they want, and there are some criteria that the training committee has set up for this ... the service unit director has the overall say" as to what training shall be provided and to whom.

As to the position description in effect at the time of the elections she testified that she was not in fact performing all of the duties set forth therein; thus, while said position description may accurately have reflected her actual duties in 1975 when it first became effective a number of those duties were not her responsibility at the time in question, such having been assumed beginning in 1976, by Barbara Ledder who at that time became her immediate supervisor.

Ms. Ledder's testimony, which I find credible, depicts Mrs. Goldtooth as a most valuable employee who provides basic health information in the general manner described by the latter in her testimony, which I also find credible. Mrs. Goldtooth's activities are scheduled by Mrs. Ledder (Tr. 226). The programs she presents are pre-planned for her. She provides essential cultural insights as a result of which modifications in program information sometimes are made although she has neither the authority nor the discretion to make any modifications in any program in which she performs (Tr. 232).

Additional credible testimony was given by Thomas K. Welty, M.D., who being Director of the Service Unit to which Mrs. Goldtooth is attached as well as her former first line supervisor, has knowledge of her duties:

A. Could you please tell us what you know directly of Rosemary's work, with special emphasis on what she has done over the past couple of years?

- 12 -

A. Okay. Well, specifically at the time of the election in question and the year preceding, in order to keep it consistent with what has been presented in this hearing, the main duties that Mrs. Goldtooth has performed during that period have included performing formula demonstrations to the obstetric patients in the hospital, and in addition to the demonstrations, reviewing the principals of infant nutrition and advising the mothers to maintain the health of their child by bringing them back for well baby checkups and immunizations.

The format for this particular presentation was developed by the Area Nutrition Department and has pretty much remained the same for the past several years, with some minor modifications.

Her duties also included going out to the field clinics and showing audio-visual presentations, in both English -- some of them were in English and some in Navajo, and those that were in English, she did interpret for the people in the audience, which were made up of the patients and the families, and their families, waiting to be seen in the clinics.

If there were questions raised by the audience that Mrs. Goldtooth couldn't answer, she would ask the physicians or the nurses who were in attendance at the clinic.

She has served as a Tribal liaison the last several years. In that capacity she has functioned as the acting secretary of the Health Board and she has interpreted on occasion in the meetings of the Health Board.

She also has volunteered her services to serve on several community groups, including the Citizens, the CCS group, which was mentioned as a group that's trying to get an extended care facility in to Tuba City, the Title IV Indian Education Committee.

Q. Dr. Welty, not to interrupt you, but strictly speaking are these parts of her employment or something that she has done voluntarily?

- 13 -

A. These are things that she has been personally interested in and has volunteered to participate on these committees on her own.

Q. Did you appoint her to these committees?

A. No, she came to be a member on these through her own interests and we granted her administrative leave to attend these functions.

Q. Anything else that you would care to add?

A. I think those are the main points, the main things that she was doing at that time.

Q. Okay. Dr. Welty, could you try to tell the Court in your own judgment, and based on your own direct experience, what degree of independent judgment and authority and discretion Rosemary has exercised in the main during these past several years?

A. Most of her activities have been outlined for her, especially for instance the formula demonstration. She has followed the outline and she now is very familiar with this outline and doesn't really need to refer to it on a day to day basis, but she did utilize this outline that was developed for her to do her teaching on the postpartum women in the Obstetrics Unit.

The films and the other health education materials that she utilizes in the field clinics were provided to her by the Area Nutrition -- or, excuse me, the Area Health Education Department or through other means. So that she was presenting the audio-visual presentations in the clinic and was interpreting the content into Navajo, and in that way she was I think somewhat dependent upon the presentations as they were, and if there were questions that did come up, as I mentioned, that were beyond her knowledge, she would very regularly ask for assistance in answering these questions that were posed to her by the audience. (Tr. 149-152)

XI

I find and conclude that in the performance of her work Mrs. Goldtooth utilizes attributes possessed as a result of her heritage and upbringing, namely an understanding of the Navajo culture and language, in conjunction with knowledge and skills of a basic rather than an advanced nature, acquired through a combination of on-the-job training, experience and academic work of an unadvanced level.

Mrs. Goldtooth is principally a conduit for the transmission of basic health information. Her work requires intelligence, but is not predominately intellectual in character. While it is likely that accommodations must be made to conform to the level of comprehension of the different individuals with whom she deals, her work largely is accomplished through pre-arranged and pre-planned demonstrations the content of which she does not have the discretion to vary; and, such discretion and judgment as she exercises is not in the application of any body of knowledge of an advanced type.

Thus, in consideration of all of the evidence bearing upon the work performed by Mrs. Goldtooth at the relevant time, as well as her education and training as reflected by the testimony and her personnel records, I conclude that she is a non-professional employee for unit/voting purposes. Certainly she is a most valuable and valued employee, she is not however, under the Assistant Secretary's criteria a professional employee.

XII

In the determination of her professional vs. non-professional status, Petitioner and Amicus have vigorously argued that it is of virtually pre-emptive significance that Mrs. Goldtooth is a Navajo who is fluent in both Navajo and English, has a full understanding of the Navajo culture and principally renders her services to Navajos on a Navajo reservation.

I have considered said factors both as criteria additional to those delineated in A/SLMR No. 170 and as a contextual framework within which to apply the A/SLMR No. 170 criteria and am unable to conclude from either approach that Mrs. Goldtooth, for unit/voting purposes, is other than a non-professional employee; although her Navajo cultured attributes are essential to the performance of her work, they do not constitute her a "professional" employee.

Placing the emphasis somewhat differently it is argued that even though she may not be a professional by the Assistant Secretary's criteria, whether Rosemary Goldtooth is a professional or a non-professional should be measured by Navajo standards rather than by non-Indian standards, and that what she does "is professional in terms of the Navajo nation, in terms of the needs of the Navajo peoples' health, mental and physical." (Tr. 103)

I do not find in the record evidence sufficient to support a factual finding either as to what the Navajo criteria/standards for professionalism are 5/ or whether, if there be such, Mrs. Goldtooth meets those standards. 6/ Accordingly, it is unnecessary to reach the question of the relevance or materiality of such considerations in this proceeding.

Finally, I conclude that neither the Indian Preference Act nor any other law or case cited by Petitioner or Amicus require that Mrs. Goldtooth be considered a professional employee.

RECOMMENDATION

On the entire record I recommend to the Assistant Secretary:

1. That the challenge to the ballot of Rosemary Goldtooth be overruled.
2. That it be directed that the ballot of Rosemary Goldtooth be opened and counted at a time and place to be determined by the appropriate Regional Administrator.
3. That it be directed that the Regional Administrator shall have a Revised Tally of ballots served upon the

5/ The testimony of Dr. Welty, a non-Navajo, that he has great respect for medicine men and considers some to be his equal professionally is of little assistance.

6/ A Navajo friend of Mrs. Goldtooth, who has known and respected her since childhood, testified that she believes her to be a professional and knows other Navajos who so view her. This testimony in my opinion

parties, and take such additional action as required by the Regulations of the Assistant Secretary.



STEVEN E. HALPERN
Administrative Law Judge

Dated: August 22, 1978
San Francisco, California

SEH:vag

6/ (cont.) is not of sufficient substance to establish Mrs. Goldtooth's reputation for professionalism, even if such were relevant. Furthermore, Mrs. Goldtooth herself has maintained throughout that her duties are non-professional.

November 16, 1978

A/SLMR No. 1147

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

SUPERVISOR OF SHIPBUILDING
CONVERSION AND REPAIR,
UNITED STATES NAVY,
GROTON, CONNECTICUT
A/SLMR No. 1147

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2105, AFL-CIO (Complainant) alleging, in essence, that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to negotiate procedures for implementing a management decision to shut down the Activity on the day after Thanksgiving and to direct the use of annual leave on that day. The Complainant alleged that this action was in violation of the parties' negotiated agreement and thereby was a violation of Section 19(a)(1) and (6) of the Order. The Respondent denied any violation, contending that although the Complainant objected to the shutdown, it neither sought negotiations nor presented any proposal on the procedures for implementing the decision.

The Administrative Law Judge found that the Complainant, although notified of the Respondent's decision, made no specific proposal, and did not request to bargain concerning the procedures, implementation or impact of the decision until after the unfair labor practice charge had been filed. He, therefore, recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed. Thus, the Assistant Secretary concluded that in the absence of an appropriate and timely request to bargain by the Complainant, dismissal of the subject complaint was warranted.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SUPERVISOR OF SHIPBUILDING
CONVERSION AND REPAIR,
UNITED STATES NAVY,
GROTON, CONNECTICUT

Respondent

and

Case No. 31-10802(CA)

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2105, AFL-CIO

Complainant

DECISION AND ORDER

On August 8, 1978, Administrative Law Judge Robert J. Feldman issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation. Thus, as found by the Administrative Law Judge, the evidence herein establishes that, upon being notified by the Respondent of the latter's decision to shut down its facility on the day after Thanksgiving and to direct the use of annual leave on that day, the Complainant requested negotiation of the decision on forced leave but made no request to bargain with respect to the procedures, implementation, or impact of the decision until after it filed its unfair labor practice charge. In the absence of an appropriate and timely request to bargain in this regard, I agree with the Administrative Law Judge's conclusion that dismissal of the subject complaint is warranted.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 31-10802(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 16, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2105, AFL-CIO
Complainant

and

SUPERVISOR OF SHIPBUILDING
CONVERSION & REPAIR, USN
GROTON, CONNECTICUT
Respondent

Case No. 31-10802(CA)

.....
WALTER J. FLAHERTY, JR., ESQ.
National Representative, AFGE
54 Cummings Park, Suite 312
Woburn, Massachusetts 01801
For the Complainant

A. GENE NIRO, ESQ.
Area Representative
Northern Field Division
Office of Civilian Personnel
Boston Office
495 Summer Street
Boston, Massachusetts 02210
For the Respondent

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION

This is an unfair labor practice proceeding in which a formal hearing of record was held pursuant to Executive Order 11491 as amended (hereinafter referred to as "the Order") and 29 CFR Part 203.

Statement of the Case

The Complainant charges Respondent with violations of Sections 19(a)(1) and (6) of the Order. In essence, it is alleged that on October 22, 1976, the Respondent by its

Commanding Officer, issued a memorandum authorizing supervisors to direct the use of annual leave on Friday, November 26, 1976 (the day after Thanksgiving); that such action constituted forced leave; that such action was taken without prior negotiation with a duly designated representative of the union; and that Respondent's unilateral action violated Article XX of the negotiated agreement between the parties, as well as Sections 19(a)(1) and (6) of the Order.

In its answer, Respondent alleges in substance that on October 21, 1976, its appropriate representative met with an authorized designee of the union president and informed him that in view of the fact that Electric Boat (the government contractor whose work Respondent oversees) would be closed on the Friday after Thanksgiving, it would be uneconomical for Respondent to remain operational, and employees would accordingly be required to take annual leave; that a copy of the proposed memorandum announcing the shutdown was then shown to the union designee; that following the issuance of the memorandum the next day, the union objected to the shutdown, but at no time offered any proposals or sought negotiation on procedures or implementation, or on the impact on the employees affected; and that prior to November 26, 1976, four meetings were held with the union in attempt to resolve the dispute without success.

Findings of Fact

At all relevant times, Complainant was the exclusive bargaining representative of Respondent's graded employees. A negotiated agreement was approved on June 7, 1976 and is still in effect.

As required by Section 12 of the Order the following provisions thereof are incorporated in the negotiated agreement and set forth in Article III of such agreement:

Rights and Obligations of the Employee.

Section 1. It is agreed that Management Officials of the Employer retain the rights in accordance with Executive Order 11491, as amended, and applicable laws and regulations and Article VI of this agreement.

* * * *

c. To relieve employees from duties because of lack of work or other legitimate reason;

Article XX of the agreement reads as follows:

Forced or Curtailed Leave

Section 1. It is recognized that the nature of the Employer's mission is such that it may be necessary for the Employer in accordance with the regulations, at times to curtail the use of leave and at times to require it to be taken. When the above actions affect a number of employees, the Employer agrees to negotiate the procedure with the Union.

2. In cases of curtailed leave, leave periods will be assigned or rescheduled on the basis of individual seniority and leave balance for each group of employees reporting to a single supervisor.

On October 21, 1976, Messrs. Bianco and Poliks, Respondent's Civilian Personnel Officer and Labor-Management Relations Specialist respectively, met with Mr. Sorkin, Complainant's Treasurer. The president of the union was then in the hospital and had theretofore advised Mr. Poliks that Mr. Sorkin would fill in for her during her absence. Mr. Poliks had contacted Mr. Sorkin as a representative of the union on one or two other matters. At the meeting in question, Mr. Bianco informed Mr. Sorkin of the directive to close down the activity on the Friday following Thanksgiving and delivered a copy thereof to him. Mr. Sorkin initialed a route sheet indicating his receipt of the directive, but there was no discussion of its contents at that time.

On the following day, October 22, the directive above referred to was issued. Its contents follow:

1. Thanksgiving Day, 25 November 1976, is a legal holiday and will be observed as a non-workday by all SUPSHIP employees.
2. In as much as EBDIV will be closed on Thursday and Friday, 25 and 26 November

1976, SUPSHIP operation on these days would be uneconomical. Accordingly, supervisors are authorized to direct the use of annual leave on Friday, 26 November 1976. Employees not having annual leave credits available for use, will be advanced annual leave upon request.

3. In accordance with reference (a) and by this memorandum, employees are furnished advance notice regarding the closing of this Command on 26 November 1976 and of the requirement to use annual leave on said day.

The union's chief negotiator, Mr. Guimond, was not notified of the meeting of October 21 and did not attend. He learned of the directive on October 22, when it was circulated. From October 25 to and including October 27, he spoke to Mr. Poliks several times in an effort to obtain rescission or modification of the directive. He requested negotiation of the decision on forced leave, pointing out that for November 11, Veterans Day, which was also a holiday at Electric Boat, the Command put out a notice permitting liberal leave, rather than forced leave. Mr. Poliks informed him that the decision was not negotiable.

Mr. Guimond made no specific proposal with respect to procedures or implementation of the decision nor as to its impact on employees. The union made no request to discuss or negotiate procedures, implementation or impact until after the unfair labor practice charge (dated October 27, 1976) had been filed.

At the hearing, Mr. Guimond testified that in his discussion with Mr. Poliks, among the things he (Guimond on behalf of the union) wanted to discuss were what we would do if a person had no leave - could he be advanced leave? That contingency, of course, was expressly provided for in the directive of October 22 and there could be no doubt as to how it was to be taken care of. Assuming that the witness had read the directive at the time of his discussion, it would not be unreasonable to infer that the question he recited was a mere afterthought, carelessly interjected as an example of a procedural matter that might have been appropriate for negotiation had it been requested. I am persuaded no such request was made.

By reason of an emergency situation that developed shortly before Thanksgiving, five employees worked on Friday, November 26.

Conclusions of Law

It is clear that the decision to shut down on the day after Thanksgiving was a reserved right of agency management under Section 12(b)(3) of the Order, as well as Article III of the negotiated agreement, and therefore no consultation or negotiation with the union with respect thereto was required. It is well established, however, that agency management is obligated to bargain concerning the implementing procedures and impact on adversely affected employees of such a management decision even though the subject matter of the decision is non-negotiable under Section 12(b). See Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71 A-56; Bureau of the Mint, U.S. Department of the Treasury, 6 A/SLMR 640, 641 (No. 750); Directorate of Facilities Engineers, Fort Richardson, Alaska, A/SLMR No. 946.

Upon closely parallel facts, it has been expressly held that no violation of Section 19(a)(1) or (6) results from a unilateral decision to shut down an activity during Thanksgiving and Christmas where the union did not at any time request to bargain about the procedures involved and the impact of the decision. Department of the Navy, Marine Corps Supply Center, Barstow, California, A/SLMR No. 692.

With respect to the allegation that the provisions of the directive for forced leave violated Article XX of the negotiated agreement, I conclude that the terms of the agreement are not so clear that it can be said that a violation occurred. Although a breach of contract can also be a violation of the Order if flagrant and persistent, I conclude that if the facts be deemed to constitute a breach of Article XX of the agreement, any such breach is not of a flagrant and persistent type that might amount to a violation of the Order.

Since no negotiations took place at the meeting of October 21 (which consisted of nothing more than the giving of prior notification to the union of the proposed

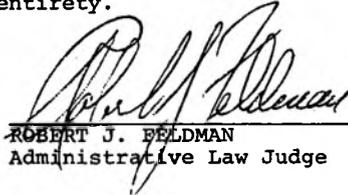
November 17, 1978

action), and since there is no evidence that Respondent subsequently refused to meet with the chief negotiator, I conclude that there was no violation of the Order or the agreement in giving such notification, in the absence of the president, to a union officer who had been authorized to act on her behalf.

Upon all the evidence adduced, it is concluded that the record fails to establish that the Respondent violated Sections 19(a)(1) or 19(a)(6) of the Order.

RECOMMENDATION

In view of the foregoing, it is recommended that the complaint be dismissed in all its entirety.


ROBERT J. FELDMAN
Administrative Law Judge

Dated: August 8, 1978
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. CUSTOMS SERVICE,
OFFICE OF REGULATIONS AND RULINGS
A/SLMR No. 1148

This case involved a petition for clarification of unit (CU) filed by the U.S. Customs Service, Office of Regulations and Rulings (Activity-Petitioner) seeking to clarify whether two senior staff attorneys in its Freedom of Information and Privacy Branch should be excluded from the exclusively recognized unit represented by the National Treasury Employees Union, Chapter 101 (NTEU). The Activity-Petitioner asserted that in order to eliminate the inherent conflict of interest which occurs when unit employees in the Freedom of Information and Privacy Branch process requests for information filed by the NTEU, two senior staff attorneys should be excluded from the unit and then assigned to process all NTEU requests under either the Freedom of Information Act (FOIA) or the Privacy Act. The NTEU contended essentially that there was no basis under the Executive Order for such exclusions.

The Assistant Secretary concluded that the senior attorney responsible for processing FOIA requests was a representative of management within the meaning of Section 2(f) of the Order. In this regard, the record revealed that FOIA requests made by the NTEU usually deal with personnel information and grievance processing, both of which, in the Assistant Secretary's view, are "matters relating to the implementation of the agency labor-management relations program" as defined in Section 2(f). Further, it was noted that the NTEU had made a considerable number of FOIA requests in the past and that there is nothing in the record to indicate that the volume of such requests will decrease in the future. Thus, in the Assistant Secretary's view, the conflict of interest present herein was neither speculative nor de minimus. Therefore, the senior attorney responsible for FOIA requests was excluded from the unit.

The Assistant Secretary further determined that there was no basis for the exclusion of the attorney specializing in Privacy Act requests. In this regard, he found that any conflict of interest with respect to the work of this employee was purely speculative in nature, as there was no evidence that the NTEU had made any Privacy Act requests in the past.

Accordingly, the Assistant Secretary ordered that the unit be clarified consistent with his findings.

RJF/mml

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. CUSTOMS SERVICE,
OFFICE OF REGULATIONS AND RULINGS

Activity-Petitioner

and

Case No. 22-08841(CU)

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 101

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Bridget Sisson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by both parties, the Assistant Secretary finds:

The U.S. Customs Service, Office of Regulations and Rulings, hereinafter called the Activity-Petitioner, filed a petition for clarification of unit (CU) seeking to clarify whether two senior staff attorneys in its Freedom of Information and Privacy Branch should be excluded from the exclusively recognized unit represented by the National Treasury Employees Union, Chapter 101, hereinafter called NTEU. Essentially, the Activity-Petitioner asserts that in order to eliminate the inherent conflict of interest which occurs when unit employees in the Freedom of Information and Privacy Branch process requests for information filed by the NTEU, two senior staff attorneys should be excluded from the unit so that they may be assigned to process NTEU requests under the Freedom of Information Act (FOIA) 1/ and the Privacy Act. 2/ The NTEU contends that there is no basis under the Executive Order for such exclusions.

1/ Freedom of Information Act, 5 U.S.C. § 552 (1966), as amended.

2/ Privacy Act of 1974, 5 U.S.C. § 552a.

The NTEU was certified as the exclusive representative for all professional employees in the U.S. Customs Service, Office of Regulations and Rulings, on April 22, 1974. 3/ The Activity-Petitioner, located in Washington, D. C., is composed of several divisions, including the Entry Procedures and Penalties Division of which the Freedom of Information and Privacy Branch is a part.

Seven attorneys are assigned to the Freedom of Information and Privacy Branch. Four of them are classified as "permanent" staff members, and three serve on a rotating basis with other attorneys in the division. Attorneys in this particular Branch are responsible for processing all requests filed with the Activity-Petitioner under either the FOIA or the Privacy Act. Of the seven staff attorneys, one attorney specializes primarily in Privacy Act matters, while the others work exclusively on FOIA requests.

The record indicates that more than 900 FOIA requests were received by the Activity-Petitioner during the first six months of 1978. During this period, 22 of the requests were from the NTEU, approximately the same number filed by that labor organization during the entire previous two years. Presently, staff attorneys, all of whom are within the bargaining unit represented by the NTEU, routinely handle such NTEU requests. Occasionally, however, requests of a particularly sensitive nature may be referred by the Branch Chief to the General Counsel of the Customs Service for disposition. There is no evidence that the NTEU has made any requests under the Privacy Act to date.

Doris Robinson, Attorney (Customs), GS-905-14

Robinson is the Branch's general expert on rules and regulations and is the senior staff attorney assigned to FOIA requests. Among her other duties, she devotes a substantial part of her time to answering telephone requests for advice and information on FOIA matters and, as a result of her acknowledged expertise in the area, has become responsible for FOIA case assignments to other attorneys in the Branch. If Robinson is excluded from the unit, the Activity-Petitioner states that she alone will be assigned to process FOIA requests made by the employees' exclusive representative.

Under the particular circumstances of this case, I conclude that Doris Robinson is a representative of management within the meaning of Section 2(f) of the Order. In this regard, the record reveals that FOIA requests made by the NTEU deal with personnel information and grievance processing, both of which in my view are "matters relating to the implementation of the agency labor-management relations program" as defined in Section 2(f).

3/ The certified unit is described as "all professional employees in the United States Department of the Treasury, United States Customs Service, Office of Regulations and Rulings, excluding all non-professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors and guards as defined in the Order."

November 17, 1978

Further, I note that the NTEU has made a considerable number of FOIA requests in the past, and there is nothing in the record to indicate that the volume of such requests is likely to decrease in the future. Thus, the conflict of interest present herein is neither speculative ^{4/} nor *de minimus*. ^{5/} Therefore, and noting particularly the Activity-Petitioner's position that she alone among attorneys in the Branch will be assigned to process all FOIA requests made by the NTEU in the future, I conclude that Doris Robinson should be excluded from the unit and I will order that the unit be clarified accordingly. ^{6/}

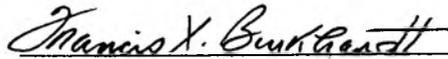
William Lawlor, Attorney (Customs), GS-905-14

Currently, Lawlor is the only Branch attorney handling Privacy Act requests, and presumably his exclusion from the unit would leave him free to handle NTEU requests under the Privacy Act without risking a potential conflict. However, as noted above, there is no evidence that the NTEU has made any Privacy Act requests to date. Thus, in my view, any conflict of interest with respect to Lawlor's work is purely speculative in nature. Consequently, under the circumstances herein, I conclude that there is no basis for Lawlor's exclusion from the bargaining unit under Section 2(f) of the Order. I further find that there is insufficient basis to support Lawlor's exclusion from the unit as a management official, confidential employee, or an employee engaged in Federal personnel work in other than a purely clerical capacity.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the National Treasury Employees Union, Chapter 101, was certified on April 22, 1974, be, and it hereby is, clarified by excluding from the unit Doris Robinson, Attorney (Customs), GS-905-14, and including in the unit William Lawlor, Attorney (Customs), GS-905-14.

Dated, Washington, D. C.
November 17, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

^{4/} Compare Federal Election Commission, A/SLMR No. 1076 (1978).

^{5/} Compare Occupational Safety and Health Review Commission, A/SLMR No. 1018 (1978).

^{6/} In view of the disposition herein, it was considered unnecessary to pass upon assertions regarding Robinson's status as a supervisor, a confidential employee, or an employee engaged in Federal personnel work in other than a purely clerical capacity.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

NATIONAL LABOR RELATIONS BOARD
A/SLMR No. 1149

This case involved an unfair labor practice complaint filed by the National Labor Relations Board Union (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) by failing to timely approve and implement a local supplemental agreement.

The Administrative Law Judge concluded that the Respondent did not violate Section 19(a)(1) and (6) of the Order and recommended that the complaint be dismissed in its entirety. In this regard, he found that the Respondent did not violate the Order when its General Counsel withheld approval of a local supplemental agreement on the basis that certain of its provisions were inconsistent with the national agreement between the Complainant and the Respondent, as well as, in certain instances, inconsistent with Section 11(b) and/or 12(b) of the Order.

In agreeing with the Administrative Law Judge that dismissal of the instant complaint was warranted, the Assistant Secretary noted particularly that the Complainant, after the supplemental agreement failed to gain the approval of the Respondent's General Counsel, never sought a determination under the procedures of the controlling agreement but, rather, immediately instituted the instant unfair labor practice proceeding.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL LABOR RELATIONS BOARD

Respondent

and

Case No. 22-08048(CA)

NATIONAL LABOR RELATIONS BOARD UNION

Complainant

DECISION AND ORDER

On September 7, 1978, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

The Administrative Law Judge found, and I agree, that the Respondent did not violate the Order when its General Counsel withheld approval of a local supplemental agreement on the basis that certain of its provisions were inconsistent with the national agreement between the Complainant and the Respondent, as well as, in certain instances, inconsistent with Section 11(b) and/or 12(b) of the Order. In this regard, it is noted that the Federal Labor Relations Council (Council) held in National Labor Relations Board Union, Local 6 and National Labor Relations Board, Region 6, Pittsburgh, Pennsylvania, FLRC No. 77A-109 (1977), that where a negotiability dispute involves both Section 11(c)(1) and 11(c)(4) matters, 2/ the parties should first resolve the issue relating to the interpretation of a controlling agreement through the procedures provided in Section 11(c)(1) before seeking a determination of negotiability from the Council under Section 11(c)(4) of the Order. In the instant case, the Complainant, after the supplemental agreement failed to gain the

1/ Exceptions filed by the Complainant were subsequently withdrawn.

2/ Section 11(c) of the Order provides, in pertinent part:

(Continued)

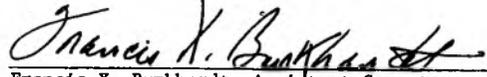
approval of the Respondent's General Counsel, never sought a determination under the procedures of the controlling agreement but, rather, immediately instituted the instant unfair labor practice proceeding. Further, it is not alleged, nor is there any evidence, that the Respondent would have refused to comply with the procedures set forth in Section 11(c) of the Order.

Under these circumstances, as the Respondent's refusal to approve the supplemental local agreement without certain modifications did not reflect an improper refusal to bargain with the Complainant, but reflected only a reasonable disagreement with respect to the interpretation of a controlling agreement, and as the Complainant did not utilize the procedures available for resolving the issues involved, I find that the Respondent's conduct herein was not in violation of Section 19(a)(1) and (6) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-08048(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
November 17, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

2/ "(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

(1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations;

...
(4) A labor organization may appeal to the Council for a decision when -

(1) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order."

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



In the Matter of

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

NATIONAL LABOR RELATIONS BOARD UNION,
Complainant

Case No. 22-08048 (CA)

BRUCE D. ROSENSTEIN, ESQUIRE
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Counsel, NLRB
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Washington, D.C. 20570
For the Respondent

LUCILE L. ROSEN, ATTORNEY
NLRB, Region 20
450 Golden Gate Avenue
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San Francisco, CA 94102
For the Complainant.

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on May 9, 1978 by the Regional Administrator, Labor-Management Services Administration, U.S. Department of Labor, Philadelphia Region, a hearing was held before the undersigned on June 14, 1978 at Los Angeles, California.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order). A complaint was filed on June 14, 1977 by the National Labor Relations Board Union (herein called Complainant) against the National Labor Relations Board (herein called the Respondent). It alleged, in substance,

that Respondent violated Sections 19(a)(1) and (6) of the Order by refusing to approve and implement a local supplemental agreement between Respondent's Region 21 and Complainant's Local 21 within 45 days as required by Section 15 of the Order.

Respondent filed a response to the Complaint on July 20, 1977. It denied the commission of any unfair labor practice and affirmatively asserted several defenses.

On March 23, 1978 the Regional Administrator dismissed the allegations in the complaint pertaining to Respondent's failure to implement the local supplemental agreement within 45 days. Absent appeal to the Assistant Secretary in accordance with Section 203.8(c) of the regulations, 1/ this dismissal is binding in the proceedings herein. 2/ Accordingly, the sole issue left for determination is whether Respondent violated Sections 19(a)(1) and (6) of the Order by refusing to approve and implement this local supplemental agreement.

Both parties were represented at the hearing and afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. Thereafter, both parties filed briefs which have been duly considered. 3/

Findings of Fact

1. At all times material herein Complainant has been the certified and exclusive bargaining representative for a unit of professional employees located in Respondent's regional, subregional, and resident offices. Representation is accorded at the local level through various local unions including, inter alia, Local 21, Complainant's representative in Region 21.

2. From December 9, 1974 to August 22, 1976 Complainant and Respondent were parties to a collective bargaining agreement covering the aforesaid unit of employees. On

1/ 29 CFR §203.8(c).

2/ See Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 1040 (May 11, 1978); National Archives and Records Service, A/SLMR No. 965 (Jan. 11, 1978).

3/ In his brief Respondent moved to correct the transcript in respect to certain errors contained therein. The motion is granted and the transcript is deemed corrected as set forth in the attachment herein marked "Appendix".

April 1, 1977 the parties executed a new agreement, effective through December 31, 1979. Both agreements contain provisions authorizing the negotiation of local supplemental agreements between local unions and Regional Directors, subject to certain specified conditions.

3. Pursuant to this authority negotiations began between Local 21 and Region 21. Principal spokesmen were, respectively, Paul D. Flemm, President of Local 21, and Wilford W. Johansen, Regional Director for Region 21. Ground rules approved March 9, 1976 provided, inter alia, that agreement was subject to approval by the General Counsel and the Executive Committee of the National Union per Article XVII, Section 2 of the National Agreement.

4. Negotiations culminated in a local supplemental agreement on June 4, 1976. The agreement provided that it would be effective upon the signatures of the parties and approval by the General Counsel and the Executive Committee of the Union. Copies of the agreement were sent to the General Counsel and National Union during the last week of June 1976.

5. Robert Droker, Complainant's President, received a copy of the agreement on June 29, 1976. Mr. Droker made two deletions, approved the rest, and returned the agreement to Paul Flemm. The deletions involved the last sentence of the first paragraph of Article VI (Regional Office Personnel File) and the whole of Article IX (Local Supplemental Transportation).

6. Mr. Johansen was advised of the Executive Committee's approval by Mr. Flemm. At this time, Mr. Johansen was invited to sign the agreement. He refused, stating that he wished to wait until the agreement had received the General Counsel's approval as well.

7. By letter dated October 8, 1976 the General Counsel informed Mr. Johansen that he would not approve the agreement unless certain modifications and changes were made as specified therein. However, the letter contained assurances that upon the agreement's resubmission with the modifications and/or deletions specified therein, it would be approved.

The General Counsel stated his reasons for withholding approval of the local supplemental agreement as follows:

"Article II of the Supplementary Agreement, inter alia, would permit employees, under certain circumstances, to choose to work under an 'informal system of compensatory time off which will require no formal accounting of time spent, or prior approval to work such overtime . . .' Inasmuch as this provision does not specifically describe the methods and/or procedures under which said informal system will operate, approval of this aspect of the Supplementary Agreement pursuant to Article XVII of the National Agreement must be withheld.

Article III of the Supplementary Agreement deals with the selection and assignment of bilingual agents to assist other agents in the processing of cases. In my view, while the procedure outlined herein represents a sound approach to the problem suggested, this Article is beyond the permissible scope of bargaining as it would restrict management's rights, retained under Section 11(b) and 12(b) of Executive Order 11491 as amended and Article III of the National Agreement. Therefore, it must be disapproved.

The first unnumbered paragraph of Article VI of the Supplementary Agreement modifies Article VI, Section 3, and Article XIV, Section 2, of the National Agreement to the extent that it requires notification to employees prior to use of any adverse comments, criticisms or materials. Since the National Agreement does not require such prior notification, this proposed requirement constitutes a modification of the National Agreement and cannot be approved.

The first unnumbered paragraph of Article VI of the Supplementary Agreement also precludes management, absent prior notification, from using any adverse comments, criticisms or materials 'as a basis for action unfavorable to the employee or for denying the affected employee a promotion.' As written, this provision places a restriction on the evaluation of employees not provided for in Article VI of the National Agreement and is inconsistent with Section 12(b)(2) of Executive Order 11491 and Article III of the National Agreement.

The first unnumbered paragraph in Article VI of the Supplementary Agreement which concludes with a provision that 'promotions are granted on the basis of merit only,' is approved with the understanding that it was meant to be consistent with the criteria for promotion as set forth in Article VI of the National Agreement.

Although I have been advised that the second unnumbered paragraph of Article VI of the Supplementary Agreement was intended to remove the subject of editing and rewriting of legal drafts from the requirements contained in the first unnumbered paragraph of Article VI, it would appear that this paragraph is also subject to the interpretation that the subject of editing and rewriting of legal drafts was to be removed from the evaluation process. Inasmuch as the meaning and intent of this paragraph is somewhat unclear and as the latter interpretation may be in conflict with the provisions of Article VI of the National Agreement, it must be disapproved." 4/

8. After learning of the General Counsel's rejection of the agreement, Local 21 did not seek to resume negotiations. Instead, Complainant charged Respondent with violating Sections 19(a)(1) and (6) of the Order by refusing to approve and implement the agreement. Efforts to resolve this dispute were unavailing, and on June 14, 1977 the instant complaint was issued.

9. The local supplemental agreement was never signed by the designated signatories thereto nor implemented in Region 21.

Conclusions of Law

Section 15 of the Order provides, in pertinent part:

"An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved. . . if it conforms to applicable law, the Order,

4/ The General Counsel also disapproved Article IX. However Complainant does not contest the validity of this action in light of the Executive Committee's deletion of this same article.

existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. . . . A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement, or, if none, under agency regulations."

Pursuant to this authority and Article XVII of the National Agreement, the General Counsel reviewed the local supplemental agreement negotiated between Complainant's Local 21 and Respondent's 21, approving some provisions but disapproving others. Complainant attacks this action in the instant unfair labor practice proceeding, claiming that the disapprovals were erroneous, unreasonable and done in bad faith.

The Order contemplates that the merits of an agency head's negotiability determinations be determined under the procedures set forth in Section 11(c). 5/ Furthermore, the

5/ See FLRC No. 76P-2 (1976); Division of Military and Naval Affairs, State of New York, New York Air National Guard, A/SLMR No. 863 (July 19, 1977); U.S. Department of Defense, Department of the Army, Army Material Command, Automated Logistics Management Systems Agency, A/SLMR No. 211 (Oct. 30, 1972).

Section 11(c) states:

"(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

(1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations;

(2) An issue other than as described in subparagraph (1) of this paragraph which arises at a local level may be referred by either party to the head of the agency for determination;

(3) An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final;

[Cont'd on next page]

procedures set forth in this section apply equally to disputes arising in connection with an agency head's Section 15 review as those in connection with other negotiations. 6/

In Ruling of the Assistant Secretary, No. 26, 1 A/SLMR 618 (March 18, 1971), the Assistant Secretary explained:

"the intent of Section 19(a) (6) is to provide a labor organization an opportunity to file a complaint when it believes that management has been arbitrary or in error in excluding a matter from negotiation which has already been determined to be negotiable through the procedures set forth in Section 11(c) of the Order." [Emphasis in original]

Therefore, since I conclude that Section 11(c) of the Order provides the exclusive procedure for determining negotiability disputes, 7/ and "[t]he unfair labor practice provisions of the Order are not part of these procedures," 8/ the instant complaint must be dismissed insofar as it requests a review of the merits of the General Counsel's negotiability determinations.

5/ [Cont'd]

- (4) A labor organization may appeal to the Council for a decision when -
 - (i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order. "

6/ See National Labor Relations Board, Region 6, Pittsburgh, Pa., FLRC No. 77A-109 (April 12, 1978); Local 174, American Federation of Technical Engineers, AFL-CIO and Subships, USN, 11th Naval District, San Diego, Calif., FLRC No. 71A-49 (1973); Air National Guard Bureau, State of Vermont, A/SLMR No. 397 (June 20, 1974).

7/ Environmental Protection Agency, Washington, D.C. A/SLMR No. 943 (Nov. 21, 1977); United States Department of Agriculture and Agricultural Research Service, A/SLMR No. 519 (May 30, 1975); Army and Air Force Exchange Service, Keesler Consolidated Exchange, A/SLMR No. 144 (March 28, 1972).

8/ Air National Guard Bureau, supra.

This is not to say that failure to approve or implement a local agreement can never amount to an unfair labor practice. 9/ An agency head's authority to review such agreements is quite limited and the agency may not withhold approval simply because it is dissatisfied with the nature of the agreement reached. 10/ Failure to approve a provision on grounds other than those specifically authorized in Section 15 of the Order may be challenged as an unfair labor practice. 11/ However, where the grounds of disapproval are appropriate under Section 15, and not so baseless as to undermine the bargaining process itself or constitute an exercise of bad faith, disapproval constitutes a valid exercise of Section 15 authority.

An analysis of the General Counsel's conclusions indicates that he has confined his review to those factors specifically enumerated in Section 15 of the Order. In essence, the General Counsel's objections were based on perceived conflicts between agreement provisions and provisions of the National Agreement and the Executive Order. Furthermore, his conclusions are not so baseless or arbitrary as to interfere with subsequent good faith negotiations. Finally, the General Counsel's review indicates a singular absence of bad faith. In National Archives and Record Service, A/SLMR No. 965 (Jan. 11, 1978), the Assistant Secretary declined to find bad faith where the Union chose not to contest management's negotiability decisions other than by a broad assertion that management was wrong. Here, the General Counsel indicated a willingness to approve the agreement subject to certain specified conditions. The reasons for his disapproval were delineated with sufficient specificity to permit Complainant either to negotiate new provisions or to challenge the disapproval under the procedures provided in Section 11(c) of the Order. 12/ This Complainant did not do. Instead, reacting to a perceived "take it or leave it" attitude on

9/ See, e.g., Defense General Supply Center, A/SLMR No. 790 (Feb. 7, 1977); The Adjutant General, State of Illinois, Illinois Air National Guard, A/SLMR No. 598 (Dec. 16, 1975); Agricultural Research Service, supra.

10/ Illinois Air National Guard, supra.

11/ See FLRC No. 71P-4 (1971).

12/ Cf. Division of Military and Naval Affairs, supra; United States Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Western Region, A/SLMR No. 794 (Feb. 16, 1977).

the part of the General Counsel, it chose to initiate the instant proceeding. Because I find that the General Counsel's rejection of the local supplemental agreement was not so arbitrary as to constitute bad faith, but instead, was a valid exercise of Section 15 authority, I conclude that the failure to approve or implement this agreement was not violative of Sections 19(a)(1) and (6) of the Order.

RECOMMENDATION

On the basis of my conclusion that Respondent has engaged in no conduct violative of Sections 19(a)(1) and (6) of the Order, the undersigned recommends that the complaint herein be dismissed in its entirety.


WILLIAM NAIMARK
Administrative Law Judge

Dated: 7 SEP 1978
Washington, D.C.

WN:mjm

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, BRSI, NORTHEASTERN
PROGRAM SERVICE CENTER
A/SLMR No. 1150

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1760 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to permit a representative of the Complainant to attend an April 21, 1977, meeting which constituted a formal discussion within the meaning of Section 10(e) of the Order, and by refusing to negotiate with the Complainant over the procedures to be followed in connection with a proposed shifting of cases from one office component to another, as well as over the adverse impact of such a change on the bargaining unit employees.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order. In this regard, he found that the April 21, 1977, meeting was a formal discussion between management and employees concerning personnel policies and practices within the meaning of Section 10(e) of the Order and that the Respondent refused to permit the Complainant to be represented at the meeting by a representative of its own choice. Furthermore, he concluded that the Respondent had failed to comply with its obligation to negotiate and bargain in good faith with the Complainant concerning the procedures that were utilized in effectuating its decision to transfer cases and about the impact of the decision on adversely affected employees.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation and issued an appropriate remedial order for the violations found.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, BRSI, NORTHEASTERN
PROGRAM SERVICE CENTER

Respondent

and

Case No. 30-7869(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1760

Complainant

DECISION AND ORDER

On September 26, 1978, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed an answering brief to the Respondent's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions filed by the Respondent and the Complainant's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, shall:

1. Cease and desist from:

(a) Instituting a transfer of a substantial number of cases from one module to another module involving employees represented exclusively

by the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), without first notifying the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the exclusively recognized labor organization, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such a transfer of cases, and on the impact such transfer will have on adversely affected employees in the exclusively recognized unit.

(b) Refusing to permit the American Federation of Government Employees, AFL-CIO, Local 1760, to be represented at formal discussions between management and employees concerning personnel policies and practices.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended.

(a) Notify the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), the employees' exclusive bargaining representative, of any intended transfer of a substantial number of cases from one module to another module and, upon request, meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such a transfer of cases, and on the impact such transfer will have on adversely affected employees in the exclusively recognized unit.

(b) Permit the American Federation of Government Employees, AFL-CIO, Local 1760, to be represented at formal discussions between management and employees concerning personnel policies and practices.

(c) Post at its facility at the Northeastern Program Service Center copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Northeastern Program Service Center and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
November 17, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a transfer of a substantial number of cases from one module to another module involving employees represented exclusively by the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), without first notifying the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the exclusively recognized labor organization, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such a transfer of cases, and on the impact such transfer will have on adversely affected employees in the exclusively recognized unit.

WE WILL NOT refuse to permit the American Federation of Government Employees, AFL-CIO, Local 1760, to be represented at formal discussions between management and employees concerning personnel policies and practices.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), the employees' exclusive bargaining representative, of any intended transfer of a substantial number of cases and, upon request, meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such a transfer of cases, and on the impact such transfer will have on adversely affected employees in the exclusively recognized unit.

WE WILL permit the American Federation of Government Employees, AFL-CIO, Local 1760, to be represented at formal discussions between management and employees concerning personnel policies and practices.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



Agency of Activity

Dated: _____ By: _____
Signature

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515-1515 Broadway, New York 10036.

.....
In the Matter of :
: DEPARTMENT OF HEALTH, EDUCATION :
: AND WELFARE, SOCIAL SECURITY :
: ADMINISTRATION, BRSI, NORTHEASTERN :
: PROGRAM SERVICE CENTER :
: Respondent :
: and :
: AMERICAN FEDERATION OF GOVERNMENT :
: EMPLOYEES, AFL-CIO, LOCAL 1760 :
: Complainant :
.....

Case No. 30-7869(CA)

SAMUEL S. GOLD, Esquire
HEW, Social Security Administration
BRSI, Northeastern Program Service Center
1220 West Highrise Building, 6401 Security Blvd.
Baltimore, Maryland 21235
For the Respondent

HERBERT COLLENDER, President
American Federation of Government
Employees, AFL-CIO, Local 1760
P.O. Box 626
Corona-Elmhurst, New York 11373
For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on March 28, 1978 by the Acting Regional Administrator for Labor-Management Services Administration, U.S. Department of Labor, New York Region, a hearing was held before the undersigned at New York, New York.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order). A complaint was filed on April 18, 1977 by American Federation of Government Employees, AFL-CIO, Local 1760 (herein called Complainant) against Department of Health, Education, and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center (herein called Respondent). It alleged, in substance, that Respondent violated Sections 19(a)(1) and (6) of the Order by refusing to permit a representative of Complainant to attend a meeting on or about April 21, 1977, and by refusing to negotiate with Complainant over the procedures to be followed in connection with a proposed shifting of cases from one office component to another, as well as over the adverse impact of such a change on the bargaining unit employees.

Respondent contended (a) there was no obligation to meet and confer with the local union over conditions of employment; (b) the April 21 meeting was not a formal meeting within the meaning of Section 10(e) of the Order; (c) Complainant was represented at the April 21 meeting and (d) the shifting of cases had no substantial impact on employees in the bargaining unit. The alleged violations of the Order were denied.

Both parties were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact 1/

1. The Bureau of Retirement and Survivor's Insurance has six program service centers located throughout the United States - one in each of six major cities. The one involved herein is the Northeastern Program Service Center. These centers review claims prepared by district offices, adjudicate and determine entitlements, and certify benefits

1/ Findings of Fact paragraphs 1 through 8, although established in the record herein, are quoted from Judge Naimark's Decision, as affirmed by the Assistant Secretary in Department of Health, Education and Welfare, SSA, BRSI, Northeastern Program Center, A/SLMR No. 1101.

for beneficiaries to the Treasury Department.

2. The National Council of Social Security Payment Center Locals, American Federation of Government Employees, AFL-CIO (herein called the Council) is composed of six local unions representing unit employees in each service center.

3. By letter dated February 27, 1969 J. F. Griner, National President of American Federation of Government Employees, AFL-CIO, notified the Commission of Social Security Administration that recognition will be granted to the national AFGE rather than the Council, and that the national office of AFGE is the bargaining agent for the Council.

4. By letter dated June 10, 1969 Hugh F. McKenna, Director of BRSI, advised Griner that the national office of AFGE, AFL-CIO (Council of Social Security Payment Center Locals) was granted exclusive recognition for a unit of all non-supervisory employees at the Payment Centers.

5. The Bureau and AFGE have been parties to collective bargaining agreements since 1971. The most recent written agreement was effective by its terms on March 15, 1974 for a period of two years. It was subsequently extended and continues in effect at the present time.

6. The aforesaid written agreement identifies the exclusive bargaining representative of the unit employees of the Program Centers as the national office of the American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), hereinafter referred to as the Council.

7. (a) Article 2, Section (a) of the aforesaid agreement provides, in substance, that representatives of the Bureau and Council shall meet semi-annually to confer and consult with respect to personnel policies and practices or other matters affecting working conditions.

(b) Article 2, Section (c) of the aforesaid agreement provides, in substance, that labor-management meetings in the Program Center to confer on local personnel policies, practices, and general working conditions shall be held monthly unless deferred by mutual consent.

(c) Article 2, Section (e) of the said agreement provides, in substance, that (1) the Bureau will consult with the Council on matters re personnel policies, practices and working conditions (2) the Program Center will consult

with its respective Local on matters within the authority of the Regional Representatives re personnel policies, practices and working conditions.

(d) Article 30 of the aforesaid agreement provides for the negotiation of supplemental agreements at each installation (Program Center) between the Center and the Local thereat. All local supplemental agreements are deemed part of the master agreement. Provision is also made in Section (d) of this Article for the establishment of ground rules to govern negotiations.

8. Under date of March 5, 1973, McKenna sent the Council a copy of the Bureau's Instruction (SSA-BRSI Instruction 711-1) pertaining to the labor-managements relations policy of the Bureau. Under the heading, "Purpose," it is stated therein that the individual Payment Center locals are representatives of AFGE (NCSSPCL) in the respective payment centers, and, as such, the Bureau consults and negotiate with them on appropriate local matters. 2/

9. On April 21, 1977 at 9:00 a.m. module manager Telford Hewitt held a meeting with Claims Authorizers in Module 25. Seven of the eight Module 25 Claims Authorizers were present at the meeting including Local 1760 Steward Arthur Mills. Mr. Mills asked Mr. Hewitt for a union representative to be present at the meeting. Mr. Hewitt advised Mr. Mills that the meeting was not a formal meeting and that Mr. Mills, who was also a Claims Authorizer, was enough union representation. Mr. Mills attended the meeting and took notes.

10. At the meeting Mr. Hewitt advised the Claims Authorizers of Respondent's decision to transfer cases which represented 1/3 of the Claims Authorizer backlog from Module 25 to Module 27.

11. Local 1760 Vice President Ritamarie Stone telephoned Mr. Hewitt after the meeting. In reply to Ms. Stone's questioning, Mr. Hewitt advised her that he did not permit Ms. Stone to attend the meeting because Mr. Mills the Local 1760 shop steward was present and that the union, thus, was represented at the meeting.

2/ Under the heading "Bureau Relationships with the Union" the instruction, though declaring that the union's right to be consulted applies to the same subject that are negotiable, draws a definitive distinction between negotiation and consultation.

12. Ms. Stone then telephoned Process Branch Manager Irving Feiner, identified herself as the union Vice President, and asked him if he had made the decision to transfer the cases from Module 25 to Module 27. Mr. Feiner replied that he had. Ms. Stone advised Mr. Feiner that this decision would have an adverse impact on the employees and that he should have notified the union and should meet and confer with the union. Mr. Feiner advised Ms. Stone that there was no obligation to meet and confer on the transfer of cases, only on the transfer of people. Ms. Stone advised Mr. Feiner that she felt the Activity was obliged to meet and confer with Local 1760 about how the shift of cases would be accomplished and the adverse effects of such a shift of cases. Mr. Feiner reiterated his refusal to meet and confer about the procedures for affecting the shift of cases and any adverse impact upon employees that might flow from the shifting of cases.

13. The subject shift of about 1/3 of the cases from Module 25 to Module 27 was accomplished.

14. After the shift of cases the Claiming Authorizers in Module 25 still had a full range of cases to work on.

Conclusions of Law

1. Respondent contends that it has no obligation to bargain or "to meet and confer" with Local 1760 concerning unilateral changes in working condition or about the procedures for implementing such changes and their impact. In Department of Health, Education and Welfare, SSA, BRSI, Northeastern Program Center, A/SLMR No. 1101, Administrative Law Judge Naimark, dealing with the same parties and exactly the same issue, concluded, after a full and perceptive analysis, that the Respondent herein is obliged to negotiate and bargain with Complainant herein concerning local issues or changes in working conditions. Judge Naimark was affirmed by the Assistant Secretary and therefore I am bound by the finding and conclusion that Respondent is obliged to negotiate and bargain with the Complainant about local issues, including changes in working conditions and the impact and implementation of such changes. 3/

2. Respondent contends that, in any event, the shifting of cases did not raise any obligation to bargain because it

3/ Even if for some reason I were not bound by such finding and conclusion, I would adopt Judge Naimark's analysis and reasoning and would reach the very same conclusion.

did not involve the transfer of people. In considering this matter it must be noted that no contention has been made that the Complainant had any right to bargain about the basic decision to shift 1/3 of the cases from Module 25 to Module 27. Rather, Complainant urges that it had a right to timely notice of the decision to shift cases and an opportunity to bargain concerning the procedures to be used in accomplishing the shift and, more importantly, the impact such a shift will have on the unit employees it represents, who work in Module 25. The Activity's arbitrary contention that, with respect to impact and implementation, it need bargain only about a decision to shift or transfer people and not cases must be rejected. The test is whether the decision in question may have an adverse impact on represented employees, and if so, to give the union an opportunity to bargain about the implementation and impact of the decision.

In the subject instance the Complainant was reasonable in concluding that the transfer of 1/3 Module 25's cases to Module 27 might have an adverse impact on the employees of Module 25 and that therefore, as the collective bargaining representative of these employees, it should have an opportunity to bargain about the procedures for implementing this transfer of cases and the impact of the decision. The Respondent argues that, in fact, no adverse impact was established and therefore there should be no obligation to bargain about impact. Such an approach would frustrate the purposes of the Order. The collective bargaining representative must have an opportunity, before a change is effected, to meet and confer about the procedures for implementing the change and to bargain about any possible adverse impact of the change. Part of these negotiations might be to ascertain whether there will in fact be any adverse impact.

Accordingly it is concluded that Respondent was obligated to meet and confer on the procedures to be utilized in effectuating its decision to transfer cases, which, in my view, effected a change in employee terms and conditions of employment, and on the impact of its decision on adversely affected employees. Department of Health Education and Welfare, Social Security Administration BRSI, Northeastern Program Service Center, A/SLMR No. 984 at Page 2.

3. With respect to the April 21 meeting at which the decision to transfer cases was announced, it is concluded that this meeting was a "formal discussion" between management and employees concerning personnel policies and practices within the meaning of Section 10(e) of the Order and, accordingly, the Complainant had a right to be represented by a

representative of its own choice. Absent a showing of some unusual circumstances establishing that the representative Complainant had chosen was not an acceptable representative, it would seem again to go contrary to the aims and purposes of the Order to permit the Respondent to decide who shall represent the Complainant. The Respondent introduced no evidence of any such unusual circumstances. Accordingly it is concluded that the Respondent violated Sections 19(a)(1) and (6) of the Order by refusing to permit the Complainant to be represented at the April 21 meeting by a representative of Complainant's choice.

4. It is concluded that Respondent did not comply with its obligation to bargain in good faith and therefore violated Sections 19(a)(1) and (6) of the Order when, after Ms. Stone specifically requested to meet and confer, Complainant refused to bargain with the Union about the procedures to be utilized in effectuating its decision to transfer cases and about the impact of the decision on adversely affected employees. Department of Health, Education and Welfare, SSA, BRSI, Northeastern Program Service Center, A/SLMR No. 984.

Recommendation

Having found that Respondent has engaged in certain conduct which is violative of Sections 19(a)(1) and (6) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purposes of Executive Order 11491, as amended.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center shall:

1. Cease and desist from:

(a) Instituting a transfer of a substantial number of cases from one module to another module involving employees represented exclusively by the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), without first notifying the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the exclusively recognized labor organization, and affording it

the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such a transfer of cases and on the impact such transfer will have on adversely affected employees in the exclusively recognized unit.

(b) Refusing to permit American Federation of Government Employees, AFL-CIO, Local 1760 to be represented at formal discussions between management and employees involving personnel policies and practices.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Notify the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Payment Center Locals), the employees' exclusive bargaining representative, of any intended transfer of a substantial number of cases from one module to another module and, upon request, meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such transfer of case, and on the impact such transfer will have on adversely affected employees in the exclusively recognized unit.

(b) Permit American Federation of Government Employees, AFL-CIO, Local 1760 to be represented at formal discussions between management and employees involving personnel policies and practices.

(c) Post at its facility at the Northeastern Program Center copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Northeastern Program Service Center and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.


SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: September 26, 1978
Washington, D.C.

SAC:yw

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a transfer of a substantial number of cases from one module to another module involving employees represented exclusively by the National Office, American Federation of Government Employees, AFL-CIO, (National Council of Social Security Payment Center Locals), without first notifying the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the exclusively recognized labor organization, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such transfer of cases and on the impact such transfer will have on adversely affected employees in the exclusively recognized unit.

WE WILL NOT refuse to permit American Federation of Government Employees, AFL-CIO, Local 1760 to be represented at formal discussions between management and employees involving personnel policies and practices.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), the employees' exclusive bargaining representative, of any intended transfer a substantial number of cases and, upon request, meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such transfer of cases and on the impact such transfer will have on adversely affected employees in the exclusively recognized unit.

WE WILL permit American Federation of Government Employees, AFL-CIO, Local 1760 to be represented at formal discussions between management and employees involving personnel policies and practices.

Agency or Activity

Dated: _____ By: _____
Signature

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 Administrator for Labor-Management Service, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515-1515 Broadway, New York 10036.

November 22, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF INTERIOR,
BUREAU OF RECLAMATION,
YUMA PROJECTS OFFICE,
YUMA, ARIZONA
A/SLMR No. 1151

This case involved a representation petition filed by the National Federation of Federal Employees, Local 1487 (NFFE) seeking a unit of Wage Board employees in the trades and crafts employed by the Yuma Projects Office, Bureau of Reclamation, Department of Interior, excluding employees assigned to the dredging operation, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in Executive Order 11491, as amended. The Intervenor, International Brotherhood of Electrical Workers, Local 640, AFL-CIO (IBEW), has exclusive recognition at the Project level for all Wage Board employees at the Yuma Projects Office, except those employees assigned to the dredging operation who are represented exclusively by the NFFE.

At the hearing, the parties stipulated as to an appropriate unit. Based upon the stipulation of the parties and the evidence developed at the hearing, the Assistant Secretary found that the unit sought was appropriate. The only issue in dispute among the parties concerned the eligibility of employees in the job category of Foreman II to be included in the unit. The Assistant Secretary concluded that the Foreman II positions are supervisory positions within the meaning of Section 2(c) of the Executive Order.

The IBEW contended that Section 24 of the Order preserves the eligibility of the Foreman II position for inclusion in the unit, in that, although supervisors, Foreman II incumbents historically have been included in the IBEW's unit by negotiated agreement. The Activity, on the other hand, contended that Section 24 of the Order does not preserve mixed units of supervisory and nonsupervisory employees. The Assistant Secretary noted particularly a history of representation by the IBEW of the employees at issue in a mixed unit, their coverage under a succession of lawful agreements since the late 1940's, and the fact that historically the IBEW has represented similar employees in private industry. He concluded that the IBEW's unit herein, containing both supervisory and non-supervisory employees, continues to be viable pursuant to Section 24 of the Order. Additionally, the Assistant Secretary concluded that the NFFE was not eligible to represent Foreman II employees in the petitioned for unit, since there was no evidence that the NFFE historically or traditionally has represented supervisors such as those at issue in private industry

Nor is there evidence that the NFFE held exclusive recognition for units of such supervisors in any agency on the effective date of Executive Order 11491.

In view of the foregoing, the Assistant Secretary found that the NFFE's petition, in effect, constituted an appropriate attempt to sever a unit of nonsupervisory employees from the existing mixed unit. He noted that the question concerning representation raised by the instant petition, therefore, did not concern whether all of the employees in the existing unit wish to continue to be represented by their current exclusive representative in the currently recognized unit, but rather, whether a majority of the nonsupervisory employees in the unit found appropriate, which constituted a portion of the exclusively recognized unit, wish to be represented separately by the NFFE. In effect, no question concerning representation existed with respect to that portion of the mixed unit consisting of supervisors who will continue to be represented by the IBEW irrespective of the outcome of the election. Consequently, in the event that a majority of those voting in the election choose the IBEW as their representative, the existing mixed unit and the representation thereof will continue. Conversely, the Assistant Secretary noted that if a majority of the voting nonsupervisory employees choose the NFFE as their exclusive representative, such employees will be severed from the existing mixed unit and the NFFE will be certified as their exclusive representative.

Accordingly, the Assistant Secretary directed that an election be conducted in the petitioned for unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF INTERIOR,
BUREAU OF RECLAMATION,
YUMA PROJECTS OFFICE,
YUMA, ARIZONA

Activity

and

Case No. 72-7371(RO)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1487

Petitioner

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 640,
AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer David Ofria. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the Activity, the Petitioner, National Federation of Federal Employees, Local 1487, hereinafter called NFFE, and the Intervenor, International Brotherhood of Electrical Workers, Local 640, AFL-CIO, hereinafter called IBEW, the Assistant Secretary finds:

1. The labor organizations involved claim to represent certain employees of the Activity.
2. In its amended petition, the NFFE seeks an election in a unit of all Wage Board employees in the trades and crafts employed by the Yuma Projects Office, Bureau of Reclamation, Department of Interior, excluding

employees assigned to the dredging operation, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in Executive Order 11491, as amended.

The IBEW has exclusive recognition at the Project level for Wage Board employees at the Yuma Projects Office. The record indicates that presently 59 of the 70 employees in the IBEW's unit are assigned to the Activity's Maintenance Branch which is composed of seven sections and organizationally is part of the Activity's Water and Land Operations Division. The Office of Project Manager directs the Water and Land Operations Division, which has responsibility for the operation and maintenance of the Yuma and the Gila Projects and the river levee work. All sections of the Maintenance Branch are included in the IBEW's unit, except for the Dredging Maintenance Section whose employees currently are exclusively represented by the NFFE. The remainder of the employees represented in the IBEW unit are assigned to the Activity's Imperial Dam Division and to its Office of Supply and Service. The Imperial Dam Division is responsible for operation and minor maintenance of the Imperial Diversion Dam, the Laguna Diversion Dam and the Central Wash Pumping Plant.

At the hearing, the parties stipulated that an appropriate unit would include all Wage Board employees in the trade and crafts employed by the Yuma Projects Office, Bureau of Reclamation, Department of Interior, who are eligible for exclusive representation under Executive Order 11491, as amended, excluding employees assigned to the dredging operation, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors not eligible for representation under Executive Order 11491, as amended. In this regard, the parties agree that the employees involved share a community of interest, and that the unit will promote effective dealings and efficiency of agency operations. The record bears out these conclusions. Thus, employees in the claimed unit have similar working conditions, are subject to the same work rules, have their wage rates established by similar methods, have a separate and distinct area of competition for reductions in force, and share a separate and distinct promotional procedure, as well as common supervision and hours of work. Also, there is evidence of interchange of employees within the existing unit.

In support of the assertion that the claimed unit will promote effective dealings, the record shows that the unit has existed substantially intact since the mid-1940's and has been covered by negotiated agreements since that time. The locus and scope of authority for collective bargaining exists and has always existed at the Project level.

Underlying the conclusion that the unit will promote the efficiency of agency operations, I note that the unit presently corresponds to the organizational and operational structure of the Agency at the Project level, and that the parties agreed that the impact of the present unit structure has been consistent with agency operations in terms of cost, productivity and the use of resources.

Accordingly, based upon the stipulation of the parties and the evidence developed at the hearing, I find that the unit sought is appropriate for the purpose of exclusive representation. 1/

The only issue raised herein among the parties concerns the eligibility of employees in the job category of Foreman II. The parties stipulated, and the record supports, that the Foreman II positions are supervisory positions within the meaning of Section 2(c) of the Order. 2/ Thus, the incumbents independently assign and direct employees working under them in the performance of their duties, they evaluate the employees' completed assignments, and they effectively recommend the scheduling of leave and the hiring of employees. The Foreman II incumbents also may adjust grievances at the first step of the negotiated grievance procedure and complete performance evaluations of the employees working under them. Based on these factors, I conclude that the employees classified as Foreman II are supervisors within the meaning of Section 2(c) of the Order.

The IBEW contends that Section 24 of the Order 3/ preserves the eligibility of the Foreman II position for inclusion in the unit, in that, although supervisory, the Foreman II position has been historically included in the IBEW's unit by negotiated agreement. The Activity, on the other hand, contends that Section 24 of the Order does not preserve mixed units of supervisory and nonsupervisory employees.

At the hearing, the parties stipulated that the contractual relationship between the IBEW and the Activity began in the late 1940's when the IBEW's predecessor, the Colorado River Power Trades Council, of which the IBEW was a part, was recognized as the employees' exclusive representative by the Activity's predecessor, the Yuma and Park-Davis Projects. Since

1/ The parties stipulated that there is no bar to an election in this matter.

2/ Section 2(c) of the Order provides that, " 'Supervisor' means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

3/ Section 24 of the Order provides that the Executive Order does not preclude -

(1) the renewal or continuation of a lawful agreement between an agency and a representative of its employees entered into before the effective date of Executive Order No. 10988 (January 17, 1962); or

(2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent the management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the date of this Order.

-3-

that time, the Foreman II position has been included by negotiated agreement in the IBEW's unit. It is noted also that in private industry the IBEW represents operation and maintenance employees who either are classified as Foreman II, or perform functions similar to those of Foreman II, and that such employees are included in units of nonsupervisory employees.

Under the foregoing circumstances, and noting particularly the history of representation by the IBEW of the employees at issue in a mixed unit, their coverage under a succession of lawful agreements since the late 1940's, and the fact that historically the IBEW has represented similar employees in private industry, I find that the IBEW's unit herein, containing both supervisory and nonsupervisory employees, continues to be viable pursuant to Section 24 of the Order. 4/

There is no evidence that the NFFE historically or traditionally has represented supervisors such as those at issue herein in private industry. Nor is there evidence that the NFFE held exclusive recognition for units of such supervisors in any agency on the effective date of Executive Order 11491. 5/ Accordingly, I conclude that the NFFE is not eligible to represent Foreman II employees in the petitioned for unit.

In view of the foregoing, I find that the NFFE's petition, in effect, constitutes an appropriate attempt to sever a unit of nonsupervisory employees from the existing mixed unit. 6/ The question concerning representation raised by the instant petition, therefore, does not concern whether all the employees in the existing mixed unit wish to continue to be represented by their current exclusive representative in the currently recognized unit, but rather, whether a majority of the nonsupervisory employees in the unit found appropriate below, which constitutes a portion of the exclusively recognized unit, wish to be represented separately by the NFFE. In effect, no question concerning representation exists with respect to that portion of the existing mixed unit consisting of supervisors who will continue to be represented exclusively by the IBEW irrespective of the outcome of the election in this matter. Consequently, in the event that a majority of those voting in the election choose the IBEW, the incumbent labor organization, as their representative, the existing mixed unit and the representation thereof will continue. 7/

4/ See the Federal Labor Relations Council's Interpretation of the Order, FLRC No. 78P-2 (August 9, 1978).

5/ The NFFE does not represent employees classified as Foreman II in its dredging operations unit at the Activity.

6/ Cf. Treasury Department, United States Mint, Philadelphia, Pennsylvania, 1 A/SLMR 236, A/SLMR No. 45 (1971).

7/ Cf. Veterans Administration Hospital, Montrose, New York, 7 A/SLMR 614, A/SLMR No. 872 (1977), and United States Department of the Army, Rocky Mountain Arsenal, Denver, Colorado, 3 A/SLMR 614, A/SLMR No. 325 (1973).

-4-

Conversely, if a majority of the voting nonsupervisory employees choose the NFFE as their exclusive representative, such employees will be severed from the existing mixed unit and the NFFE will be certified as their exclusive representative.

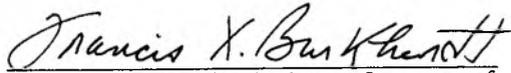
Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Section 10(b) of Executive Order 11491, as amended:

All Wage Board employees in the trades and crafts employed by the Yuma Projects Office, Bureau of Reclamation, Department of Interior, excluding employees assigned to the dredging operation, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate as soon as possible but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below including employees who did not work during that period because they were out ill, or on vacation, or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who quit or who have not been rehired or reinstated before the election date. Those eligible shall vote whether they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 1487; the International Brotherhood of Electrical Workers, Local 640, AFL-CIO; or neither.

Dated, Washington, D. C.
November 22, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

November 22, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY OF LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES AIR FORCE
A/SLMR No. 1152

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees (NFFE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when it failed to supply certain information sought by the NFFE with respect to a proposed reorganization effected within the Air Training Command and when it failed to give appropriate notice to the NFFE of the proposed reorganization based on the obligation imposed by Section 9(b) of the Order under which the NFFE has been granted national consultation rights by the Respondent.

The Administrative Law Judge concluded that as the reorganization was effected by the Air Training Command under its independent authority to do so, there was insufficient basis for a finding of a violation of Section 19(a)(1) and (6) of the Order predicated upon a failure of the Respondent to accord the NFFE rights imposed by Section 9(b) of the Order. In this regard, the Administrative Law Judge noted that the evidence was insufficient to indicate that the Air Training Command was acting as an agent for the Respondent when it effected the reorganization. In addition, he concluded that assuming arguendo there had been a Section 9(b) obligation, the Respondent, in fact, accorded timely notice of the reorganization and an opportunity to submit meaningful comments thereon to the NFFE. With respect to the alleged failure to supply requested information, the Administrative Law Judge concluded based on credited testimony that all information that was available to the Respondent at the time of the request was in fact supplied. Under all the circumstances, he recommended dismissal of this aspect of the unfair labor practice complaint.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation that the complaint be dismissed. In reaching this conclusion, he found it unnecessary to pass upon the Administrative Law Judge's conclusion that, had there been a Section 9(b) obligation, the Respondent by its actions had not deprived the Complainant of any of its national consultation rights. Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES AIR FORCE

Respondent

and

Case No. 22-08634(CA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On September 19, 1978, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order, and the Respondent filed a brief in opposition to the Complainant's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting briefs filed by the parties and the brief in opposition to the Complainant's exceptions filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation. Thus, the evidence establishes that the Air Training Command is not an agency or a primary national subdivision of an agency within the meaning of the Executive Order and Part 2412 of the Federal Labor Relations Council's Rules and Regulations. 1/ Nor does the evidence establish that the Air Training Command was acting as an agent for an agency or a primary national subdivision of an agency when it carried out the reorganization involved herein. Accordingly, in agreement with the Administrative Law Judge, I find that there was no obligation under Section 9(b) of the Order for

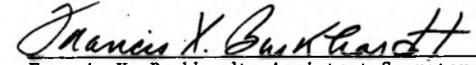
1/ Cf. Department of the Navy, Military Sealift Command, 5 A/SLMR 672, A/SLMR No. 576 (1975).

the Respondent to accord the Complainant timely notice or the opportunity to submit comments with respect to the proposal of the Air Training Command to reorganize. 2/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-08634(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 22, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

2/ As I have adopted the Administrative Law Judge's conclusion that the Respondent was under no obligation to consult with the Complainant regarding the reorganization in question, I find it unnecessary to pass on his further conclusion that the Respondent had, in fact, accorded timely notice of the reorganization to the Complainant and an opportunity to submit meaningful comments thereon.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



..... :
 In the Matter of :
 :
 UNITED STATES AIR FORCE :
 Respondent :
 :
 and : Case No. 22-08634(CA)
 :
 NATIONAL FEDERATION OF :
 FEDERAL EMPLOYEES :
 Complainant :

CAPTAIN DERRICK R. FRANCK
 CAPTAIN THOMAS J. THOMPSON
 General Litigation Division
 Office of the Judge Advocate General
 1900 Half Street, S.W.
 Washington, D.C. 20324
 For the Respondent

ROBERT ENGLEHART, ESQUIRE
 National Federation of Federal Employees
 1016-16th Street, N.W.
 Washington, D.C. 20036
 For the Complainant

Before: BURTON S. STERNBURG
 Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on December 5, 1977, under Executive Order 11491, as amended, by the National Federation of Federal Employees, (hereinafter called the Complainant or NFFE), against the United States Air Force (hereinafter called the Agency or Respondent), a Notice of Hearing on Complaint was issued by the Regional Administrator on May 17, 1978.

The Complaint alleges, in substance, that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in failing to (1) supply, upon request,

information necessary to NFFE for intelligent bargaining and (2) to give appropriate prior notice of, and allow comments on, a proposed reorganization within the Air Training Command to NFFE which holds national consultation rights.

A hearing was held in the captioned matter on August 1, 1978, in Washington, D.C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein.

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

Various Locals of NFFE, the Complainant herein, hold exclusive recognition at a number of individual training units of the Air Training Command (ATC) of the Department of the Air Force. Specifically, NFFE Local 943 represents employees at Keesler Air Force Base, Biloxi, Mississippi; NFFE Local 779 represents employees at Sheppard Air Force Base, Wichita Falls, Texas; NFFE Local 493 represents employees at Chanute Air Force Base, Rantoul, Illinois; and NFFE Local 1497 represents employees at Lowry Air Force Base, Denver, Colorado.

NFFE was granted national consultation rights by the Department of the Air Force, the Respondent herein, on June 4, 1971.

The Air Training Command is a major air command within the Department of the Air Force and is responsible, among other things, for all the technical training conducted in the Air Force. According to the uncontradicted testimony of Major Easton, Chief of the Organization Branch, as well as Air Force Regulation 26-2, ATC is a major command, which has complete authority to reorganize the structure of its training skills without any prior consultation with, or permission from, representatives of the Department of the Air Force with which NFFE holds national consultation rights. The record further establishes that the decision to reorganize various elements within the ATC was made by General Roberts, the commander of the ATC, without any prior consultation or other input by representatives from Air Force headquarters.

On June 13, 1977; pursuant to a request by NFFE, a meeting was held between Air Force Headquarters personnel and various representatives from NFFE. NFFE had requested

the meeting for purposes discussing a program known as "Hasty Chief" which dealt with a possible revision in the methods and time involved in certain training programs. Additionally, NFFE was concerned about rumors regarding the hiring of a Colonel Cadou for purposes of conducting a study with respect to a reorganization within the Air Training Command.

Following a discussion of the "Hasty Chief" program, NFFE raised a number of questions concerning the hiring of Colonel Cadou and what his specific duties were to be. Representatives of the Respondent informed NFFE that Cadou had been hired to do a study with respect to a reorganization within ATC but that they had no other specific information or details. In response to a request from NFFE, Respondent's representatives assured NFFE that they would supply all information on the reorganization, including a copy of the Cadou report which was due in July, as soon as it became available.

In early July, 1977, the Cadou Report was completed and submitted to the Air Training Command. Thereafter, copies of the Cadou Report were sent to the commanders of the five technical training centers affected by the report for comment thereon. According to the letter accompanying the report, the comments were to be submitted to General Roberts, Commander of the Air Training Command by July 20th, 1977. The letter made it clear that the reorganization contained in the Cadou Report was a "proposed reorganization". Following receipt of comments from the respective commanders of the five technical training centers, General Roberts notified the center commanders on August 10, 1977, that he had decided to proceed with the reorganization and that the effective date would be January 1, 1978. Although noting in his August 10th message that "some further ATC internal work" had to be done before the reorganization was made a matter of public information, the center commanders were given authority to "begin phasing into the new organization as conditions permit". On August 16, 1977, ATC requested its representatives at each of the centers to determine what manpower changes would be necessary to implement the reorganization.

On August 19, 1977, the Office of the Secretary of the Air Force formally announced the reorganization to both NFFE and the Congress of the United States. According to the record, it is customary and routine procedure for the Office of the Secretary of the Air Force to make such announcements in order to insure that all interested persons such as NFFE and the Congress receive the information before the general public.

Pursuant to a request from NFFE, a meeting was held on August 29, 1977 between representatives of NFFE and the Air Force. During the course of the meeting Air Force representatives gave an exhaustive briefing on the Cadou Report and its recommended reorganization. The briefing explained the possible impact and manner of implementation. Additionally, Respondent's representatives willingly answered all questions propounded by NFFE personnel. NFFE was further informed at this meeting that there would be at least three opportunities in the future for NFFE personnel to submit their views on the reorganization before the reorganization was in fact implemented. At the conclusion of the meeting, the NFFE president demanded that the reorganization be immediately cancelled 1/. Although at least two NFFE representatives had copies of the Cadou Report in their possession during the meeting, NFFE requested that they be given copies of the Cadou Report. NFFE formally received copies of the Cadou Report on September 16, 1977. On September 29, 1977, NFFE filed its precomplaint charge which is the basis of the instant action. 2/

With respect to the allegation concerning the failure to supply information, the only evidence offered in support thereof consisted of the undetailed testimony of Ms. Exley. Thus, Ms. Exley testified that following the June 13th meeting she continually asked for information pertaining to the reorganization. According to Ms. Exley, no information was forthcoming until August 19th when NFFE was informed by letter of the reorganization. Prior thereto she was always informed that the unspecified requested information was not in existence. Respondent's witnesses, whom I credit, denied the receipt of any request for information (other than the Cadou Report) prior to the August 29th meeting. They also deny that any statistics or other information concerning the reorganization were compiled prior to completion of the Cadou Report. With respect to the Cadou Report the

1/ By letter dated September 2, 1978, Colonel Herring, Chief, Training Programs Division, informed NFFE President Pierce that the Air Force was going to proceed with the reorganization and invited NFFE's views with regard to impact and implementation. The letter also set forth the times when the civilian personnel officers at the various centers were scheduled to meet to discuss implementation of the reorganization so that NFFE could submit further comments etc.

2/ NFFE made it clear during the hearing that the instant complaint was based solely on events occurring between June 13 and September 29, 1977.

record indicates that NFFE representatives were in possession of same prior to the August 29th meeting and that such representatives asked many informed questions during the meeting concerning the report.

Discussion and Conclusions

NFFE, relying primarily on the Assistant Secretary's decisions in Secretary of the Navy, Department of the Navy, Pentagon, A/SLMR No. 924, and Department of the Navy, Office of Civilian Personnel, A/SLMR No. 1012, contends that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in not giving NFFE, which holds national consultation rights, timely notice of the proposed reorganization and an opportunity to submit comments, etc. on the impact and implementation of the reorganization as required by Section 9(b) of the Executive Order.

Respondent, on the other hand, takes the position that it was under no obligation to give notice and/or consult with NFFE since the reorganization was not effected by the Air Force, the Respondent herein, but rather by the Air Training Command, an independent organizational entity below the agency or primary national subdivision level. Respondent cites in support of its position National Weather Service, A/SLMR No. 847, and would distinguish Department of Navy, A/SLMR No. 1012 on the ground that the record is barren of any evidence indicating that the Air Training Command was acting as an agent of, or upon direction from, the Air Force which had accorded NFFE national consultation rights.

As alternative defenses, Respondent argues that it was not obligated to consult with NFFE since the reorganization did not constitute a "substantive change in personnel policies" and was in any event a matter on which the Air Force would not be required to meet and confer even if NFFE was entitled to exclusive recognition. Respondent further argues that inasmuch as it was under no obligation to consult with NFFE concerning the decision to reorganize it was also under no obligation supply any information bearing on the reorganization, such as the Cadou Study, manpower figures etc. Consistent with the foregoing position, Respondent questions the validity of the Assistant Secretary's decision in Department of Navy, A/SLMR No. 924, wherein it was found that irrespective of the fact that the change there involved concerned a reserved management right, the Agency was still obligated to consult with respect to impact and implementation. Finally, Respondent takes the position that, in any event, Complainant was given appropriate notice of the reorganization and allowed to consult with agency management on the reorganization and present its views in writing thereon.

A review of the respective positions of the parties set forth above makes it clear that resolution of the instant dispute turns upon the relationship between the Air Training Command and the Air Force, the Respondent herein. If the Air Training Command was acting as agent of, or under direction from, the Air Force in connection with the reorganization here involved, then NFFE, which enjoyed national consultation rights with the Air Force, was entitled to timely notice of the reorganization and an opportunity to submit meaningful comment thereon. Department of the Navy, A/SLMR No. 1012. If, on the other hand, the decision to reorganize was made independently by the Air Training Command without any input whatsoever from the Air Force then the duties and obligations arising under NFFE's national consultation rights would not come into play. Cf. National Weather Service, A/SLMR No. 847.

Based upon the credited testimony of Major Easton as well as a reading of Air Force Regulation 26-2 I find that the Air Training Command is a major operational component of the Air Force possessing the authority to independently effect a reorganization among its subordinate units. I further find that record supports the conclusion that the reorganization which underlies the instant controversy was effected without any input whatsoever from the Department of the Air Force. In this connection, I attach no significance to the fact that the reorganization was first announced by the Department of the Air Force. Thus, I note that it was customary and routine procedure to have all major changes in the organizational structure of any major command announced by Department of the Air Force in order to insure that the Congress, as well as other interested parties, were informed prior to the general public.

Under the circumstances, and particularly in view of the absence of any probative evidence indicating that the Air Training Command was acting as an agent of the United States Air Force when it effected the reorganization, I find that an insufficient basis exists for a 19(a)(1) and (6) finding predicated upon the alleged failure of the United States Air Force to accord NFFE the rights set forth in Section 9(b) of the Executive Order.

Moreover, and assuming arguendo a contrary conclusion I further find that NFFE was indeed accorded timely notice of the reorganization and an opportunity to submit meaningful comments thereon. Thus, I note that NFFE was notified of the reorganization only 9 days after the final decision to proceed with the reorganization was made and some four

months prior to its effective date. 3/ Additionally, it is noted that the Air Force on a number of occasions within the period August 19-September 2 solicited NFFE's input and comments and made it clear that a final determination with respect to implementation had not been made. Accordingly, I find that NFFE was not deprived of any of its national consultation rights in violation of Section 19(a)(1) and (6) of the Order. 4/

Lastly, based upon the record as a whole as well as my credibility determinations, I find that NFFE has failed to establish that the Respondent failed to timely supply upon request any information necessary for intelligent bargaining.

Recommendation

That the complaint be dismissed.


BURTON S. STERNBURG
Administrative Law Judge

Dated: September 19, 1978
Washington, D.C.

BSS:hjc

3/ With regard to the decision to reorganize, I find, contrary to the contention of Respondent, that the reorganization did constitute "a substantive change in personnel policies". Cf. Dept. of Navy, Office of Civilian Personnel, A/SLMR No. 1012. I further find that such decision is a reserved management right within the meaning of Section 9(b) and that Respondent was only obligated to allow NFFE a reasonable opportunity to consult in person on the reorganization. Cf. International Association of Firefighters and Griffiss Air Force Base, FLRC No. 71A-30, April 19, 1973 wherein a reorganization was deemed to fall within the exclusionary language of Section 11(b) of the Order.

4/ In reaching this conclusion I find the Assistant Secretary's decisions in Secretary of the Navy, Department of the Navy, Pentagon, A/SLMR No. 924 and Department of the Navy, Office of Civilian Personnel, A/SLMR No. 1012, to be distinguishable in that notice of the proposed changes there involved were never given and/or given at a time when the changes were already a fait accompli, which is not the case herein.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE,
SOUTHWEST REGION, APPELLATE
BRANCH OFFICE, NEW ORLEANS,
LOUISIANA
A/SLMR No. 1153

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and its Chapter 91, alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally changing the past practice of allowing Chapter 91 the use of Activity typewriters during non-duty time.

The Administrative Law Judge, noting that the issue in the subject case was raised previously in U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, New Orleans, Louisiana, A/SLMR No. 1034, found that the Respondent had violated Section 19(a)(1) and (6) by unilaterally terminating the past practice of allowing Chapter 91 the use of the Respondent's typewriters in connection with labor-management correspondence prepared during non-duty time. In this regard, he found that there had been a past practice of allowing the use of the Respondent's typewriters for non-IRS activities, including their use by Chapter 91, and that the Respondent had knowledge of that practice.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation and issued an appropriate remedial order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS.

INTERNAL REVENUE SERVICE,
SOUTHWESTERN REGION, APPELLATE
BRANCH OFFICE,
NEW ORLEANS, LOUISIANA

Respondent

and

Case No. 64-3843(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 91

Complainants

DECISION AND ORDER

On August 10, 1978, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendation.

1/ On pages 5, 7 and 11 of his Recommended Decision and Order, the Administrative Law Judge inadvertently spelled the name "Landeche" as "Landerche". In footnote 3 on page 13 of his Recommended Decision and Order, the Administrative Law Judge inadvertently stated that a witness, Ms. Lillian Stanton, had "testified that she had taken an hour of annual leave" to type a letter for the union, although the record indicates that, in fact, she testified that she "would have taken an hour of annual leave." These inadvertencies are hereby corrected.

The Administrative Law Judge determined that the evidence established that the Respondent had an established practice of allowing the use of its typewriters for non-tax work, such as retirement parties, softball rosters, the United Fund, as well as by the Complainant, NTEU Chapter 91, for labor-management matters. He also found that the Respondent had knowledge of the Complainant's use of the typewriters.

I agree that the record supports the Administrative Law Judge's finding concerning past practice, noting particularly the un rebutted testimony of Ms. Elvira Burch who testified that her supervisor, Ms. Sharon Landeche, had specific knowledge of her use of the Respondent's typewriters for union-related matters. 2/ Consequently, in agreement with the Administrative Law Judge, I conclude that the Respondent's unilateral termination of the past practice with respect to the Complainant's use of the Respondent's typewriters for labor-management matters during non-duty time was in derogation of its bargaining obligation under the Executive Order in violation of Section 19(a)(1) and (6).

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26 of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Southwest Region, Appellate Branch Office, New Orleans, Louisiana, shall:

1. Cease and desist from:

(a) Unilaterally altering or changing the established past practice of allowing the National Treasury Employees Union, Chapter 91, the exclusive representative of its employees, the use of Activity typewriters for union business relating to labor-management correspondence incidental to Chapter 91's representational obligations, and consonant with the provisions of Section 20 of Executive Order 11491, as amended, and the regulations of appropriate authorities, without first bargaining in good faith with the National Treasury Employees Union, Chapter 91.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive

2/ In view of Ms. Burch's un rebutted testimony, I find it unnecessary to adopt the Administrative Law Judge's finding of an adverse inference on page 7 of his Recommended Decision and Order in regard to the Respondent's failure to call Ms. Landeche as a witness in this matter.

Order 11491, as amended.

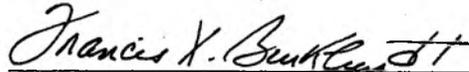
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Withdraw the oral instruction of Branch Chief R.J. McCoy of February 8, 1977, and his written confirmation of February 16, 1977, that "government production equipment (including typewriters), are not to be used in connection with Union business. This includes non-working hours."

(b) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Branch Chief, Internal Revenue Service, Southwest Region, Appellate Branch Office, New Orleans, Louisiana, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to all employees are customarily posted. The Branch Chief shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
November 24, 1978



Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT unilaterally alter or change the established past practice of allowing the National Treasury Employees Union, Chapter 91, the exclusive representative of our employees, the use of Activity typewriters for union business relating to labor-management correspondence incidental to Chapter 91's representational obligations, and consonant with the provisions of Section 20 of Executive Order 11491, as amended, and the regulations of appropriate authorities, without first bargaining in good faith with the National Treasury Employees Union, Chapter 91.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL withdraw the oral instruction of Branch Chief R. J. McCoy of February 8, 1977, and his written confirmation of February 16, 1977, that "government production equipment (including typewriters), are not to be used in connection with Union business. This includes non-working hours."

Activity

Dated _____ By: _____
Signature

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



Statement of the Case

This proceeding under Executive Order 11491, as amended (hereinafter also referred to as the "Order"), was initiated by a charge filed on, or about, June 7, 1977, and a complaint, dated September 23, 1977, filed on September 26, 1977 (Asst. Sec. Exh. 1) which alleged violations of Sections 19(a) (1) and (6) of the Order by Respondent's unilateral instruction, given orally on February 8, 1977, and reduced to writing on February 16, 1977, that:

"... government production equipment (including typewriters), are not to be used in connection with Union business. This includes non-working hours." (Comp. Exh. 1)

Complainant asserts that this instruction unilaterally altered or changed the established past practice whereby officers and stewards of Complainant used Respondent's typewriters and the assistance of certain employees of Respondent for the purpose of typing letters, memoranda and other communications.

Notice of Hearing issued December 22, 1977, for a hearing on March 7, 1978, pursuant to which a hearing was duly held before the undersigned on March 7 and 8, 1978, in New Orleans, Louisiana. All parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. At the close of the hearing, April 8, 1978, was fixed as the date for the filing of briefs, which date, pursuant to the joint motion of the parties and for good cause shown, was subsequently extended to May 26, 1978. Complainant's Brief, mailed May 24, 1978, was received May 26, 1978, and Complainant's corrected Brief, mailed May 31, 1978, was received June 2, 1978; Respondent's Brief, mailed May 26, 1978, was received May 31, 1978. Complainant's corrected Brief deletes the word "non" on page 2, line 21 before the word "union" and the corrected brief is hereby accepted as Complainant's original brief was timely filed. The extremely helpful briefs have been carefully considered.

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

PRELIMINARY MATTER

The legal issues raised in this case were raised in U.S. Department of the Treasury, Internal Revenue Service

In the Matter of :

INTERNAL REVENUE SERVICE :
SOUTHWEST REGION, APPELLATE :
BRANCH OFFICE, NEW ORLEANS, :
LOUISIANA :

Respondent : Case No. 64-3843(CA)

and :

NATIONAL TREASURY EMPLOYEES :
UNION AND NTEU CHAPTER 91 :
Complainant :

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For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

New Orleans District, New Orleans, Louisiana, A/SLMR No. 1034 (1978), and the determination of such legal issues as to the effect of Section 204 of Executive Order 11222 and Department of the Treasury's Minimum Standards to Conduct, Section 0.735-50(31 C.F.R. § 0.735-50 (1970)), under identical circumstances as are presented here is fully controlling in the present case. Indeed, the issue and only issue, to be determined in this case is the essentially factual issue as to whether the use of Respondent's typewriters in the Appellate Branch Office for union business had become an established term and condition of employment. If so, then the decision in A/SLMR No. 1034, *supra*, is fully dispositive, with recognition, as the Assistant Secretary noted in A/SLMR No. 1034 that:

"Section 20 of Executive Order 11491, as amended, states that the solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. The remedial order issued herein, therefore, is limited to only those past practices which would not be inconsistent with Section 20. Clarification of what is permitted and prohibited by Section 20 is contained in FPM Letter 711-120 (October 14, 1976) and the policy of the Federal Labor Relations Council set forth in Matter of GAO No. B-156287, FLRC No. 75F-1, 3 FLRC 875 (1976)." U.S. Department of the Treasury, Internal Revenue Service, New Orleans, Louisiana, A/SLMR No. 1034, n. 1 (1978)

FINDINGS AND CONCLUSIONS

1. Organization

The New Orleans Branch Office of the Assistant Regional Commissioner (Appellate), Southwest Region, Internal Revenue Service, is one of five branch offices under the supervision of the Assistant Regional Commissioner (Appellate), Mr. Douglas Moore. The other branch offices within the Southwest Region are located in Dallas, Houston, Oklahoma City and Denver. The Assistant Regional Commissioner (Appellate) is one of six Assistant Regional Commissioners under the supervision of

the Regional Commissioner for the Southwest Region of the Internal Revenue Service. The Southwest Region is one of seven geographic regions of the Internal Revenue Service.

Complainant, Chapter 91 of National Treasury Employees Union, is the exclusive representative for collective bargaining for professional and non-professional employees who comprise the bargaining unit within the Southwest Regional Office. Complainant and Respondent were, at the time of the incidents giving rise to the complaint, parties to a multi-regional collective bargaining agreement entitled Multi-Regional Agreement I (hereinafter MRA-I). Complainant became the exclusive bargaining representative for collective bargaining about March 1, 1975, and at that time became a party to MRA I.

Notwithstanding that Complainant represents a bargaining unit which is region wide, the incidents which gave rise to the complaint relate exclusively to the New Orleans Branch Office. The New Orleans Appellate Branch Office has about twenty employees and two responsible supervisors, the Branch Chief and the supervisory secretary.

The District Office, which was involved in A/SLMR No. 1034, *supra*, is represented by NTEU Chapter 6. The District Office is headed by a District Director and the District Office is subject to a Multi-District Agreement.

2. The Practice of Using Government Typewriters for Union Business In the Appellate Branch Office.

With full recognition that nearly all Appellate Branch employees have come directly from the District Office and that some appellate employees, including the present Branch Chief, Mr. Robert McCoy, have switched back and forth several times between the Appellate Branch Office and the District Office, I accord no weight to the practice of the District Office vis-a-vis use of typewriters for union business and look entirely to the practice, if any, in the Appellate Branch Office.

At the outset, it should be noted that the record reflects without possible doubt extensive use of government typewriters for non-tax work, ranging from lists of names and addresses for Christmas parties and social functions, softball rosters, volleyball rosters, personal letters, retirement parties, the Flower Fund, and the United Fund. Indeed, Mr. Howard Watkins, Chief of the Appellate Branch Office from December, 1974, until November 1976, testified:

"Q. Did you approve that use?

"A. Oh, yes. I believe I participated in that. (Tr. 297)

* * * *

"A. I don't think that anybody came to me to ask me to approve them, as such. Actually, I was involved in it, and it was just understood that they could use the typewriters for that purpose." (Tr. 298).

Mr. Hilton T. Ponthier has worked for the Internal Revenue Service since February 14, 1960, having been employed initially as an Internal Revenue Agent in the District Office. In 1966, Mr. Ponthier moved to the Appellate Branch; in 1968, he returned to the District Office; and on either February 17, or 18, 1974, he returned to the Appellate Branch Office. On October 1, 1973, Mr. Ponthier was elected Vice President of NTEU Chapter 6, New Orleans District, which is the exclusive representative for the District Office. When Mr. Ponthier returned to the Appellate Branch Office in February, 1974, he continued to serve as Vice President of Chapter 6 and his duties included preparation of editorial comments for a Chapter 6 Newsletter, which comments were typed in the Appellate Branch Office; planning and coordinating, a Quad District Conference, sponsored by NTEU, which was held in May or June, 1974, in New Orleans, which required considerable typing. Mr. Ponthier testified that Mr. William A. Berry, at that time Chief of the Appellate Branch Office: a) had encouraged him to return to the Appellate Branch with full knowledge of his responsibilities as vice president of Chapter 6; b) was told by Mr. Ponthier of his (Ponthier's) union responsibilities, including the Quad District Conference; and c) was in Mr. Ponthier's office and saw him working on the Quad District Conference but expressed no opposition.

Ms. Elveria Burch, now employed by HEW in Hammon, Louisiana, was employed by the Internal Revenue Service from December, 1964, through July, 1977, and in the Appellate Branch Office from 1972 until July, 1977. She testified that while in the Appellate Office she typed union material when she had time to do so, although such work was not required and was not a condition of her employment; that sometimes it was done on breaks, before work, or after work. Ms. Burch further testified that "if we didn't have anything to do, we would use the typewriters, not only to do union business, but for personal business". She stated that she had typed letters to NTEU Headquarters, to NTEU attorneys; that her supervisor Ms. Sharon Landerche was told of the Union typing.

Ms. Lillian Stanton has been employed by the Internal Revenue Service for approximately 25 years. She came to the Appellate Branch in 1973 as an auditor and later became an appellate conferee; is a member of Chapter 91 and has been Secretary of Chapter 91 and a steward for Chapter 91, since March or April, 1975. She testified that she typed union material fairly frequently, which she stated meant one to three times per week, on a typewriter in her office while in the old building (F. Edward Hebert Building) and since the Appellate Branch has been in the new building (Hale Boggs Building) she has used a typewriter adjacent to her cubicle; that she typed union matters before work in the morning, during her lunch break, or after work; that she had union letterhead paper in her desk; and that she had seen Ms. Barton, Ms. Burch, Ms. Lacey and Ms. Mary Thomas typing union material. Ms. Stanton testified that, for the most part, she typed union letters to management, but sometimes to other stewards or vice presidents, usually for President Pilie but on occasion from herself as Secretary or as Chief Steward; letters to NTEU National Office; and minutes of Union meetings. I have given careful consideration to Respondent's assertion that Ms. Stanton's testimony should be rejected because she had given an affidavit to the effect that "Typewriters have not been used for the purpose of typing matters which are wholly internal union business, such as election ballots" whereas she admitted on cross-examination that she had typed union minutes. She may have been in error when she made this statement in her affidavit or, equally probable, she may have viewed "wholly internal union business" as essentially limited to "such as election ballots". In any event, I found Ms. Stanton to have been a most forthright and truthful witness and therefore fully credit her testimony. Moreover, there is no inconsistency in her testimony that she typed union material on Respondent's typewriters on her own time and whether such union business concerned, to some degree, internal union business, however that might be defined, is not material as to whether there was, or was not, a practice of using Respondent's typewriters for union business.

Mr. J. Maurice Pilie has been employed by the Internal Revenue Service for about 31 years, the last 20 years in the Appellate Branch Office. He was first Acting President of Chapter 91 and was then elected President of Chapter 91. Mr. Pilie testified that when he had union correspondence to be typed he would take the draft, along with union letterhead stationery and an NTEU envelope, to one of the secretaries and ask that she type it; if he took the draft to Ms. Stanton he did not supply union stationery because she

kept her own supply in her desk. The matter would not always be typed immediately and Mr. Pilie would leave the draft and union letterhead lying uncovered on the secretary's desk. After the letter had been typed on union letterhead it would remain on the secretary's desk until Mr. Pilie picked it up. Complainant's Exhibit 9-1 through 9-75 are representative examples of the correspondence involved, the overwhelming majority of which were directed to IRS management officials. Much of the correspondence directed to management officials bore a signature stamp which is a government stamp used by the Internal Revenue Service and retained in the possession of Respondent's secretaries who placed the imprint on the correspondence.

Mr. Pilie testified that, although he had not seen her do so, he believed that Ms. Landerche, supervisory secretary, had typed union correspondence on union letterhead. Certainly, Ms. Burch testified that Ms. Landerche was told by her that if she, Ms. Landerche, did not have anything for her, Ms. Burch, to do she was going to type a described letter for Mr. Pilie or for Mr. Ponthier, and, although Ms. Landerche was present in the courtroom during the hearing, she was not called as a witness. Accordingly, I do draw the inference that had Ms. Landerche been called as a witness she would have admitted that she was aware that union correspondence was been typed on Respondent's typewriters.

Mr. Howard L. Watkins, now Senior Appeals Officer, Miami Appellate Office, was Chief of the New Orleans Appellate Branch Office, having been selected in December, 1974, and reported for duty in February, 1975, until November, 1976. He testified, in part, as follows:

"Q. ... were you aware of any typing being done by NTEU, Chapter 91, its officers, or its members, pertaining to union business, other than Respondent's Exhibits No. 4? 1/

1/ Respondent's Exhibit No. 4 is a memorandum on IRS stationery; was addressed to "All Concerned"; was from Chief, Appellate Office, Mr. Watkins, and President, NTEU Chapter 91, Mr. Pilie; was the result of discussions between Messrs. Watson and Pilie; concerned "Extension of Time for Filing Grievance"; and was, to Mr. Watson's knowledge typed on an IRS typewriter. Indeed, Mr. Watson testified that he probably asked Maurice [Pilie] to have his [Mr. Pilie's] aide type it.

"A. No, I can't say that I was actually aware that it was being done, but I don't believe I would really have concerned myself with it ... Since in my judgment, communications -- written communications flowing both from management to union officials and vice versa should be considered in the interest of the employer, and probably that's what I considered it, so I never concerned myself with it, because I don't recall it ever coming up, in fact, or even questioning it."

"Q. During this period, other than this one document [Res. Exh. 4] ... were you aware of any other document being typed by NTEU --

* * * *

"A. No, I was not.

"Q. No [o]ther documents?

"A. No, but I might add that this is my philosophy then, and it's still my philosophy, that communications between the two, I think would be beneficial for the well being of the employees, and, also, in a more efficient IRS operation.

* * * *

"A. -- overtly aware, no, but I -- based on my own philosophy in this regard, I can see how it could possibly be interpreted that I made no objection to it." (Tr. 286-287)

"Q. (By Mr. Self) If someone had asked your permission to do so, would you have remembered it?

"A. No, I -- well, I may have, or may not have. I don't -- I can't recall now of having ever specifically authorized it, but it -- if it had been asked, and I felt it was in the interest of both

labor and management relations, the well being of employees, more efficient operation, I would have approved it, I'm sure.

* * * *

"A. And, I do recall that Maurice was receiving quite a number of calls from the ARC, Appellate, Southwest Region, Paul Williams, but he would run things by Maurice that dealt with changes -- at least, possible changes in personnel policies, or procedures, or what-have-you, and would ask his opinion, and Maurice would sometimes come up and talk with me about that.

* * * *

"A. And, I'm sure that also Maurice communicated by phone, which was fine with me. ...

* * * *

"A. Well, its communication. I'm just trying to see. He could easily interpret that to mean that using the typewriters in non-duty hours would also be permissible, but I cannot recall, now, any specific time when I gave him, you know, carte blanche authority to use -- use typewriters, but, like I say, I wasn't really concerned with -- with that question." (Tr. 289-290)

Mr. Watkins made it clear that he recalled no instance when he had observed that IRS typewriters were being used to type on NTEU stationery; but he testified that:

"... if I had seen it, I wouldn't have felt there was any impropriety." (Tr. 292)

provided only that: a) it was during off-duty time; and b) it pertained to communications between management and union.

Mr. Watkins, after discussion with Paul Williams, authorized Ms. Stanton's having a typewriter in her office. Mr. Watson was aware that Ms. Stanton frequently stayed after

hours. When asked if he had approved her use of that typewriter for union business, he stated:

"THE WITNESS: I don't recall. I don't -- I'm not saying that it -- that it wasn't done. All I can say is that I don't recall; and, because of the way I viewed the union -- ... this union communication, it could have been asked, and I approved it without it being of any real significance to me, because I would have felt it was in the interest of the employer, and it could have happened." (Tr. 295)

* * * *

"Q. -- during this period?

"Did she ever tell you that she was going to be typing union business when staying late?

"A. I don't recall that ever coming up. I'm not saying it didn't, because, like I say, if she had, it wouldn't -- it wouldn't have registered with me. It would have been fine with me, and I think she -- she knew that." (Tr. 301)

Mr. Watkins also cited an example where Mr. Roy Ellis, a labor-management specialist on the staff of the Regional Commissioner, had sent minutes of a labor-management meeting to Mr. Pilie for review and comment and that he [Mr. Watkins] had seen Mr. Pilie's typed response, as to which Mr. Watkins stated:

"A. ... I think he knew that he had tacit approval for something of that matter to get it type[d].

"Q. Did you ever give tacit approval?

"A. Well, just sort of my own philosophy, and I'm sure my philosophy came through to the people in the office as to how I viewed -- how I viewed our relationship, management's and labor's relationship, and I can certainly see how he could maybe deduce from that that the

area, the limited area, that I have expounded on, that it would be permissible, --

* * * *

"A. -- after off-duty hours."
(Tr. 296-297).

CONCLUSIONS

The record shows that even before Chapter 91 became the exclusive representative for the Appellate Branch there had existed a practice in the Appellate Branch Office of using IRS typewriters for union business, which practice was known to Mr. Berry, then Chief of the Appellate Branch Office; that such practice continued after Mr. Watkins became Branch Chief; that Mr. Watkins specifically knew that union officials were communicating, by FTS and by written responses typed on IRS typewriters, to management inquiries; that Mr. Watkins, although he did not recall ever being asked to authorize the off-duty use of IRS typewriters for union business relating to labor-management relations, would have authorized such use; and that Mr. Watkins believed that Ms. Stanton knew that off-duty use of IRS typewriters for labor-management matters would have been fine with him.

Of course, if Mr. Watkins had clearly articulated his "tacit" authorization to the union, which he did not, it would be true that such "authorization" had been violated, inter alia, by: use of IRS typewriters during duty hours; typing of minutes of union meetins; typing of union editorials; but that is not the issue here. Rather, the issue is whether there was a practice of using IRS typewriters for union business which was known to Respondent. Clearly, the record shows that there was. First, there is no doubt whatever as to the existence of the practice. Second, the record shows affirmatively that Ms. Landerche, supervisory secretary, was told of union typing. Ms. Landerche, although present during the hearing, was not called as a witness and there was no denial of this testimony. Moreover, there was also testimony that Ms. Landerche had, as a supervisory secretary, personally typed union matters before February, 1977, or that either she did or she was completely aware that aides she supervised were doing it.

Third, Mr. Watkins testified that he was aware that Mr. Pilie communicated with IRS officials, both by FTS and by written correspondence, as a union official in response to management inquiries. He stated that Mr. Pilie knew that he had tacit approval for the use of IRS typewriters for such purpose, i.e., union communications, to management in connection with labor-management relations. Mr. Watkins further testified that, while he did not recall that Ms. Stanton ever told him she was going to be typing union business when she stayed late,

"it would have been fine with me, and I think she -- she knew that."

When Mr. Watkins began receiving, from management, copies of some union-management correspondence, the inference is inescapable that, pursuant to his tacit approval, he was made aware, further, of the use of IRS typewriters for the typing of union correspondence to IRS management.

I am aware that both Mr. Pilie and Mr. Ponthier served on various occasions as Acting Branch Chief. Although their knowledge of the use of IRS typewriters for union business is beyond doubt, I would have strong reservations as to whether the knowledge of persons merely acting as Branch Chief could, or would, standing alone, constitute knowledge by Respondent of the practice. However, as Respondent had knowledge of the practice wholly independent of the imputed knowledge of its Acting Branch Chiefs, the knowledge of the practice through Messrs. Ponthier and Pilie, as Acting Branch Chief, further shows knowledge by Respondent of the practice.

Fourth, the Appellate Branch Office was a small office and, as the record shows, the practice of having union correspondence typed by IRS personnel on IRS typewriters was open, extensive and was participated in by most, if not all, aides including Ms. Burch, Ms. Lacey, Ms. Thomas and Ms. Barton; union letterhead stationery was regularly furnished with each draft, except to Ms. Stanton who kept a supply of union stationery in her desk; and Mr. Pilie's name stamp, which belonged to IRS and was retained by IRS secretaries, was routinely stamped on courtesy copies of correspondence. Although an open and notorious practice, even when extending over a substantial period, might not, standing alone, constitute actual knowledge to Respondent of the existence of the practice, where, as here, the record shows that Respondent had knowledge of the practice through Mr. Berry, Mr. Watkins and Ms. Landeche, the open and notorious practice itself constitutes further notice to Respondent of the existence of the practice.

Mr. McCoy, previously Chief of the Conference Staff in the District Office, became Branch Chief of the Appellate Office in December, 1976, succeeding Mr. Watkins. Mr. McCoy testified that he was aware of the practice of using IRS typewriters for union business in the District Office, but stated that he was wholly unaware of any such practice in the Appellate Branch Office; however, on February 8, 1977, he called Mr. Pilie to his office and told him:

"I don't know whether he's using the typewriters for union business and I'm not accusing him, but if he is, he shouldn't be using them..." (Tr. 334)

Mr. McCoy stated that he "noticed the district was having trouble with the use of typewriters by the union"; that the Appellate Branch was "having problems with unauthorized use of FTS by union officials"; and that he "had received correspondence around the end of January" that looked like it had been typed on an IRS typewriter. The letter in question was dated January 27, 1977 (Comp. Exh. 9, No. 74). ^{2/} Because it appeared to have been typed with a carbon ribbon and because the type looked like Respondent's, Mr. McCoy had his secretary look at it and she told Mr. McCoy that she had seen Ms. Stanton, an appeals officer, sitting at a secretary's desk typing. ^{3/} Mr. Pilie, on February 8, 1977, and again on February 15, 1977, requested that Mr. McCoy reduce his oral instruction to writing which Mr. McCoy subsequently did on February 16, 1977. The memorandum issued by Mr. McCoy on February 16, 1977, stated:

^{2/} Complainant in its Brief, pp. 16-17, places this letter, and related events, on or about February 27, 1977. I find this to be in error as the Exhibit is dated January 27, 1977, and all testimony purports to relate to the FTS matter involving Mr. Byrnes.

^{3/} Although Ms. Stanton had, indeed, typed the letter of January 27, 1977, on an IRS typewriter, she testified that she had taken an hour of annual leave to do so; that on the occasion she had been seen typing at Ms. Barton's desk she had actually been correcting a supporting tax statement; and that when Mr. McCoy spoke to her about the matter his only stated objection had been whether she had been typing union business during duty hours, not whether she had been using an IRS typewriter. When she assured Mr. McCoy that she had not been typing union business during duty hours that ended Mr. McCoy's inquiry.

"As per your request of February 15, 1977, I am reducing to writing my February 8, 1977 reminder to you that government production equipment (including typewriters), are not to be used in connection with Union business. This includes non-working hours." (Comp. Exh. 1)

Mr. McCoy's use of the words "reminder" and "production" (which he asserted at the hearing should have been "reproduction") presumably was an effort, albeit obtuse, to relate this instruction to a discussion in a Labor Management meeting held on June 6, 1975, at which Mr. Roy Ellis had stated:

"... the Union Contract does not provide for use of FTS or reproduction facilities of the Service by Union officials ... After discussion of these points, it was recommended that individuals who needed to use the FTS to communicate between offices regarding contract matters should clear these calls with their supervisors. By doing so, all individuals will be aware the call is official and has been cleared." (Comp. Exh. 2)

The testimony does not demonstrate that Mr. McCoy made any reference to "production equipment" in his discussion with Mr. Pilie on February 8, 1977. To the contrary, Mr. McCoy testified, in effect, that I don't know whether you are using IRS typewriters for union business but if you are you shouldn't be using them. But even if he had referred, in some manner to the Labor-Management Relations Committee meeting of June 6, 1975, the meaning, or effect, of such reference would be ambiguous, at best, as to the use of typewriters.

More directly, Mr. McCoy on February 28, 1977, justified his prohibition on the use of IRS typewriters for union business by reference to Handbook of Employee Responsibilities and Conduct, IRM 0735.1 (Comp. Exh. 3) and thereafter Respondent relied on E.O. 11222 (Res. Exh. 2) and specifically Section 204 thereof which provides:

"An employee shall not use Federal property of any kind for other than officially approved activities. He must protect and

conserve all Federal property, including equipment and supplies, entrusted or issued to him." (Res. Exh. 2, E.O. 11222, as amended, Section 204)

This provision is carried forward in the Minimum Standard of Conduct for Department of Treasury employees as Section 0. 735-50, 31 C.F.R. § 0.735-50 (Res. Exh. 3). The record establishes: a) that Respondent's supervisory secretary was informed that union correspondence was to be typed on IRS typewriters, indeed, that the supervisory secretary, if she did not personally type such correspondence, at least she knew that aides were doing so; b) that Branch Chief Watkins knew that union responses to management inquiries had been typed on IRS typewriters and further, that Mr. Watkins had given tacit approval for the use of IRS typewriters, in off-duty hours, for union-management correspondence.

Obviously, E.O. 11222 does not prohibit the use of Federal property for officially approved activities. As Judge Sternburg aptly stated in the District case:

"It is further well established that the use of agency facilities and equipment by a union is a privilege and not a right; once granted however, such privilege becomes, in effect, an established term and condition of employment which may not thereafter be unilaterally changed." U.S. Department of the Treasury, Internal Revenue Service New Orleans District, New Orleans, Louisiana, Case No. 64-3612(CA) (1977), aff'd, A/SLMR No. 1034 (1978).

Respondent, having knowingly permitted the use of its typewriters for certain union business, permitted such practice to ripen into a term and condition of employment which it was not at liberty to unilaterally withdraw as Mr. McCoy did, orally, on February 8, 1977, and in writing on February 16, 1977. Such action by Branch Chief McCoy on February 8 and 16, 1977, without any prior negotiation or consultation with the Union, whereby the use of Respondent's typewriters for union business at any time was prohibited, violated Section 19(a)(6) of the Order and, derivatively, violated 19(a)(1) of the Order.

As noted earlier, the use of IRS typewriters for union business specifically known by Mr. Watkins and fully condoned by him had related to responses to management inquiries and

and Mr. Watkins' tacit approval of the use of IRS typewriters had been limited to : a) non-duty time; and b) labor-management correspondence. Accordingly, for reasons well stated by the Assistant Secretary in A/SLMR No. 1034, the remedial order issued herein will be limited to only those past practices which would not be inconsistent with Section 20 of the Order as clarified by FPM Letter 711-120 (October 14, 1976), and by Matter of GAO No. B-156287, FLRC No. 75P-1, 3 FLRC 875 (1976).

Various other contentions of Respondent, including 12(b) of the Order, were considered and rejected in the New Orleans District case, supra, and such determinations are fully determinative here. Indeed, as stated at the outset, the single controlling issue for determination in this case was, and is, whether a practice, known to Respondent, of using government typewriters for union business existed in the Appellate Branch Office. Having found that such practice did exist in the Appellate Branch Office; that Respondent knew of the practice; and that Respondent had given tacit approval to the practice, the decision in the New Orleans District case, supra, is controlling.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Southwest Region, Appellate Branch Office, New Orleans, Louisiana, shall:

1. Cease and desist from:
 - a) Unilaterally altering or changing the established past practice of allowing National Treasury Employees Union Chapter 91, the exclusive representative of its employees, or any other exclusive representative, the use of Activity typewriters, and the voluntary non-duty time assistance of certain Activity personnel, for union business relating to labor-management correspondence incidental to Chapter 91's representational obligations, and consonant with the provisions of Section 20 of Executive Order 11491, as amended, and the regulations of appropriate authorities, without first bargaining in good faith with the National Treasury Employees Union, Chapter 91, or any other exclusive representative.

b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Order:

a) Withdraw the oral instruction of Branch Chief R.J. McCoy of February 8, 1977, and his written confirmation of February 16, 1977, that "government production equipment (including typewriters), are not to be used in connection with Union business. This includes non-working hours."

b) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Branch Chief, Internal Revenue Service, Southwest Region, Appellate Branch Office, New Orleans, Louisiana, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to all employees are customarily posted. The Branch Chief, Appellate Branch Office, shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: August 10, 1978
Washington, D.C.

WBD/mml

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT unilaterally alter or change the established past practice of allowing National Treasury Employees Union Chapter 91, the exclusive representative of our employees, or any other exclusive representative, the use of Activity typewriters, and the voluntary, non-duty time assistance of certain Activity personnel, for union business relating to labor-management correspondence incident to Chapter 91's representative obligations, and consonant with the provisions of Section 20 of Executive Order 11491, as amended, and the regulations of appropriate authorities, without first bargaining in good faith with the National Treasury Employees Union, Chapter 91, or any other exclusive representative.

WE WILL withdraw the oral instruction of Branch Chief R.J. McCoy of February 8, 1977, and his written confirmation of February 16, 1977, that "government production equipment (including typewriters), are not to be used in connection with Union business. This includes non-working hours."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

Activity

Dated _____ BY: _____

Signature

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.

December 8, 1978

Appendix (cont'd)

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF SUPPLEMENTAL DECISION AND ORDER
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION AND
WELFARE, SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS, REGION II,
SAN JUAN, PUERTO RICO
A/SLMP No. 1154

In his Supplemental Recommended Decision and Order issued pursuant to the Assistant Secretary's Decision and Remand in A/SLMR No. 1127, the Administrative Law Judge made a finding of fact as directed by the Assistant Secretary.

Based on the Administrative Law Judge's finding, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY ADMINISTRATION, BUREAU OF HEARINGS AND APPEALS, REGION II, SAN JUAN, PUERTO RICO

IT IS HEREBY ORDERED that the complaint in Case No. 37-01914(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C. December-8, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

Respondent

and

Case No. 37-01914(CA)
A/SLMR No. 1127

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3534

Complainant

SUPPLEMENTAL DECISION AND ORDER

On June 27, 1978, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the alleged unfair labor practices and recommending dismissal of the complaint in its entirety. Thereafter, on September 22, 1978, the Assistant Secretary issued a Decision and Remand in A/SLMR No. 1127 remanding the case to the Administrative Law Judge for the purpose of making an appropriate finding of fact determined to be necessary in reaching a resolution of the subject complaint. On October 27, 1978, the Administrative Law Judge issued his Supplemental Recommended Decision and Order, in which he found that the alleged statement by Perez had not been made. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Supplemental Recommended Decision and Order.

In view of the Administrative Law Judge's above-noted finding of fact, I conclude that the evidence herein is insufficient to establish that the Respondent's conduct in this matter was based, in whole or in part, on the union activity of the alleged discriminatee. 1/ Accordingly, I shall order that the complaint be dismissed in its entirety.

-2-

1/ See Navy Exchange, U.S. Naval Station, Quonset Point, Rhode Island, 2 A/SLMR 376, 377, A/SLMR No. 180, at footnote 1 (1972).

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



..... :
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 In the Matter of :
 :
 DEPARTMENT OF HEALTH, EDUCATION :
 and WELFARE :
 SOCIAL SECURITY ADMINISTRATION :
 BUREAU OF HEARINGS AND APPEALS : Case No. 37-01914(CA)
 REGION II, SAN JUAN, PUERTO RICO :
 Respondent :
 :
 and :
 :
 AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES, AFL-CIO, LOCAL 3534 :
 Complainant :

SUPPLEMENTAL RECOMMENDED DECISION AND ORDER

On June 27, 1978 I issued my Recommended Decision and Order recommending that the complaint be dismissed. The complaint had alleged that Violeta Crespo, in one of the seven categories in her annual performance evaluation, had received a "satisfactory" (R) in the category of "getting along with others" (category 6) instead of an "outstanding" (O) rating in that category because of her activities as a union steward.

In my Discussion I stated that the issue was whether Crespo's rating in category 6 "was motivated, at least in significant part, by her union activities."

Buono, the Administrative Law Judge for whom Crespo worked, had testified that when he spoke to Perez (the Hearing Administrator and Crespo's official supervisor and rater) about raising Crespo's rating in category 6 from R to O, that among the reasons Perez gave for not doing so was that Crespo went too much to the office of Goldman, the Administrative Law Judge in Charge, presumably on union matters. Perez categorically denied making any such statement. I then stated that I need not resolve that conflict because even if Perez made a statement susceptible to the interpretation Buono gave it "I have no doubt the view expressed did not play the slightest part in the appraisal given Crespo by Perez". In the concluding sentence of my

Discussion I stated that since I had concluded that Crespo's appraisal was not motivated even in part by consideration of her union activities I would recommend that the complaint be dismissed.

On September 22, 1978 the Assistant Secretary remanded the case to me "for the purpose of making an appropriate finding of fact determined to be necessary in reaching a resolution" of the complaint.

In his discussion preceding his Order, the Assistant Secretary said that if Crespo's rating was based even in part on union considerations, even where there was a legitimate basis for the management action, a violation of Section 19(a)(2) of the Executive Order would be found. That is, "it would not be necessary ... to establish that agency management had acted ... to a significant extent on the basis of union considerations. ... [but] only that one of the reasons ... was based on union activity. ..."

Since I had already found that even if Perez made the statement attributed to him by Buono such view "did not play the slightest part in the appraisal given Crespo by Perez" and that "Crespo's appraisal was not motivated even in part by considerations of her union activities", the remand Order cannot mean that I should make a finding on whether "one of the reasons for agency management's conduct was based on the union activity of Crespo", as indicated in the last sentence of the last full paragraph of page 2 of the Assistant Secretary's decision. I had already found that it had not played "the slightest part". Rather it must mean that I should make a finding, not whether union consideration in fact played any part in the rating but whether Perez indicated to Buono that the rating was based in part on union activities.

I find he did not. This is not to say that Buono deliberately lied. But he was at least confused about a number of things pertaining to Crespo's rating.

Buono, although he did not rate Crespo, recommended to Perez what rating Perez should give Crespo in the several categories. The instructions on making the ratings provided that in some categories an "A" rating, or "exceeds the requirements of the job", is permitted, but not in category 6. In that category the only permitted ratings are "B" (unsatisfactory), "R" (satisfactory), and "O" (outstanding). Yet Buono recommended an "A" for Crespo in category 6, a rating not permitted in that category. Yet he told Crespo he had recommended an "O" for her in that category. Also,

December 8, 1978

- 3 -

he tried to persuade Perez to give Crespo an "O" in category 6 although he himself had not recommended her for a rating that high; he must have been confused also about the ambit of an "R" rating in category 6 which covers all gradations between unsatisfactory and outstanding. Tr. 126.

Perez did not appear to be confused about anything. It may be that at some time in some context unrelated to Crespo's performance appraisal he commented to Buono that Crespo appeared to go to Goldman's office rather often just as he might have commented about any other attribute of Crespo such as her clothes or coiffure. If he did it was at some other time and unrelated to Crespo's performance appraisal, but Buono in his confusion may have related the two. This is speculation. I do not find that such an incident occurred. But I do not believe that either Buono or Perez testified knowingly untruthfully (although we know Buono had untruthfully told Crespo that he had recommended an "O" for her in category 6). Or perhaps he was confused about that also. See Tr. 126.

I repeat my original recommendation that the complaint be dismissed.


MILTON KRAMER
Administrative Law Judge

Dated: October 27, 1978
Washington, D.C.

MK/mml

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT-RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

PENNSYLVANIA ARMY AND
AIR NATIONAL GUARD
A/SLMR No. 1155

This case involved an unfair labor practice complaint filed by the Association of Civilian Technicians (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to negotiate with respect to the clarification and implementation of a provision of the parties' negotiated agreement dealing with the posting of job vacancy announcements. The Complainant maintained that during contract negotiations the parties had agreed to conduct such further negotiations after the contract became effective.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In this regard, he found that there was no agreement to negotiate with respect to the job announcements provisions, as there was nothing in the negotiated agreement or elsewhere to suggest that further clarification or revision of the provision was contemplated by the parties. In addition, he found that the Complainant's allegation that the Respondent failed to furnish certain information regarding geographical areas of consideration was not encompassed in the complaint, that the Complainant already had the requested material, and that the complaint was moot because the contract involved had expired and the parties were about to commence negotiations on a new agreement.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation that dismissal of the instant complaint was warranted because there was no agreement between the parties to negotiate with respect to the provision at issue. In reaching his conclusion, he found it unnecessary to pass upon the Administrative Law Judge's findings relating to the scope and mootness of the complaint. Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PENNSYLVANIA ARMY AND
AIR NATIONAL GUARD

Respondent

and

Case No. 20-06674(CA)

ASSOCIATION OF CIVILIAN TECHNICIANS

Complainant

DECISION AND ORDER

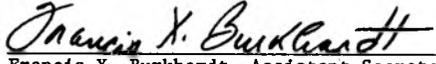
On September 15, 1978, Administrative Law Judge William A. Gershuny issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the entire record in the subject case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, as modified herein. 1/

1/ The Administrative Law Judge found, and I agree, that the Respondent did not improperly refuse to furnish certain requested information to the Complainant as the evidence established that the latter already had the requested material. Under these circumstances, it was considered unnecessary to pass upon the Administrative Law Judge's finding that the instant complaint was not broad enough in scope to encompass the allegation of an improper refusal by the Respondent to furnish certain requested information. Nor was it considered necessary to pass upon his finding that the controversy herein was moot since the agreement involved expired and the parties were about to commence negotiations on a new agreement.

IT IS HEREBY ORDERED that the complaint in Case No. 20-06674(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 8, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
 OFFICE OF ADMINISTRATIVE LAW JUDGES
 Suite 700-1111 20th Street, N.W.
 Washington, D.C. 20036



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 PENNSYLVANIA ARMY AND AIR NATIONAL GUARD :
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 Activity :
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 AND : Case No. 20-06674(CA)
 :
 ASSOCIATION OF CIVILIAN TECHNICIANS :
 :
 Complainant :
 :

Major George M. Orndoff
 Pennsylvania Army and Air National Guard
 Annville, Pennsylvania 17003
 For Activity

Leonard Spear, Esq.
 12th Floor, Lewis Tower Building
 15th and Locust Streets
 Philadelphia, Pennsylvania 19102
 For Complainant

BEFORE: WILLIAM A. GERSHUNY
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The Activity, by complaint dated March 29, 1978, is charged with a refusal to negotiate a "clarification and implementation" of a labor contract provision relating to geographical areas of consideration in filling certain civilian technician positions, in violation of Sections 19(a)(1) and (6) of Executive Order 11491, as amended. It is charged that, during contract negotiations, the parties agreed to conduct such further negotiations after the contract became effective.

I

Section 20.1 of the contract provides for a two year term, effective May 7, 1976, but contains no provision for its extension during negotiations on a new contract. Thus, at the time of the

August 31, 1978 hearing, the contract already had expired. Section 20.2 provides for re-opening of the contract by mutual consent.

The sole contract provision involved in the alleged agreement to renegotiate is Section 5.3(b)(1) of Article V, MERIT PROMOTION:

"(b)Excepted Positions

(1) The initial announcements for positions which provide for job progression or promotional opportunities for currently assigned Technicians will be limited to the minimum installation or geographical area of consideration as presently designated by TAGPA the Activity."

Negotiations relative to this provision were conducted on October 25 and 26, 1974. Complainant's Assistant Chief Negotiator, Mr. Owsinski, present at both sessions, testified that the parties agreed to accept the current practice as to designation of geographical areas of consideration and that the Association assumed it could re-open the contract during "the mid-term contract re-opener" to renegotiate this provision. Nether the official notes taken by the Association during negotiations nor the notes taken by individual Association representatives reflect any agreement to renegotiate or "re-open". Nevertheless, Mr. Owsinski recalls that the Activity negotiator stated, "We can work this out." The testimony of two other Association representatives, present on at least one of the sessions, was essentially identical to that of Mr. Owsinski, except that Mr. Ruby conceded that other Activity assurances were reflected in the Association's notes. Another Association negotiator, Mr. Flynn, was subpoenaed by the Association, but did not appear. His unsworn statement, in letter form, to a Labor Department compliance officer was not admitted in evidence.

By letter of counsel dated November 5, 1977, the Association first requested that negotiations for the revision of Section 5.3(b)(1) be commenced. The letter makes no reference to a 1974 agreement during contract negotiations and, the Association concedes, was intended as a request to re-open under Section 20.2. The request was rejected.

Six months after the contract became effective, two provisions were amended, one of which was Section 5.5, Evaluating and Ranking Candidates. Mr. Owsinski testified that while those renegotiations were the result of a similar agreement during original contract negotiations, they did not deal with the subject of geographical areas of consideration under Section 5.3(b)(1).

Finally, considerable Association testimony was received to the effect that the Activity agreed, during negotiations, to later provide the Association with information as to how areas of consideration were determined. Like the alleged agreement to renegotiate, this agreement is not reflected in the Association's notes. Disputed testimony was received that several oral requests were made for such information shortly after the contract became effective and that, out of frustration, the Association counsel was requested to make a written request for the information. No such letter was offered in evidence and the only correspondence in the record makes no reference to an agreement to provide information or a prior oral request. The Activity's Personnel Officer, Colonel Niles, testified that the criteria for determining geographical areas of consideration under the contract are contained in personnel documents available at all facilities to all civilian personnel. When recalled to the stand by the Court, Mr. Owsinski conceded that the Association already had such data. He stated that the Association was seeking a document concerning such areas which he recalls seeing posted prior to the time civilian technicians were made federal employees. Colonel Niles testified such a document never existed and that Mr. Owsinski previously had been so informed.

II

For a number of reasons, I find no agreement to negotiate the clarification and implementation of Section 5.3(b)(1) of the contract. First, the contract language does not suggest that further clarification or revision was contemplated by the parties. If that had been their intent, the provision would have contained language, like that in Section 5.5 which was later amended, reflecting an agreement for further negotiation. Second, the Association's own notes of the negotiating sessions reflect no such agreement. That omission alone strongly suggests the absence of an agreement. Also suggestive of no agreement is the fact that the Association's December, 1977 request for negotiations makes no mention of an earlier agreement. The record thus points to the inescapable conclusion that members of the Association's negotiating team present at the two relevant sessions settled on contract language with the "hope" that the Activity later would agree, under Section 20.2, to re-open negotiations. This expectancy falls far short of supporting a charge of "agreement".

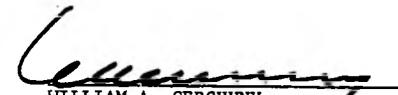
Further I find the Association's charge of a refusal to furnish the criteria used by the Activity to determine the geographical areas of consideration is not encompassed in the complaint charging a refusal to negotiate. The find that the complaint, drafted by counsel, was based on the Activity's negative response to the December, 1977 demand for negotiations and was not intended to charge a failure or refusal to furnish information. If counsel, an experienced labor law attorney, had intended the latter, he would have specifically charged a failure to provide information necessary for bargaining (or grievance-handling). In any event, I find that the Association

already had available to it all criteria used by the Activity in determining areas of consideration. In this respect, the Association's witnesses were lacking in candor. It was not until the Court recalled Mr. Owsinski, after the Activity rested, that the Association acknowledged it already had the requested material.

Finally, I find the contract to have expired and the parties about to commence negotiations on a new contract. Thus, the controversy is moot in the sense that no effective relief, even if otherwise warranted, could be afforded.

RECOMMENDATION

It is recommended that the Complaint be dismissed.


 WILLIAM A. GERSHUNY
 Administrative Law Judge

Dated: September 15, 1978
 Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, REGION IX,
SAN FRANCISCO, CALIFORNIA

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, REGION IX,
SAN FRANCISCO, CALIFORNIA
A/SLMR No.1156

Respondent

and

Case No. 70-5978(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3159, AFL-CIO

Complainant

DECISION AND ORDER

On September 25, 1978, Administrative Law Judge Alfred Lindeman issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in conduct which was violative of Section 19(a)(1) and (6) of the Order and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge also found that the Respondent's conduct was not violative of Section 19(a)(2) of the Order and recommended that that aspect of the complaint be dismissed. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26 of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education, and Welfare, Region IX, San Francisco, California, shall:

1. Cease and desist from:

(a) Conducting formal discussions concerning grievances, personnel policies and practices, or other matters affecting general

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3159, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by denying union representation to a probationary employee at a meeting called for the sole purpose of terminating his employment. Further, the Complainant alleged that the termination was based, in whole or in part, upon union animus.

The Administrative Law Judge concluded that the Respondent had violated Section 19(a)(1) and (6) of the Order. He found that, under all the circumstances, since the meeting called by the Respondent was for the purpose of notifying the probationary employee of his termination such meeting was a formal discussion within the ambit of Section 10(e) of the Order and that the Complainant should have been notified of its opportunity to be represented. In regard to the Section 19(a)(2) allegation, the Administrative Law Judge found that the evidence failed to establish that the probationary employee's termination was discriminatorily motivated and that it reflected, in fact, that the termination was based upon his unsatisfactory work performance.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations. Accordingly, he ordered the Respondent to cease and desist from engaging in the conduct found violative of the Order and to take certain affirmative actions. He also ordered that the portion of the complaint alleging a violation of Section 19(a)(2) of the Order be dismissed.

working conditions of employees in the unit without giving the American Federation of Government Employees, Local 3159, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Executive Order:

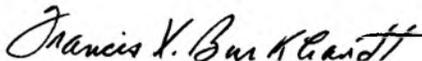
(a) Notify the American Federation of Government Employees, Local 3159, AFL-CIO, of, and give it the opportunity to be represented at, formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(b) Post at its facility located in the San Francisco, California, area copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Regional Director and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Regional Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges a violation of Section 19(a)(2) of the Order, be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 11, 1978



Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving the American Federation of Government Employees, Local 3159, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Executive Order.

WE WILL notify the American Federation of Government Employees, Local 3159, AFL-CIO, of, and give it the opportunity to be represented at, formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Ave., San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

San Francisco Regional Office
Suite 600 - 211 Main Street
San Francisco, California 94105



Area Code-415 556-0555

3159 of the American Federation of Government Employees, AFL-CIO, charges the Respondent Activity, U.S. Department of Health, Education and Welfare, Region IX, with violating sections 19(a)(1), (2) and (6) of the Executive Order in connection with the termination of probationary employee Leslie Edge from his position in the Office of Education on August 19, 1977.

Pursuant to a Notice of Hearing on Complaint, dated August 1, 1978, a hearing was held in San Francisco, California, on August 16 and 17, 1978, at which both parties were afforded full opportunity to be heard, to adduce evidence, to call, examine and cross-examine witnesses and to make oral arguments. Post-hearing briefing, as requested by the parties, has been fully considered. Upon the entire record, including my observation of the demeanor of witnesses and my review of the exhibits, I make the following findings of fact, conclusions and recommendations.

In the Matter of)

DEPARTMENT OF HEALTH, EDUCATION)
AND WELFARE, REGION IX,)
SAN FRANCISCO, CALIFORNIA)
Respondent)

and)

AMERICAN FEDERATION OF GOVERN-)
MENT EMPLOYEES, LOCAL 3159,)
AFL-CIO)
Complainant)

CASE NO. 70-5978(CA)

Findings of Fact

Leslie Edge was employed in the Office of Education on February 14, 1977 (Tr. 79) */ as a Clerk-Dictating Machine Transcriber, GS-316-4 (Cx. 14). The Complainant Union at all times material had exclusive recognition as representative of the bargaining unit of which Edge was a member; the Union negotiated and entered into a collective bargaining agreement with the Activity herein, effective December 16, 1975 (Ax. 1). During his seven months employment, Edge was not a member of the Complainant Union.

Edge worked as a clerk in the Control Central unit of the Administration and Management Division of the Office of Education. He was first placed under the supervision of Pat Becket, a grants specialist. She trained him by giving him verbal instructions and by referring him to an office manual. She found a series of problems with his performance, including his failure to follow instructions and difficulty getting along with co-workers, and in June of 1977, she recommended to Ned Bynner, her superior, that Edge be terminated; failing

Ian Robert McLean, President and
Jack Louie, Vice-President
American Federation of Government
Employees, Local 3159
P. O. Box 5363
San Francisco, California 94102
For the Complainant

Leonides Albidrez, Jr.
Gary S. Kataoka
Labor Relations Officers
Department of Health, Education
and Welfare, Region IX
50 United Nations Plaza
San Francisco, California 94102
For the Respondent

Before: ALFRED LINDEMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding arises under Executive Order 11491, as amended (hereafter the "Executive Order"), pursuant to a Complaint filed October 17, 1977, and an Amended Complaint dated July 10, 1978, wherein Complainant, Local

*/ The following abbreviations are used herein:

Tr. - Transcript page
Cx. - Complainant's Exhibit
Ax. - Activity's Exhibit

that, she asked to be relieved as Edge's supervisor (Tr. 113-119, 146). Edge's next supervisor was Alicia Marquez. She also found his work performance and attendance unsatisfactory (Tr. 166-7).

On July 5, 1977, Edge was involved in what was later to be referred to as "The Daly City Incident." In the early morning hours, while off duty, Edge received a parking ticket. Then, by his own sworn testimony, he telephoned the police department, identified himself as a Federal Government Grants Management Specialist, and threatened to prevent Daly City from receiving any more Office of Education grants unless his ticket was rescinded (Tr. 51-2, 567). The conversation was tape-recorded by the police department, and the next day Edge acknowledged his conduct to Ned Bynner (Cx. 19). According to Edge, Bynner told Edge "Don't worry Les, we will take care of it" (Tr. 54). Further, according to Edge, on July 21, 1977, there was a meeting with Edge, his then immediate supervisor Alicia Marquez, and the Assistant Regional Commissioner, John Thorslev, at which Thorslev told Edge he would probably just get a reprimand (Tr. 55). Between the time of that meeting and August 19, 1977, Marquez and two HEW personnel office representatives, James Duffy and Wanda Littlejohn, each expressed the opinion that Edge be terminated as a result of said incident (Tr. 173, 190, 194, 210). After Littlejohn expressed her recommendation that Edge be terminated immediately to Bynner on August 18, 1977, Bynner said he was going to discuss it with his superior, Thorslev, who was on vacation at the time (Tr. 283-4).

Contemporaneously with the foregoing events, since April of 1977 Edge had been requesting a performance evaluation in order that he could use it to apply for another job. At first he had been told he could not get an evaluation for a year (Tr. 40; see also Cx. 9). But after he made a written demand of Bynner, dated August 17, 1977, asking for an evaluation "by Friday at the latest" (Cx. 4), Bynner and Becket met with him on Thursday, August 18, 1977, and gave him a performance evaluation. Edge did not like the evaluation, including the fact that his earlier supervisor, Becket, had acted as his rater rather than Marquez (who was on leave at the time), and he indicated he would appeal the appraisal or take some legal action (Tr. 43). He proceeded to speak with personnel officers Littlejohn (later the same day) and Duffy (in the morning of August 19) (Tr. 46). They gave him information and forms regarding the filing of a grievance under the collective bargaining agreement and the names of the Complainant Union's officials (Tr. 211-213).

Based on a composite of the record I find that Edge attempted to see the Regional Director on August 17 about his difficulty obtaining the appraisal (Ax. 9, page 2) and indicated his intent to do so again in order to "fight his performance evaluation" after receiving the August 18 appraisal (Cx. 12, page 2; Ax. 5, page 1; Tr. 10, 47). The Regional Director's Office apprised Duffy of the attempt, and Duffy informed Bynner and Becket. Bynner then made an appointment for them to see the Regional Commissioner, Duon Bjerke, about Edge on August 19 (Ax. 5; Tr. 143-5, 153-4).

At a meeting at 2:00 p.m. on August 19, 1977, attended by Regional Commissioner Bjerke, Bynner, Becket and another employee, Hodge, it was decided that Edge should be terminated "right away" (Ax. 5, page 1; Cx. 3; Tr. 155). The termination letter was prepared with the assistance of Duffy in personnel, signed by Bynner (for Thorslev), and at 4:10 p.m. Edge was called into Thorslev's office. He was handed the letter in the presence of Bynner, Becket and Hodge (Cx. 5; Ax. 5; Tr. 50, 250). There were no discussions about the contents of the letter. Edge opened it but didn't read it until after he left. Edge was asked to turn in his HEW identification and office key, which he did. The meeting lasted about three minutes. No notice or opportunity had been afforded for Edge to have a union representative present on this occasion.

Subsequently, after meeting with Edge, Complainant Union's president, Mr. Ian McLean, telephoned Bynner, to discuss the Edge matter. According to Mr. McLean's testimony, Bynner said Edge's superiors originally were going to issue a reprimand concerning the Daly City episode until Edge "threatened to appeal his appraisal or fight his appraisal, take it to the R.D., ... that this was seen by management as the last straw with Mr. Edge, and they decided that they would just terminate him inasmuch as he was in a probationary period" (Tr. 10-11). Mr. McLean also stated that Bynner said "The basis for the termination was essentially the 'tape'" (Cx. 1). ^{1/} Following these discussions the formal charges and Complaint were filed in this matter, and after some interim decisions by the Regional Administrator the Notice of Hearing was ultimately issued (see Assistant Secretary's Exhibits la-h).

^{1/} Bynner, no longer a government employee, was not called as a witness, and neither party offered into evidence his sworn statement given to the Department of Labor Compliance Officer who investigated the matter.

Conclusions

I

Under the facts of this case, I conclude that the failure to afford probationary employee Edge the opportunity to have a union representative present when he was handed his termination letter on August 19, 1977, and the failure to afford the Complainant Union the opportunity to be present at that meeting when the employee was given his notice of termination were in violation of sections 19(a)(1) and (6) of the Executive Order, but not in violation of section 19(a)(2).

Violation of Sections 19(a)(1) and (6)

Respondent has violated sections 19(a)(1) 2/ and (6) 3/ of the Executive Order by denying Edge and the union their respective rights protected under section 10(e) of the Executive Order 4/, and Article IV, section H 5/ of the collective bargaining agreement between the parties (Ax. 1). On their face, these provisions afford the opportunity for union representation when two requirements are met: (1) the discussion or meeting must be "formal," and (2) the subject matter of the discussion or meeting must concern "grievances, personnel policies and practices, or other matters affecting general working conditions."

2/ Section 19. Unfair Labor Practices: "(a) Agency management shall not - (1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order."

3/ Section 19. Unfair Labor Practices: "(a) Agency management shall not - (6) refuse to consult, confer, or negotiate with a labor organization as required by this Order."

4/ Section 10(e): "... When a labor organization has been accorded exclusive recognition ... the labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." (underlining added).

5/ Section H: "The Union has a right to be represented at formal meetings between the Employer and employees concerning the adjustment of individual employee grievances, personnel policies and practices, or other matters affecting general working conditions." (underlining added).

These criteria have been applied to "termination" meetings or discussions in Department of Defense, U.S. Navy, Norfolk Naval Shipyard, A/SLMR No. 908 (1977), where the Assistant Secretary found meetings called by management for the purpose of notifying four probationary employees of their terminations were "formal discussions." The Assistant Secretary also held: "Such meetings not only substantially affected personnel policies as they related to the specific employees' job security, but they also substantially affect personnel policies and practices as they pertain to other employees in the bargaining unit."

Respondent contends that this case should be distinguished from Norfolk because the delivery of Edge's termination letter on August 19, 1977, should be viewed as a substitute for postal delivery and, thus, not a "meeting" where substantive reasons for the termination are discussed and the employee is given an opportunity to reply or explain.

I am not persuaded that the policies intended to be advanced by the Executive Order (e.g., "the well-being of employees and efficient administration of the Government") would be served by relegating the event when an employee receives notice of termination to a "non-formal" occasion through the application of a hyper-technical analogy to postal delivery. To be sure, Respondent was acting within its rights when it prepared the termination letter according to the provisions of the Federal Personnel Manual section concerning "Separation of Probationers" (Cx. 18), and delivered it in accordance with its normal practice (Tr. 251-3). But having elected to call a meeting to deliver said letter rather than use the U.S. mails, Respondent created an occasion where a discussion could reasonably be anticipated even though the termination decision had been made and reduced to writing. In fact, Ms. Becket, one of Edge's supervisors who was present at both the meeting with Bjerke and the later meeting when the letter was handed to Edge, testified that had Edge wanted to discuss the letter, they were prepared to do so (Tr. 157). Thus, I conclude the first requirement of section 10(e) of the Executive Order and Article IV, section H, was satisfied in this case.

Further, I find the second requirement was satisfied because the "termination letter meeting" not only directly concerned Edge's personnel status but it also had potential relevance to other employees in the bargaining unit; it involved management's policy and procedures regarding the termination of probationary employees. Department of Defense, U.S. Navy, Norfolk Naval Shipyard, supra.

If the right to be afforded the opportunity of representation at a termination meeting exists, as I conclude it does, both the employee 6/ and the union possess the derivative right to be notified of the opportunity to exercise such right a reasonable period in advance of said meeting. Without such notification by the Activity, which knows the subject matter of the meeting, neither the unprepared employee nor the unaware union can be expected to request the exercise of their rights to representation. Accordingly, Respondent's failure to give such notification constituted both an actionable restraint upon the employee under section 19(a)(1) of the Executive Order and a refusal to consult and confer with the union under section 19(a)(6).

Having found the foregoing violation, however, it must be noted that the Respondent had no basis for knowing its delivery of Edge's termination letter at a "meeting" rather than by mail would trigger the requirements that I now conclude exist. That is, the collective bargaining agreement does not cover procedures for notifying probationary employees of termination, and the Respondent did follow the steps prescribed in the Federal Personnel Manual for notifying the probationer in writing. Accordingly, absent a finding that the termination itself was a reprisal for the employee's exercise of protected rights, I do not believe the fact that the letter was delivered in person and without the opportunity for union representation is a valid basis for ordering reinstatement as the remedy. See Department of Defense, U.S. Navy, Norfolk Naval Shipyard, supra (violation based on denial of employee's request for representation at termination meeting did not warrant reinstatement); Department of Health, Education & Welfare, Public Health Service, Indian Health Service, Phoenix Indian Medical Center, A/SLMR No. 798 (1977) (procedural errors and deficiencies in separation procedure were held not a violation of the Executive Order).

No Violation of Section 19(a)(2)

I conclude section 19(a)(2) 7/ of the Executive Order was not violated in this case because there is no

6/ As the Federal Labor Relations Council stated with respect to section 10(e) in FLRC No. 75 P-2, "while this right ... inures to the union ... the employee involved likewise is vested with a derivative or companion right to insist that the agency fulfill its express obligation..." Statement on Major Policy Issue, No. 116, December 2, 1976.

7/ Section 19. Unfair Labor Practices: "(a) Agency management shall not - (2) encourage or discourage membership in

evidence that the termination notification procedure followed with Edge was motivated in whole or in part by union animus. Edge was not a member of the union, his supervisors had no knowledge whatsoever regarding his union affiliation or sympathies, and there was no mention of the union in any of the deliberations or discussions with or concerning Edge. Although the Complainant presented evidence regarding certain alleged actions Respondent took against three other union member employees who had filed EEO complaints, there was no showing that the treatment of Edge was in any way discriminatory or related to "membership in a labor organization." 8/ Social Security Administration, Great Lakes Program Center, Chicago, Illinois, A/SLMR No. 804 (1977). Instead, I find Respondent's motivation for dealing with Edge in the manner it did was the desire to act as swiftly as his probationary status would allow, and it did so by adhering to the Federal Personnel Manual (Cx. 18). Department of Health, Education & Welfare, Public Health Service, Indian Health Service, Phoenix Indian Medical Center, supra; Department of the Navy Norfolk Naval Shipyard, A/SLMR No. 548 (1975).

II

I conclude there was no violation of sections 19(a)(1), (2) or (6) of the Executive Order resulting from the decision to terminate probationary employee Edge.

Under the regulations, 29 C.F.R. § 203.15, Complainant has the burden of proving the allegations contained in its Complaint and Amended Complaint by a "preponderance of the evidence." Complainant's contention that Edge was fired because of his threat to pursue his protected rights "to grieve" his performance evaluation is based on two types of evidence. First is the testimony of Complainant president's conversation with Bynner, i.e., that Edge going to the Regional Director was "the last straw". Second is the circumstantial chronology of events, namely, that as of the time of the "performance evaluation meeting" on August 18, there was no mention of termination, but after obtaining knowledge of Edge's intent to go to the Regional Director, Respondent terminated him the next day. Upon analysis of the entire record in this case, however, I find that this evidence

7/ (Continued) a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment."

8/ Nor did the Complaint or Amended Complaint allege any discrimination based on Edge's union status.

only establishes there was a definite nexus between Edge's intention to go to the Regional Director concerning his performance evaluation and the decision to arrange a meeting with Bjerke. The preponderance of the evidence does not indicate that the decision to terminate Edge was based on his efforts to exercise his rights to appeal his performance evaluation.

The facts of this case are to be distinguished from Veterans Administration, North Chicago Veterans Hospital, North Chicago, Illinois, A/SLMR No. 1024 (1978), where the termination of an employee was overturned as a violation of the Executive Order based upon findings that the termination was not for valid reasons but was in fact a reprisal for the employee's union activities. That is not the situation here. This record is replete with evidence that Respondent had a valid reason for terminating Edge based on his off-duty threat to a police officer to foreclose future federal grants to Daly City unless Edge's parking ticket was destroyed. 9/ If anything, Edge, a probationary employee, had been accorded deferential treatment by his supervisors who avoided giving him a negative evaluation as long as possible (Cx. 9), even though they had had occasions to admonish him about his excessive use of leave (Ax. 7; Tr. 169), criticize his performance (Ax. 3) and been informed of what was perceived as a serious episode of misconduct concerning his federal government employment (Cx. 19; Ax. 8).

I find the fact that no mention was made of termination on August 18, and yet termination was effectuated on August 19, is attributable to the decision-making vacuum caused by Thorslev's (Bynner's superior) absence from the office. That is, in Thorslev's absence, Bynner had been unable to make the recommended decision regarding Edge's misconduct with the Daly City police and was awaiting Thorslev's return to work (Tr. 207, 210; Ax. 10, page 2). The intervening performance evaluation led to the development that Edge was "taking it to Regional Director," and, indeed, that information was "the last straw" for Bynner that precipitated the meeting with Regional Commissioner Bjerke. However, the decision to hold the meeting with Bjerke about Edge, though it was causally related to Edge's efforts to go

9/ Although Complainant may argue that the transcript of the taped conversation does not clearly support a conclusion of wrongdoing, Edge's own testimony and that of his supervisors who heard the tape leave no doubt about the intent and effect of Edge's threat both in Edge's mind and the minds of his superiors. (Tr. 51-2, 56, 172-3, 190, 193-4, 282-3, 300, 304).

to the Regional Director, was not an independent violation of any protected rights under the Executive Order or the parties' collective bargaining agreement absent a showing that the action was taken as a reprisal for Edge going to the Regional Director. In fact the Activity had its own protected right and responsibility under Executive Order section 12(b) to reach a decision as to what disciplinary action, if any, it would take concerning the Daly City incident.

I credit the live testimony of those parties involved in recommending, arranging or attending the meeting in question to the effect that the purpose of the meeting was to prepare Bjerke for a call from the Regional Director. Ms. Becket testified about the events leading to the meeting as follows:

... Mr. Bynner received a call from personnel and they informed him that Mr. Edge was going to the Regional Director to discuss his evaluation and at this point, Mr. Bynner then decided that because the Regional Director would be contacting the Regional Commissioner [Bjerke], it was now important that we should appraise [sic] him of the difficulties we were having. So he asked for a meeting with Mr. Bjerke and that is how it occurred. (Tr. 143-4).

Mr. Duffy, the personnel officer who informed Bynner of Edge's efforts to see the Regional Director, testified:

I told him [Bynner] we were at the stage now where Mr. Thorslev was not there and since the regional director's office and I felt the regional commissioner [Bjerke] had to become involved....

I thought it was appropriate for him [Bynner] now to sit down and talk to Mr. Bjerke and give him everything that occurred since early June or early July, and how did he see the matter. My recommendation was the same recommendation it was two and a half weeks ago, that Mr. Edge be terminated. That was all I was saying for the reasons I had given two and a half weeks earlier. (Tr. 241-2; see also Ax. 9, page 2).

Thus, I find the evidence of Bynner's comments to Mr. McLean and the evidence of the timing of the meeting do not support a conclusion that Respondent violated the Executive Order. Instead, I find the evidence establishes

that for Bynner, the supervisor without clear authority to make a decision in Thorslev's absence, Edge's actions in going to the Regional Director were "the last straw" in terms of causing the meeting, but Complainant has not shown that the meeting was intended to sanction Edge for the exercise of any protected activities.

Having found that the decision to hold the meeting with Bjerke concerning the month-long developments regarding Edge, though causally related to Edge's announced intention to go to the Regional Director, was not made as a reprisal, I have closely reviewed the record evidence regarding the substance of the meeting itself to determine whether the decision to terminate was a reprisal against Edge's exercise of protected rights. Ms. Becket, the only person of those who attended the meeting to actually testify at the hearing, stated:

We discussed the troubles that we had been having and he [Bjerke] asked us questions about his [Edge's] performance and about the Daly City incident. Then he asked was he such a good employee that he was worth all of this trouble and we agreed that we did not think that he was and then Mr. Bjerke said, "Then, fire him" and Mr. Bynner said, "Today?" and he said, "Yes, if you're going to do it, you should do it today" and so we went back and I believe Mrs. Hodge prepared the letter working with personnel. (Tr. 155).

In her signed statement given to the Department of Labor compliance officer Ms. Becket stated:

Mr. Bynner, Ms. Hodge and I did in fact meet with Mr. Bjerke and informed him of all the problems regarding Mr. Edge. When we informed him of the incident with the Daly City Police Department, Mr. Bjerke indicated that that incident standing alone was serious enough to terminate Mr. Edge. Mr. Bjerke asked us if Mr. Edge was really such a good employee that we were willing to put up with all the problems we had described to him. We indicated that he was not very good. Mr. Bjerke informed us that we should terminate Mr. Edge right away. (Ax. 5; Tr. 125).

The signed statement of Bjerke, who was not called to testify by either party, was introduced into evidence. It contains the following relevant assertions:

As I recall the August 19 meeting, either Fran [Hodge], Ned [Bynner], or Pat [Becket] mentioned to me that John Thorslev was on vacation, but that they had spoken to him regarding the problem they were bringing to my attention. They indicated that a probationary employee in their office, Leslie Edge, had had a number of problems and that they mentioned that Mr. Edge had had a problem with the Daly City Police Department. As I recall, they described the incident to me. Additionally, they described problems Mr. Edge had had regarding his work habits and his relationships with his supervisors. After they described these problems to me and expressed their recommendation that he not be continued in service, I indicated that if they had made a thorough and complete analysis and had concluded that the appropriate action was to termination [sic] Mr. Edge, they should initiate the action. The action was signed by Ned Bynner. It was my impression during the meeting that to terminate Mr. Edge, the action required was of an unpleasant nature to all of the people involved.

I do not recall any mention of the fact that Mr. Edge had been given his performance appraisal and had indicated that he intended to appeal the appraisal. I do not recall any mention of any appeal or grievance whatsoever. I also do not recall any mention of the fact that Mr. Edge had attempted to see the Regional Director and that the purpose of the meeting with me was to put me on notice regarding the problems with Mr. Edge so that I would be able to respond should the Regional Director contact me. (Cx. 3).

Although I credit Ms. Becket's contrary recollection regarding the last paragraph quoted from Bjerke's statement (Tr. 160), I conclude that the preponderance of the evidence is that the decision to terminate was based on the numerous, previously pending misconduct recommendations stemming from the "Daly City Incident" and the less-than-satisfactory performance assessments of Edge's supervisors; it was not a reprisal or a pretext for denying Edge any protected rights to grieve or appeal his performance

evaluation. 10/ See Department of Transportation, Federal Aviation Administration, William P. Hobby Aircraft Traffic Control Tower (TRACAB), Houston, Texas, A/SLMR No. 1039 (1978); Veterans Administration, Biloxi VA Center, Biloxi, Mississippi, A/SLMR No. 450 (1974).

In retrospect, it is observed that Respondent may not have acted wisely in unnecessarily assuming the risks it did in effecting the termination so close in time to Edge's activities vis-a-vis the Regional Director, and in failing to allow opportunity for union representation at the time the decision was made, notwithstanding the fact it was acting within its rights in both respects. I reject Complainant's contention (Cx. 12), however, that the chronological juxtaposition of Edge's activities to appeal his performance evaluation and his termination will have a "chilling effect" on other employees who might be inclined to exercise their rights to appeal performance evaluations. There need be no such chilling effect on other employees who have not engaged in misconduct that is by itself a valid basis for disciplinary action.

III

The last issue for determination on the facts of this case is whether the decision to terminate Edge and/or the procedure followed in giving him notification constituted a patent breach of certain portions of the parties' collective bargaining agreement, in violation of sections 19(a)(1) and (6) of the Executive Order. I conclude that neither the Respondent's actions in deciding to terminate nor the notification procedure employed was a clear or unilateral breach of the collective bargaining agreement.

10/ Even though Edge was terminated before he perfected the filing of his performance evaluation grievance, it would seem the pre-filing indicia of Edge's intent on August 18 and 19, 1977, would be sufficient to maintain his grievance rights for the limited purpose of seeking modification, if warranted, of the performance evaluation form for future use in seeking other employment. See Department of the Treasury, IRS, Chicago District, Request for Review, No. 968 (1977), FLRC No. 77A-111 (1978). See also Tr. 274-6.

The collective bargaining agreement of the parties (Ax. 1) contains provisions concerning the union's rights and obligations to represent employees and to be present at "formal meetings" between the employer and employees (Article IV, sections B and H); employees' rights to representation during "adverse-action proceedings" and during grievance procedures (Article IV, sections D and K; Article XV, section F); the employer's responsibilities during disciplinary actions (Article XV, sections A, C, F and K) and grievance procedures (Article XXI); and the proper procedures to be followed in connection with employee position classification (Article VIII, sections A, C, E, H) and performance evaluation appraisals (Article IX, sections A, B, C and D). Complainant has failed to show that Respondent was not at all times herein relevant to the handling of employee Edge following procedures which Respondent's personnel in good faith believed to be the proper steps involving a probationary employee.

First, it must be noted that the collective bargaining agreement does not in any of the foregoing provisions refer to the term "probationary employees." Thus, it is ambiguous whether the parties intended any distinction between probationary and permanent employees in terms of the application of the agreement. Further, the evidence of record is that the personnel individuals who dealt with Edge cooperated in his efforts to obtain a performance evaluation, gave him the names of union officials to contact (by one account even before he received his evaluation), and followed what they genuinely perceived to be the applicable regulations in connection with the preparation and delivery of the termination letter (Tr. 213, 253, 255, 259, 267-8, 270-1; Cx. 18; Ax. 10, page 1).

Complainant has introduced evidence that Edge may have been performing duties not precisely contained in his official position description as a Clerk-Dictating Machine Transcriber (Cx. 14) and that the persons acting as his supervisors were not literally classified as supervisory personnel themselves. There has been no evidence presented, however, that any of Edge's superiors knew they were running afoul of any of the collective bargaining agreement provisions dealing with position descriptions and performance evaluations, or that Edge or any union representative had voiced any objection to his duties, supervisors, or position description. Moreover, I note that in my view Edge's duties as a "clerk in Control Central" were not significantly outside his position description, and he had been fully instructed as to his duties by the persons acting as his supervisors.

In any event, the issue of whether an employee may perform tasks in part outside his position description and be supervised by persons not specifically classified as supervisory personnel is not before me as an alleged unfair labor practice (see Assistant Secretary Exhibits 1a and b). Such issue should be resolved by the parties under the terms of their collective bargaining agreement, Article XXI, section B. See Report No. 49, Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations, Vol. 2, p. 639 (February 15, 1972).

In view of the foregoing, I do not find the requisite flagrant breach of contract that would constitute an unfair labor practice.

Recommendation

Accordingly, on the basis of the foregoing findings and conclusions, I hereby recommend that the Assistant Secretary adopt the following Order designed to effectuate the policies of Executive Order 11491, as amended:

RECOMMENDED ORDER

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education and Welfare, Region IX, San Francisco, California, shall:

1. Cease and desist from:

(a) Conducting formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit, including meetings at which probationary employees are terminated, without giving notice to the American Federation of Government Employees, Local 3159, AFL-CIO, the employees' exclusive representative, of the opportunity to be represented at such discussions by its own chosen representative.

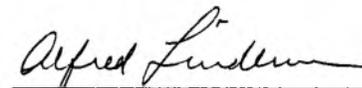
(b) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Order, and refusing to consult, confer or negotiate with the American Federation of Government Employees, Local 3159, AFL-CIO, by failing to notify them of their rights to request representation by the American Federation of Government Employees, Local 3159, AFL-CIO, at formal discussions concerning grievances, personnel

policies and practices, or other matters affecting general working conditions of employees in the unit, including meetings at which probationary employees are terminated.

2. Failing to take the following affirmative actions in order to effectuate the purposes and provisions of the Executive Order:

(a) Post at Department of Health, Education and Welfare, Region IX, San Francisco, California, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director and they shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure such notices are not altered or defaced or covered by any other material.

(b) Pursuant to section 203.27 of the regulations, notify the Assistant Secretary in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.


ALFRED LINDEMAN
Administrative Law Judge

Dated: September 25, 1978
San Francisco, California

AL:scm

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit, including meetings at which probationary employees are terminated, without giving notice to the American Federation of Government Employees, Local 3159, AFL-CIO, the employees' exclusive representative, of the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Order, or refuse to consult, confer or negotiate with the American Federation of Government Employees, Local 3159, AFL-CIO, by failing to notify them of their rights to request representation by the American Federation of Government Employees, Local 3159, AFL-CIO, at formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit, including meetings at which probationary employees are terminated.

(Agency or Activity)

Dated _____

By _____
(Signature)

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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

December 11, 1978

A/SLMR No. 1157

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. CUSTOMS SERVICE,
REGION IV,
MIAMI, FLORIDA
A/SLMR No. 1157

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order when it extended a 90-day warning notice connected with a performance appraisal. The Complainant alleged the extension was in reprisal for seeking union assistance in processing a grievance filed over the original warning notice.

The Administrative Law Judge recommended that the complaint be dismissed. Thus, he found no evidence that the extension was imposed based on the filing of the grievance, or on other discriminatory considerations.

The Assistant Secretary adopted the recommendation that the complaint be dismissed, noting that the evidence failed to establish that the Respondent's conduct was discriminatorily motivated. Accordingly, he ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. CUSTOMS SERVICE,
REGION IV,
MIAMI, FLORIDA

Respondent

and

Case No. 42-4188(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

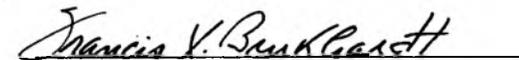
On September 20, 1978, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation. Thus, I agree that there is insufficient evidence to establish that the Respondent's conduct herein was discriminatorily motivated.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 42-4188(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 11, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



In the Matter of

U.S. CUSTOMS SERVICE, REGION IV
MIAMI, FLORIDA

Respondent

Case No. 42-4188 (CA)

and

NATIONAL TREASURY EMPLOYEES UNION
Complainant

Appearances:

KEITH POOLE, ESQ.

Assistant Counsel
National Treasury Employees Union
3445 Peachtree Road, N.E.
Suite 930
Atlanta, Georgia 30326
For the Complainant

MARC L. BARBAKOFF, ESQ.

Office of the Regional Counsel
U.S. Customs, Region IV
99 S.E. 5th Street
Miami, Florida 33131
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated February 2, 1978 and filed February 6, 1978 alleging a violation of Sections 19(a) (1) and (2) of the Executive Order. By response dated February 24, 1978 the Respondent denied the material allegations of the complaint.

On April 28, 1978 the Regional Administrator issued a Notice of Hearing for a hearing to be held on July 13, 1978 in Miami, Florida. A hearing was held on that day in that City. Both parties were represented by counsel. Both parties presented witnesses who were examined and cross-examined and offered exhibits which were received in evidence. Both parties made closing arguments and filed timely briefs.

Facts

The Complainant is and at all relevant times was the certified and recognized exclusive representative of a unit of Respondent's employees containing about 800 of Region IV's approximately 2,000 employees. Region IV includes six Districts including a District in Miami, Florida.

David Vogt is an employee of the Respondent represented by the Complainant and a member of its Chapter 146. He has been an employee of the Respondent's Miami District since 1971 and since 1975 has been a Customs Air Officer.

Edward H. Ragan is a Supervisory Customs Air Officer and Vogt's supervisor. He has been employed by Respondent since 1971 in various capacities. He has been a Supervisory Customs Air Officer since October 1976 and for three years before that he was a Customs Air Officer. He became a member of Complainant's Chapter 137 ^{1/} about the time it was organized in 1975 and authorized a checkoff of his dues. After he became a supervisor he was no longer in the unit and no longer covered by a checkoff but continued his membership in Chapter 137 until he was dropped for non-payment of dues in March 1978.

On July 22, 1977 Ragan gave Vogt his annual performance appraisal dated June 30, 1977. The appraisal was based on fourteen aspects of performance, with a number from 1 to 5 being given in each aspect, with 1 being the lowest and 5 the highest performance in each aspect. Appraisals were as outstanding, satisfactory, unsatisfactory, or "rating postponed". An average of 3 was required for a "satisfactory" rating. Ragan rated Vogt as 3 in eight factors, 2 in five factors, and 1 in one factor, the factor of "attitude". ^{2/} The Federal Personnel Manual provides that before a rating of unsatisfactory is given to an employee because he does not meet standards in one or more critical areas, he must be given at least 90 days to raise work performance to a satisfactory

^{1/} Chapters 137 and 146 apparently have overlapping jurisdiction.
^{2/} Exhibit C-1.

level. "If the warning is not issued 90 days before a rating is due, the rating may be postponed until the employee has had at least 90 days to improve performance."

The appraisal Ragan gave Vogt was "rating postponed - see attached 90-day warning notice". The warning notice was in considerable detail (nine single spaced legal size pages) 3/ emphasizing (three pages on the one factor of "attitude") Vogt's hostile attitude toward Ragan and failure to work harmoniously with others. On the appraisal itself the Reviewing Officer noted that he had personally observed Vogt's hostile attitude toward Ragan and had not observed any effort to change such conduct.

When Vogt was given his performance appraisal and 90-day warning notice by Ragan on July 22, 1977, he made no comment either on the appraisal form or to Ragan but called Ronald J. Rizzo, the President of Chapter 146 of which Vogt was a member. Rizzo and Vogt met the next day and decided to present an informal grievance to Ragan on the performance appraisal. The informal grievance on the performance appraisal was presented to Ragan on August 1, 1977, and supplemented on August 4, 1977 with Rizzo representing Vogt but Ragan made no change in his appraisal or ratings. 5/

On August 20, 1977 Rizzo presented a formal grievance on behalf of Vogt to the Regional Commissioner of the Customs Service. 6/ The Regional Commissioner appointed a Grievance Examiner to investigate and report his findings on the grievance. The Examiner held hearings or interviews with Vogt (represented by Rizzo and an NTEU attorney) and about sixteen other employees in the Miami District. His discussion with Vogt and his representatives lasted about five hours. Summaries were made of the hearings or interviews. The Grievance Examiner made findings and reported them to the Regional Commissioner, with copies to Vogt and Ragan. Vogt prepared comments on the Examiner's findings and sent them to the NTEU attorney who added a letter and sent them to the Grievance Examiner for inclusion in the grievance proceeding.

The formal grievance was rejected by the Regional Commissioner. The record does not show when this occurred but it indicates, 7/ and I find, it was sometime after October 20,

3/ Exhibit C-8, Sec. 1-8(c).
4/ Exhibit C-2.
5/ Tr. 105; Exhibit C-3.
6/ Exhibit C-4.
7/ Exhibit R-7.

1977. During the pendency of the grievance and of the 90-day warning, Vogt received from Ragan a 60-day notice dated September 7, 1977 proposing to deny a within-grade increase because Ragan thought Vogt's level of performance made it impossible for Ragan to recommend the increase "at this time". 8/

During the investigation of the formal grievance by the Grievance Examiner he had hearings with or interviewed about seventeen of Vogt's fellow employees. Some of them, including the other Customs Air Officers in Ragan's unit, acquired the impression that Vogt was a conduit to the section on Internal Affairs (security) of the District, reporting to them on infractions of regulations, such as using government cars for private purposes, and this caused resentment in Ragan's unit.

During the 90-day warning period Vogt talked with Ragan several times to discuss his progress, and each time was told that there was improvement. The fifth such meeting was on October 20, 1977, the last day of the 90-day period. During that period Vogt and Ragan had worked on the same days about 30 times and because of the nature of their work Vogt was under the direct supervision of Ragan about half the days they both worked. Vogt had spent a large portion of this time working on his grievance. This was not objected to or criticized but it did reduce the quantity of official duties performed by Vogt and Ragan's opportunity to observe Vogt's performance of his duties.

On that day, October 20, Ragan told Vogt that although Vogt's attitude had improved his work performance would have been better had he not spent as much time as he did on his grievance, that Ragan had had insufficient time to observe and evaluate Vogt's performance, and that he was extending Vogt's 90-day warning period 30 days to give Ragan a better opportunity to re-evaluate Vogt. The 30-day extension was confirmed in writing the same day. 9/

It was that 30-day extension of the 90-day warning that is contended to have constituted an unfair labor practice in violation of Sections 19(a)(1) and (2) of the Executive Order. The Complainant contends that it was a violation of

8/ Attachment (e) to Exhibit R-1.
9/ Attachment b to Exhibit R-1.

Section 19(a)(1) because Ragan said to Vogt at the end of the 90 days that his production would have been better had he not spent so much time "with the union" in working on his grievance, thereby interfering with his right to utilize the assistance of his recognized representative and imposing a penalty for having filed a grievance. The Complainant contends also that it was a violation of Section 19(a)(2) because discriminatory in that others who had 90-day warnings did not have the warning period extended and that the discrimination was motivated by anti-union animus.

The record does not show that anyone in the Miami District of Region IV other than Vogt had ever received a 90-day warning. In the two years preceding the hearing there had been eight 90-day warning letters, including Vogt's, in the Region; of those eight, four, including Vogt's, had 30-day extensions. The circumstances concerning the other seven 90-day warnings are not indicated.

At the expiration of the 30-day extension of Vogt's warning, Ragan gave him a satisfactory rating and recommended his within-grade increase which he was given.

Discussion and Conclusions

I have not found that Ragan said the 30-day extension was made because Vogt had spent so much time "with the union" in processing the grievance. On the basis of the record I could not make such a finding or find that Ragan said or implied anything that would tend to discourage Vogt's working with the union. There is no evidence and I do not find that the 30-day extension was imposed because of the filing of the grievance. There was thus no violation of Section 19(a)(1) for two reasons.

First, the factual foundation for the Complainant's contention of such a violation was not established. And second, even if the 30-day extension was imposed in reprisal for filing the grievance, it is stipulated that the grievance was filed under an agency-prescribed grievance procedure and not under a negotiated procedure. 10/ Thus even if the extension had been in reprisal for Vogt filing his grievance, it would not have been a violation of Section 19(a)(1). See Office of Economic Opportunity, Region V and Michael Bottigliero and Local 2816, A.F.G.E., A/SLMR No. 50-5999, 3 A/SLMR 699, 670-71 (December 4, 1973). This is not to

10/ Tr. 130.

say it would not have been wrong and perhaps remediable somewhere. It is to say it would not have been a violation of Executive Order 11491 as amended.

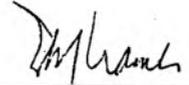
Nor was there a violation of Section 19(a)(2). There was no showing of discriminatory treatment of Vogt. So far as the record shows, he was the only employee in the Miami District who ever received a 90-day warning, so extending it for 30 days was not treating him differently than others in the District who had received 90-day warnings. And he was one of four in the Region who had received 30-day extensions out of eight in the Region who had received 90-day warnings in the two years preceding the hearing. The circumstances of the other seven cases are not known, so it cannot be said Vogt was treated differently than others similarly situated.

Nor was there a showing of anti-union animus on the part of Ragan. On the contrary, he had been a member of the union before he became a supervisor and remained a dues-paying member for a year and a half after he became a supervisor and was no longer a member of a unit represented by the union.

The Complainant cites other decisions of the Assistant Secretary or an Administrative Law Judge to show that others in Region IV have been found to harbor an anti-union animus. But it is the animus of Ragan that is pertinent here. Attributing anti-union animus to Ragan solely on the basis that a couple of other supervisors in Region IV in other cases have been found to have such an attitude is carrying guilt by association too far if carrying it anywhere is not carrying it too far. Furthermore, in the other cases the victim of the improper animus was a union official and activist. The record here does not indicate that Vogt was anything more than a member who sought the union's assistance in presenting a grievance, not an activist in the union cause. I cannot and do not conclude that the 30-day extension of Vogt's warning was motivated by his union membership or union assistance in presenting his grievance.

RECOMMENDATION

The complaint should be dismissed.


 MILTON KRAMER
 Administrative Law Judge

Dated: September 20, 1978
 Washington, D.C.

MK/mml

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, BRSL, NORTHEASTERN
PROGRAM SERVICE CENTER
A/SLMF No. 1158

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, BRSL, NORTHEASTERN
PROGRAM SERVICE CENTER

Respondent

and

Case Nos. 30-07855(CA) and
30-07868(CA)

This matter involved two unfair labor practice complaints filed by the American Federation of Government Employees, AFL-CIO, Local 1760, (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to negotiate with the Complainant concerning the impact and implementation of two employee details.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1760

Complainant

In both cases, the Administrative Law Judge rejected the Respondent's contentions that the Complainant was not the exclusive representative of the employees involved, and that the issues herein involved arguable interpretations of the negotiated agreement between the parties.

DECISION AND ORDER

The Administrative Law Judge concluded in one case that there was no violation of Section 19(a)(1) and (6) of the Order, because the rotation of technical assistants to different modules on March 30, 1977, caused no "real" change in the working conditions, duties, or responsibilities of the affected employees, and resulted in no substantial impact upon the affected employees. Noting particularly the absence of exceptions therein, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge in this regard and he ordered that the complaint be dismissed.

On August 23, 1978, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the subject cases, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint in Case No. 30-07855(CA) and recommending that the complaint in that case be dismissed in its entirety. No exceptions in this regard were filed with respect to the Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge found further that the Respondent had engaged in the unfair labor practices alleged in the complaint in Case No. 30-07868(CA) and recommended that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order in Case No. 30-07868(CA), and the Complainant filed an answering brief thereto.

In the second matter, the Assistant Secretary agreed with the Administrative Law Judge's conclusion that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to fulfill its obligation to afford the Complainant notice and an opportunity to meet and confer on the procedures to be utilized in effectuating its decision to assign a task force of claims authorizers to clear up a backlog of screening work in a unit other than their own, and on the impact of its decision on adversely affected employees. In so doing, it was noted that the establishment of a task force for this purpose constituted a change in the Respondent's past practice affecting the working conditions of unit employees. Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from engaging in the conduct found violative of the Order and that it take certain affirmative actions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in these cases, including the Respondent's exceptions and the Complainant's answering brief in Case No. 30-07868(CA), and noting particularly the absence of exceptions in Case No. 30-07855(CA), I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, as modified herein.

I concur with the Administrative Law Judge's finding, in Case No. 30-07868(CA), that the establishment of a task force, which necessitated the assignment of claims authorizers to perform screening in a different work area, constituted a change in the Respondent's past practice affecting the working conditions of unit employees. Under these circumstances, the Respondent was obligated under the Order to afford the Complainant notice and an opportunity to meet and confer on the procedures to be utilized in effectuating its decision to assign a task force of claims authorizers to clear up the backlog of screening work in a unit other than their own, and on the impact of its decision on adversely affected employees. By failing to fulfill these obligations under the Order, I find, in agreement with the Administrative Law Judge, that the Respondent violated Section 19(a)(1) and (6) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Center shall:

1. Cease and desist from:

(a) Assigning employees represented exclusively by the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals) to a task force to perform screening work outside their permanent work unit without first notifying the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the exclusively recognized labor organization, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such task force, and on the impact such task force will have on adversely affected employees in the exclusively recognized unit.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Notify the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), the employees' exclusive bargaining representative, of any intended assignment of employees to a task force to perform screening work outside their permanent work unit and, upon request, meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such detail

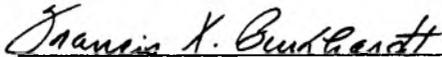
or assignment, and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

(b) Post at its facility at the Northeastern Program Service Center copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Northeastern Program Service Center and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint in Case No. 30-07855(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 12, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT assign employees represented exclusively by the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals) to a task force to perform screening work outside their permanent work unit, without first notifying the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the exclusively recognized labor organization, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such task force and on the impact such task force will have on adversely affected employees in the exclusively recognized unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify the American Federation of Government Employees, AFL-CIO, Local 1760, the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), the employees' exclusive bargaining representative, of any intended assignment of employees to a task force to perform screening work outside their permanent work area and, upon request, meet and

confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such detail or assignment, and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515 - 1515 Broadway, New York, New York 10036.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



In the Matter of

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY ADMINISTRATION, BUREAU OF RETIREMENT AND SURVIVORS INSURANCE, NORTHEASTERN PROGRAM SERVICE CENTER

Agency

Case No. 30-07855 (CA)
30-07868 (CA)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL UNION 1760

Complainant

JULIAN M. BERGMAN, ESQUIRE
HEW, Social Security Administration
BRSI, Northeastern Program Service Center
96-05 Horace Harding Expressway
Flushing, New York 11368

For the Respondent

HERBERT COLLENDER, President
American Federation of Government
Employees, AFL-CIO, Local 1760
P.O. Box 626
Corona-Elmhurst, New York 11373

For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Cases

Pursuant to a Notice of Hearing on Complaint issued on April 4, 1978 by the Acting Regional Administrator for Labor-Management Services Administration, U.S. Department of Labor, New York Region, a hearing was held before the undersigned on May 18, 1978 at New York, New York.

This proceeding arose under Executive Order 11491, as amended (herein called the Order). A complaint was filed in Case No. 30-07855 on July 8, 1977 by American Federation of Government Employees, Local 1760 (herein called Complainant) against Department of Health, Education and Welfare, Social Security Administration, Bureau of Retirement and Survivors Insurance, Northeastern Program Service Center, (herein called Respondent). It alleged that on March 30, 1977 Respondent refused to meet and confer with Complainant re the procedures to be followed, as well as the adverse impact, in respect to a detailing of bargaining unit members Grace Kaufman, Bernard Zapkin and Seymour Epstein -all in violation of Sections 19(a) (1) and (6) of the Order.

Respondent filed a response to the aforesaid complaint on July 22, 1977 denying it violated the Order. It averred that no change was made in policies or working condition, and that protection was afforded Respondent as to such action under Section 12(b) of the Order.

A complaint was filed by the aforesaid Complainant in Case No. 30-07868 on July 18, 1977 against the aforementioned Respondent. It alleged a refusal by Respondent on April 20, 1977 to meet and confer with Complainant in respect to the detailing of a task force of claims authorizers from Section 1 to 3 with respect to procedures to be followed and adverse impact upon those detailed and bargaining unit members - all in violation of Sections 19(a) (1) and (6) of the Order.

Respondent filed a response to said complaint in Case No. 30-07868 on August 9, 1977 denying the commission of any unfair labor practices. It averred that it was not required, under the contract, to meet and confer but merely to consult with Complainant; that its actions were a management right under 12(b) of the Order; and that it had no obligation to consult since there was no change in working conditions or substantial impact wrought herein.

By an order issued on April 4, 1978 the aforementioned cases, 30-07855 and 30-07868, were consolidated.

Both Complainant and Respondent were represented at the hearing, were afforded full opportunity to be heard, to adduce evidence and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Case No. 30-07855(CA)

Findings of Fact

1. At all times since about 1969 Complainant has represented the non-supervisory employees of Respondent's Northeastern Program Center.
 2. A collective bargaining agreement, effective on March 15, 1974, was executed by the National Office, American Federation of Government Employees, AFL-CIO and various locals, including Complainant, and the Bureau of Retirement and Survivors Insurance (BRSI) of Social Security Administration, covering the unit of non-supervisory employees of Respondent's Program Center and other service centers of BRSI. The said agreement continues in effect. 1/
 3. Respondent employs about 2500 employees who comprise two process branches and a separate facility at College Point. There are 7 operating sections which are organized into 6 modules, 2/ except that Section 6 has 4 modules and Section 7 (College Point) has 7 modules. There are 41 modules containing approximately 48-50 employees. Each section had a manager who was responsible for overall supervision thereof.
 4. About 6 or 7 claims authorizers work in each module, and these individuals handle claims for benefits reviewed by this branch. There are a limited number (4) of claims authorizers Technical Assistant (TA's) who provide advice for, and guidance to, claims authorizers. The TA's, who have more than one module to handle, audit work of the authorizers in accordance with a quality improvement plan, hold meetings and discuss cases with the authorizers, render advice, and review memos as well as transmittal letters.
- 1/ These findings are based on the facts and conclusions found in Case No. 30-7725, (June 8, 1978), which involved the same parties as the present proceeding. Moreover, judicial notice is taken of the terms of the master agreement between the Bureau and National AFGE which are recited in the prior case.
- 2/ A module is a mini-payment center which handles cases from their inception to conclusion.

5. In October, 1976 Respondent's operations changed from the branch concept to the quasi-module set up. Under the traditions branch arrangement a TA was assigned to audit an adjoining section. Rotations of TA's occurred among the 3 sections and the practice was to notify the Union of the rotations. Under the module arrangement as well as prior thereto TA's did a 3 day audit on every claims authorizer.
 6. In March, 1977 Respondent decided to rotate the TA's under its module system. On March 30, 1977 Isodore Gross, process section manager at the time, told Bruce Friedman, Treasurer of Complainant, that he planned to rotate TA's Grace Kaufman, Bernard Zapkin and Seymour Epstein who were in Section 1. At that time Kaufman sat in module 2, but was responsible for units 1 and 2; Epstein sat in module 4, but was responsible for units 3 and 4; Zapkin sat in module 6, and was responsible for units 5 and 6; and Richard Vail, the remaining technical assistant, was utilized as a floater to fill in wherever needed during absences of the others. The purpose behind the plan to rotate the TA's, as explained by Gross, was to enable claims authorizers to have their work reviewed by different TA's and thus obtain different and unbiased evaluations.
 7. Upon being informed by Gross as to the proposed detail 3/ of the 3 named TA's, Friedman stated that Respondent must meet and confer re the change as well as the impact of the proposal. Gross replied it was not necessary; that he was, however, informing the union of the planned assignment. Thereafter, Friedman asked both Alvin Brown, Gross' supervisor, and Julian Bergman, labor relations representative, to meet and confer re the rotation. In each instance the request was denied. 4/
 8. On March 30, 1977 Respondent moved the Technical assistants as proposed. Epstein went to modules 5 and 6; Kaufman was assigned to module 4; and Zapkin moved to module 1 and 2. In respect to their functions, record testimony
- 3/ The Federal Personnel refers to a "detail" as being a temporary assignment to a different position and duties. Hence Respondent designates the assignment herein as a "rotation".
4. Respondent has always taken the position that it did and stands ready to, "consult" with the Complainant re the rotation; that such term connotes its willingness to listen to the union's objection or suggestion, but would not "bargain" concerning these assignments.

reflects there was no change in the TA's principal functions, they audited the work of the same number of, but different, claims authorizers. Moreover, the hours and other working conditions, including benefits, remained the same. While Gross continued to be the rating officer for these TA's, the latter were evaluated by, and responsible to, different managers in the module to which they were assigned. Although the TA's auditing tasks did not change, managers differed in their method of operations. Thus, they varied in the particular records required to be kept by TA's and the information to be included therein. The rotation or assignment lasted until February 1978.

Conclusions

While there is little, if any, factual dispute herein, the parties are in sharp disagreement as to whether Respondent violated the Order.

Complainant insists that management was required to meet and confer with it re the impact and implementation of its decision 5/ to rotate or "detail" the 3 technical assistants, and that its failure to do so was violative of 19(a)(1) and (6). Respondent insists it's refusal to bargain over the impact and procedures in rotating the TA's was not violative of the Order. It makes 3 principal contentions in support thereof: (1) since the master agreement was made between the Bureau and National AFGE, as the bargaining representative, Complainant local is not a proper party to bring this proceeding; and further, no obligation exists to negotiate with Local 1760 since it was neither granted exclusive recognition nor designated as agent by such representative; (2) the issue involves an arguable interpretation and application of the master agreement, and thus, as enunciated in Report 49, the matter herein cannot be the subject of an unfair labor practice but should be decided under the agreement; (3) no change in practice resulted from Respondent's conduct, and the transfer of TA's had no substantial impact upon the employees which required it to meet and confer thereon.

(1) In respect to Respondent's position that it was not obligated to bargain, as distinguished from consult, with Complainant since the local union is not the exclusive representative, I reject this contention for the same reasons

5/ Complainant concedes that under Section 11(b) and 12(b) of the Order, Respondent was under no obligation to meet and confer in respect to the decision to transfer the technical assistants to a different module.

expressed by me in Case No. 30-7725 involving the same parties. Moreover, as indicated in Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 984, Complainant herein was entitled to act for the National AFGE and call upon Respondent to meet and confer in the proper instance regarding matters affecting the unit employees at this program center.

(2) Neither do I accept the argument that the matter herein should be dismissed under the doctrine that issues involving arguable interpretations of contract are not properly the subject of unfair labor practice proceedings. Cases of that nature have been dismissed where the grievance of the complaint is a breach of contract which concerns an arguable interpretation and application of a contract. 6/ In the case at bar the basis for the alleged unfair labor practice lies in the action taken apart from the contract, Complainant union does not contend that such action was a breach of contract giving rise to differing interpretation thereof but a violation of the Respondent's obligation under the Order. While it is true that one must look to the agreement to consider such an obligation - and rights may flow therefrom - I do not deem the grievance of this complaint to deal with breach of contract. Hence, I find the cases cited by Respondent in that regard to be inapposite.

(3) While management retains certain rights under Section 12(b) of the Order and thus is not obliged to bargain concerning its decisions in that regard, it may well be required to meet and confer re the impact and implementation of that decision. See Directorate of Facility Engineers, Fort Richardson, Alaska, A/SLMR No. 946. However, the Assistant Secretary has also held that unless such decision results in a substantial impact on the personnel policies, practices and general working conditions of unit employees, no such obligation will be imposed upon the employer. Department of the Navy, Naval Communication Area, Master Station, Eastpac, Honolulu, A/SLMR No. 1035. Moreover, where the subject of the complaint was an established past practice and did not constitute a change in working conditions, management is not obligated to meet and confer thereon. Department of the Navy, Mare Island, Naval Shipyard, Vallejo, California, A/SLMR No. 736.

6/ See American Federation of Government Employees, AFL-CIO, National Office, A/SLMR No. 809; Aerospace Guidance and Meteorology Center, Newark Air Force Station, Newark, Ohio, A/SLMR No. 677.

In the case at bar I am not convinced that the rotational system of TA's constituted a real change in their duties or resulted in a substantial impact upon bargaining unit employees. Thus, record facts show that the technical assistants in the past, and prior to March 30, 1977, audited the claims authorizers and did so in different sections. It was also an established practice to rotate the TA's among the sections. Although the Respondent structured its center by setting up modules and the TA's rotate among these units, I do not perceive this structural modification to have resulted in any significant changes in the working conditions of these employees. They continued to audit the same class of employees, i.e. claims authorizers, and no change was effected in the hours, wages, benefits or working condition of the technical assistants. The fact that the latter individuals reported to a different manager in the unit is scarcely significant, particularly since their rating officer remained the same individual.

The rationale enunciated in Department of Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 814, has applicability herein. In the cited case the activity issued a new standard position description (SPD) for control clerks. The SPD was the same as the old one except it made mention of duties involving integrated data retrieval system (IDRS) which duties the control clerks had performed prior to the SPD modification. It was held by the Assistant Secretary that no duty to bargain re the impact and implementation of this new SPD since the control clerks had performed such IDRS functions previously and no change was effected in the terms and condition of employment.

In Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 984, it was concluded that a transfer of claims cases to the claims authorizers effected a change in employee terms and conditions of employment and impacted the employees in the unit. But that matter dealt with the nature and amount of work performed by the claims authorizers - to whom the cases were transferred - and the transfer of such cases might conceivably determine volume or type of work performed by the claim examiner. In the case at bar the rotation of TA's caused no change in the amount of their work, nor did it involve a difference in the auditing functions of these employees. 7/

7/ Cf. Case No. 7725(CA), Recommended Decision and Order issued June 8, 1978. This case, which involved a transfer of employees to work in a different area on special reports, is somewhat dissimilar from the present proceeding. [Cont'd on next page]

Accordingly, I am persuaded that the rotation of technical assistants to different modules on March 30, 1977 was not a sufficient change in the past practice of Respondent's; that no "real" change was effected by this rotational move in the working conditions of these employees or in their duties or responsibilities; and that such reassignment to other modules resulted in no substantial impact upon the bargaining unit employees. Therefore, I find no violation of 19(a)(1) and (6) by virtue thereof on the part of Respondent.

Recommendation

Having found that Respondent did not violate Sections 19(a)(1) and (6) of the Order, I hereby recommend that the complaint in Case No. 7855(CA) be dismissed in its entirety.

Case No. 30-7868(CA)

Findings of Fact

1. At all times since about 1969 Complainant has represented the non-supervisory employees of Respondent's Northeastern Program Center.
2. A collective bargaining agreement, effective on March 15, 1974, was executed by the National Office, American Federation of Government Employees, AFL-CIO and various locals, including Complainant, and the Bureau of Retirement and Survivors Insurance (BRSI) of Social Security Administration, covering the unit of non-supervisory employees of Respondent's Program Center and other service centers of BRSI. The said agreement continues in effect. 8/
3. Respondent employs about 2500 employees who comprise two process branches and a separate facility at College Point. There are 7 operating sections which are organized

7/ [Cont'd]

In Case No.30-7725(CA), where the same parties are concerned, the detail affected the members selected since the hours were changed as to one employee and overtime was an issue therein. Moreover, the rotational system or detail had not been a usual practice in the past.

8/ These findings are based on the facts and conclusions found in Case No. 30-7725, (June 8, 1978), which involved the same parties as the present proceeding. Moreover, judicial notice is taken of the terms of the master agreement between the Bureau and National AFGE which are recited in the prior case.

into 6 modules, 9/ except that Section 6 has 4 modules and Section 7 (College Point) has 7 modules. There are 41 modules containing approximately 48-50 employees. Each section had a manager who was responsible for overall supervision thereof.

4. Prior to April 20, 1977, Vivian Frey, process branch manager, branch 1, decided to assign several claims authorizers from Section 1 to Section 3 in said branch to perform screening functions. Claims authorizers process cases involving, inter alia, awards to beneficiaries. Her decision was prompted by the fact that the workload in Section 1, module 1, was very light whereas it was very heavy in Section 3. The assignment of the claims authorizers to Section 3 to screen cases would thereby reduce the time that beneficiaries must wait for receipt of their awards.

5. The screening process involves a summary review of many cases - 50 or 60 - to determine the complexity of the matters. If the case can be processed quickly - 10 minutes or less - the claims authorizers will handle it; otherwise it will be put aside and handled by someone for an in-depth review and processed accordingly. The screening of cases is an ongoing process. It may be an integral part of the claims authorizers duties, since in some modules (terminal digits) the authorizer must screen his own work each day.

6. Prior to modularization of the Center screening was performed in a unit by several people selected for this purpose whenever the work was heavy. Record facts show that in 1972 management set up a task force to handle over 500 cases; that it met with the local union which gave it ideas for selecting the forums assigned thereto; and that some changes were made by the activity by virtue thereof.

7. On April 20, 1977 Helen Grossman, manager of Section 1, unit 1, held a meeting of the employees. She announced that a detail would be formed of several claims authorizers to be assigned to Section 3 to screen cases and reduce the backlog thereat. Bruce Friedman, treasurer of Complainant asked Grossman whom she consulted from the union, and the manager replied she had not talked to the union in this regard. At the suggestion of the manager, Friedman spoke to Frey re management's meeting and conferring concerning the detail, and the latter informed the unions official she was told by Julian Bergman, Respondent's labor relations representative, it was not a matter about which the activity was required to meet and confer.

9/ A module is a mini-payment center which handles cases from their inception to conclusion.

8. Three claims authorizers were then assigned from Section 1 to Section 3 to perform the screening and ease the workload in the latter section. They were assigned for a period of 1-10 work days. Those chosen were required to possess technical knowledge so as to solve problems that might arise, but they don't necessarily perform the full range of the claims authorizer job while screening cases.

9. Present policy calls for rotating the screeners who are assigned for this detail. Record facts do show, however, that those remaining in the module i.e. who are not assigned as a task force to screen, will do a greater share of the workload.

Conclusions

In contending that it did not violate the Order by assigning the claims examiners, as a task force, to do screening work in a different section on April 20, 1977, Respondent insists: (1) it was under no obligation to meet and confer with Complainant since the latter was not designated as the exclusive bargaining representative nor properly designated to act as the agent for such representative; (2) there is an arguable interpretation and application of the master agreement, and therefore the matter is not properly the subject of an unfair labor practice proceeding; (3) the action taken herein followed a past practice so that no change occurred, and the assignment resulted in no substantial impact upon the unit employees.

In respect to Respondent's contentions that no obligation exists to bargain with Complainant since it is not the bargaining representative nor the agent thereof, and, further, that the issue involves contract interpretation, I reject their arguments. My reasons therefor are as stated in Case No. 30-7855(CA), supra, together with the cases cited in my recommended decision and order therein, as well as those expressed by me in Case No. 30-7725 (recommended decision and order issued June 8, 1977).

Respondent also argues that the "detailing" of the three claims authorizers to screen cases in Section 3 was neither a changed conditions of employment nor resulted in a substantial impact on personnel policies and practices. I do not agree.

While the record does establish that screening by claims examiners was a continuing operation, it does not appear that assigning a task force, as occurred herein, was an established practice. Individual examiners were, it is true, designated to screen cases in a particular unit. However, the assignment of a group of employees to perform this operation in a different work area under these circumstances was a variation from the former procedure. Under the former practice, the screening of cases was not formalized nor did it necessarily call for a reassignment of individuals to alleviate a heavy workload. It occurred within the unit, and may not have resulted in any change in the work performance or time devoted thereto.

The assignment on April 20, 1977 of the authorizers to Section 3 as screeners for a 1-10 day period called for such individuals to spend 100% of their time on such an operation. Except for those in the terminal digit modules, claims authorizers do not screen their own work each day. Thus, the devotion by the task force of all of their time screening cases, albeit an assignment of short duration, might well be a matter about which the Complainant would seek to bargain. In this respect, I conclude that this case differs from 30-7855(CA) wherein the technical authorizers spent the same percentage of their time auditing the claims authorizers' work during the detail as therefore. In the cited case the assignment produced no change other than the TA's reporting to a different manager and auditing cases of different claims authorizers. Since the individuals in the case at bar were required to screen matters exclusively during the period of assignment, I conclude there must necessarily exist a substantial impact upon, at least, these particular employees. Their work is centered upon a specific phase of Respondent's operation, and the employees in Section 1 may well be concerned about being assigned to a task limited to screening cases. In this posture, the assignment herein is dependent upon the particular caseload in Section 3.

Accordingly, I conclude Respondent was obligated to meet and confer as the procedure to be followed in effectuating the assignment and on the impact of its decision on adversely affected employees. See Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 984. This obligation was not met by Respondent's announcement of the intended assignment at the meeting on April 20, 1977 and its informing the Complainant thereof on that date.

Despite Complainant's request to do so, Respondent adhered to its position that it was not required to meet and confer re the procedures to be followed in the assignment of the screeners to Section 3, as well as the impact of the assignment on the employees adversely affected. I conclude and find that such refusal constituted a violation of Section 19(a)(6) of the Order. Federal Railroad Administration, A/SLMR No. 418.

Moreover, I find that the failure and refusal to bargain with Complainant re the implementation and impact of the assignment of those screeners had a restraining effect upon employees and was violative of Section 19(a)(1) of the Order. Federal Railroad Administration, supra.

Recommendation

Having found that Respondent violated Section 19(a)(1) and (6) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purpose of Executive Order 11491, as amended.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center shall:

1. Cease and desist from

(a) Instituting a detail or assignment of its employees for the purpose of screening social security claim cases without notifying American Federation of Government Employees, AFL-CIO, Local 1760, as the authorized representative, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such detail or assignment, and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Notify American Federation of Government Employees, AFL-CIO, Local 1760, as the authorized representative of the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals), the exclusive bargaining representative of Respondent's employees, of any intended detail or assignment of employees to screen social security claim cases, and upon request meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in implementing such detail or assignment, and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

(b) Post at its facility at the Northeastern Program Center copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Director of Respondent and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.26 of the Regulations, notify the Assistant Secretary, in writing, within 20 days from the date of this order, as to what steps have been taken to comply therewith.


WILLIAM NAIMARK
Administrative Law Judge

Dated: 23 AUG 1978
Washington, D.C.

WN:mjm

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a detail or assignment of employees for the purpose of screening social security claim cases, which employees are represented exclusively by the National Office, American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals) without notifying American Federation of Government Employees, AFL-CIO, Local 1760, as the authorized representative, and affording it the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedure which management will observe in implementing such detail or assignment and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify American Federation of Government Employees, AFL-CIO, Local 1760, of any intended detail or assignment of employees for the purpose of screening social security claim cases, and upon request meet and confer in good faith, to the extent consonant with law and regulations, on the procedures which management will observe in implementing

such detail or assignment, and on the impact such detail or assignment will have on adversely affected employees in the exclusively recognized unit.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

Agency or Activity

Dated: _____ By: _____
(Signature)

DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD,
LONG BEACH, CALIFORNIA
A/SLMR No. 1159

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

If employees have any other questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, U.S. Department of Labor, whose address is: Room 3515 - 1515 Broadway, New York, New York 10036.

This case involved an unfair labor practice complaint filed by the Federal Employees Metal Trades Council, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by prohibiting a shop steward and an employee from conferring in a particular building. The Respondent contended that the refusal to permit the meeting did not constitute an unfair labor practice and even if such conduct were found to constitute a breach of the negotiated agreement it was not an unfair labor practice as contemplated within Section 19(a)(1) and (6) of the Order.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order. In this regard, he found that Respondent's refusal to permit the shop steward and the employee to meet in a building which was the employee's work site was in violation of the parties' negotiated agreement and violative of the Order. The Administrative Law Judge also found that no proof was offered to substantiate the allegation that the Respondent violated Section 19(a)(2) of the Order.

Contrary to the Administrative Law Judge, the Assistant Secretary found that the Respondent had not violated Section 19(a)(1) and (6) of the Order and dismissed the complaint in its entirety. In this regard, he considered that the Respondent's interpretation and application of Article VII, Section 6 of its negotiated agreement in refusing to permit the shop steward and the employee to meet in the building involved did not constitute a clear and patent breach of the parties' agreement. Rather, he found that the Respondent's action was based on an arguable interpretation of the parties' agreement. Under these circumstances, the Assistant Secretary concluded that the Respondent's conduct did not, standing alone, constitute a violation of Section 19(a)(1) and (6) of the Order.

Accordingly, he ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD,
LONG BEACH, CALIFORNIA

Respondent

and

Case No. 72-7482(CA)

FEDERAL EMPLOYEES METAL TRADES
COUNCIL, AFL-CIO

Complainant

DECISION AND ORDER

On September 29, 1978, Administrative Law Judge John V. Evans issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the instant case, including the Respondent's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The Administrative Law Judge found that the Respondent's refusal to permit employee Snead and Shop Steward Jackson to meet in the immediate vicinity of the employee's assigned work site, Building 216, as provided for in Article VII, Section 6 of the parties' negotiated agreement, was a breach of that agreement and violative of the Order. I disagree.

It has consistently been held that a party to a negotiated agreement acts at its peril in interpreting and applying such agreement. Thus, if the Respondent's interpretation of the negotiated agreement was such that

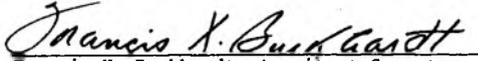
it resulted in a clear and patent breach of the agreement, then such interpretation could rise to the level of an unfair labor practice. On the other hand, if the Respondent's interpretation was arguably within the terms of the negotiated agreement, then such interpretation would merely be a matter of contract interpretation to be resolved through the parties' grievance and arbitration machinery. 1/

Applying these principles to the facts of the instant case, I find that the action of the Respondent in interpreting and applying the provisions of Article VII, Section 6 of its negotiated agreement in refusing to permit employee Snead and Shop Steward Jackson to meet in Building 216 did not constitute a clear and patent breach of that agreement but, rather, was arguably within the terms of the agreement. Thus, the language of Article VII, Section 6, provides, in part, that, ". . . consistent with workload commitments, meetings between employees and Council Representatives . . . will normally take place in the immediate vicinity of the employee's assigned work site." (Emphasis added.) Under these circumstances, I conclude that the Respondent's action was based on an arguable interpretation of the parties' agreement, and that, therefore, its refusal to permit employee Snead and Shop Steward Jackson to meet in Building 216 did not, standing alone, constitute a violation of Section 19(a)(1) and (6) of the Order. Accordingly, I shall order that the complaint herein be dismissed in its entirety. 2/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-7482(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 12, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1/ See Department of the Navy, Naval Air Research Facility, Alameda, California, A/SLMR No. 1089 (1978); Watervliet Arsenal, U.S. Army Armament Command, Watervliet, New York, 6 A/SLMR 526, A/SLMR No. 726 (1976); Federal Aviation Administration, Muskegon Air Traffic Control Tower, 5 A/SLMR 458, A/SLMR No. 534 (1975); and General Service Administration, Region 5, Public Buildings Service, Chicago Field Offices, 5 A/SLMR 425, A/SLMR No. 528 (1975).

2/ In agreement with the Administrative Law Judge, I find insufficient basis in the record to support the allegation in the complaint that the Respondent's conduct violated Section 19(a)(2) of the Order. Accordingly, dismissal of this aspect of the complaint also was considered to be warranted.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036
Suite 600 - 211 Main Street
San Francisco, California 94105

In the Matter of

DEPARTMENT OF THE NAVY, LONG BEACH
NAVAL SHIPYARD, LONG BEACH,
CALIFORNIA

Respondent

and

FEDERAL EMPLOYEES METAL TRADES
COUNCIL, AFL-CIO

Complainant

CASE NO. 72-7482(CA)

Thomas Martin, Esquire
Park Place, Suite D-10
4647 Long Beach Boulevard
Long Beach, California 90805
For the Complainant

Herbert L. Zipperian
Office of Civilian Personnel
Department of the Navy
Long Beach, California
For the Respondent

Before: JOHN V. EVANS
Administrative Law Judge

This proceeding arises under Executive Order 11491, as amended. Pursuant to the regulations of the Assistant Secretary of Labor for Labor-Management Relations, a Notice of Hearing on the Complaint was issued on June 30, 1978, with reference to alleged violations of sections 19(a)(1) and (16) of the Order.

The case was initiated by a Complaint filed on April 20, 1978, by the Federal Employees Metal Trades Council, AFL-CIO against the Department of Navy, Long Beach Naval Shipyard, Long Beach, California.

A hearing was held in Long Beach, California, on August 22, 1978, at which time all parties were represented and were afforded full opportunity to be heard,

adduce evidence, examine and cross-examine witnesses, and argue orally. Thereafter, both parties filed briefs which have been considered. Upon the entire record, from observation of the witnesses and their demeanor, and from all of the testimony and evidence, the following findings, conclusions, and recommendations are made.

Facts

On Friday, March 3, 1978, Willie C. Jackson, a Shop Steward of the Metal Trades Council, received a telephone call from Ed Williams, the Sandblaster Foreman in Shop 71, telling him that an employee, James C. Snead, employed in building 216, wished to have a meeting with Mr. Jackson.

On Monday morning, March 6, 1978, Mr. Jackson went to building 216 to see Mr. Snead but was informed by Foreman Williams at building 216 that Mr. Snead was at the dispensary and not available. Mr. Jackson left and later that day received a telephone call from Foreman Williams that he could see Mr. Snead at 1:00 p.m. on March 7, 1978, (with no mention as to where the meeting would take place).

March 7th, 1978, Shop Steward Jackson went to building 216 and on his arrival he was advised by Mr. Snead to have a seat and Mr. Snead would be right back. While awaiting Mr. Snead's return James L. Lewis the Shop Superintendent of Shop 71, entered and inquired as to what Mr. Jackson was doing there. After being advised by Mr. Jackson that he was there to see Mr. Snead, Mr. Lewis asked if Jackson had permission to be in building 216. Mr. Jackson told Lewis he had Foreman William's permission. Mr. Lewis summoned Foreman Williams who then stated that he had given permission for the interview, but not in building 216. At this point Mr. Jackson asked when and where he could see Mr. Snead and was advised by Foreman Williams that he could see Mr. Snead at 8:00 a.m., March 8th in building 161.

Witnesses Jackson, Snead, Sanders and Johnnie Williams all testified that work in building 216 did not at any time stop while the discussion between Jackson, Snead, Foreman Williams and Superintendent Lewis was taking place on March 7th. Superintendent Lewis was emphatic that all work was stopped when he arrived at building 216 and saw Steward Jackson and Mr. Snead conferring. Foreman Williams was unsure as to whether the machinery was on or off. Superintendent Lewis cited the machinery stoppage as his reason for objecting to a meeting in

building 216. The greater weight of the evidence is contrary to Lewis' testimony.

A meeting was held in building 161 on March 8th between Mr. Snead and Steward Jackson after which they requested Foreman Williams to permit them to go to building 216 to observe certain conditions. Williams advised them that he could not grant them permission but agreed to seek guidance from his superiors. Whereupon he placed a telephone call to the Personnel Supervisor for Management who said she would call back in five minutes. On calling back, the Personnel Supervisor told Foreman Williams that a Mr. Soanes, Head Superintendent of the Service Group, would not grant permission for Steward Jackson and Mr. Snead to go to building 216.

It is the position of the Union that Respondent's failure to permit Shop Steward Jackson and employee Snead to meet in building 216 on March 7th and to go to building 216 on March 8th constitute facts which substantiate the charges in their Complaint.

Respondent contends that the refusal to permit the meetings in building 216 did not constitute an unfair labor practice and even if it was found to be a breach of the negotiated agreement (Resp. Ex. 1) it was not an unfair labor practice as contemplated within sections 19(a)(1) and (6).

Issue

Did Respondents' actions in prohibiting Shop Steward Jackson and employee Snead from conferring in building 216 on March 7th and 8th, 1978, constitute an unfair labor practice under sections 19 (a)(1) and (6) of Executive Order 11491, as amended.

While the Complaint alleges a violation of section 19(a)(2), no proof was offered to substantiate a charge under that section of the Executive Order.

Conclusions

Respondents' Exhibit 1 being an agreement, dated February 11, 1974, between Long Beach Naval Shipyard and Federal Employees Metal Trades Council, Long Beach, AFL-CIO, at pages 16 and 17, provides as follows:

Section 6. Any employee in the Unit, who has a complaint or an alleged grievance has the right, and shall be protected in the exercise of that right, to discuss the matter with a Council representative of his choice.

A Unit employee may request the service of a specific Council Representative, either through his supervisor or privately during non-duty hours, such as lunch periods, before and after work.

In those cases where an employee, through his supervisor, requests the services of a Council Representative, that supervisor will arrange the date, time and place at which the employee can expect to meet with the requested Council Representative.

In those cases where an employee, privately during non-duty hours, requests the services of a Council Representative, that Council Representative will so notify his supervisor who will arrange the date, time and place at which the Council Representative can expect to meet with the employee who requested his services.

In either case the responsible supervisor will advise the employee or the Council Representative of the arrangements made.

To expedite the resolution of complaints and grievances and consistent with workload commitments, meetings between employees and Council Representatives will be scheduled promptly and will normally take place in the immediate vicinity of the employee's assigned work site.

It is apparent from the undisputed facts that the Respondent refused to permit the employee Snead and his Union Shop Steward Jackson to meet "in the immediate vicinity of the employee's assigned work site" as provided for in the aforementioned agreement. It is found that the requested "worksite meeting" was a reasonable and feasible demand under the facts in this case.

This admitted conduct on the part of the Respondent is found to be a violation of the terms of the Agreement and to constitute an unfair labor practice under sections 19(a)(1) and (6).

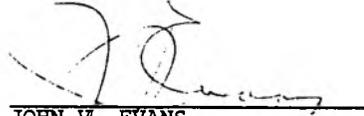
Recommended Order

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations, hereby orders that the Department of Navy, Long Beach Naval Shipyard, Long Beach, California shall:

1. Cease and desist from refusing to permit its employees from meeting with their Council Representative in the immediate vicinity of the employee's assigned work site as provided for in section 6 of Article VII of the Agreement.

2. Post at its Long Beach Naval Shipyard, Department of the Navy, Long Beach, California, copies of the attached notice marked "appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, Long Beach Naval Shipyard, Department of the Navy, Long Beach, California, and they shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered or defaced or covered by any other material.

3. The Commanding Officer shall, pursuant to section 203.27 of the regulations, report to the Assistant Secretary in writing within twenty (20) days from date of this Order what steps have been taken to comply with said Order.


JOHN V. EVANS
Administrative Law Judge

Date: September 29, 1978
San Francisco, California

JVE:tl

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

WE WILL NOT refuse permission for Counsel Representatives to meet with employees in the immediate vicinity of the employee's work site in those cases where the counsel Representative is meeting with the employee pursuant to Section 6 of Article VII of the Agreement of February 11, 1974, between the Long Beach Naval Shipyard and the Federal Employees Metal Trades Council, Long Beach, AFL-CIO.

(Agency or Activity)

By: _____

Dated:

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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, San Francisco Region, Room 9061, 450 Golden Gate Avenue, San Francisco, California, 94102.

December 13, 1978

A/SLMR No. 1160

UNITED STATES DEPARTMENT OF LABOR

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION MEDICAL
CENTER, WASHINGTON, D.C.
A/SLMR No. 1160

VETERANS ADMINISTRATION MEDICAL
CENTER, WASHINGTON, D.C. 1/

Activity

and

Case No. 22-09099(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, AFL-CIO (AFGE) seeking to clarify a unit of guards and security police represented by AFGE Local 2798 by including in said unit employees classified as Supervisory Hospital Police Officer, GS-083-6. The Activity took the position that the subject employees were supervisors within the meaning of Section 2(c) of the Order and should be excluded from the unit on that basis.

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Robert Hardin. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Assistant Secretary found that the employees in the disputed classification were supervisors within the meaning of the Order. He noted that they utilize independent judgment in assigning work, authorizing overtime, approving leave and adjusting employee complaints. Further, they make effective recommendations with regard to employee evaluations, the retention or dismissal of probationary employees and the granting of awards. Under these circumstances, the Assistant Secretary found that the disputed employees were supervisors within the meaning of Section 2(c) of the Order, and he clarified the existing unit consistent with his finding.

Upon the entire record in this case, including the brief filed by the Activity, 2/ the Assistant Secretary finds:

In this proceeding, the Petitioner seeks to clarify a unit represented by the American Federation of Government Employees, Local 2798, AFL-CIO, which unit consists of "All Guards and Security Police employed by and assigned to Washington, D.C. Veterans Administration Hospital," by including employees classified as "Supervisory Hospital Police Officer, GS-083-6." The Activity takes the position that the employees involved are supervisors within the meaning of Section 2(c) of the Order and should be excluded from the unit on that basis.

The employees in the disputed classification are assigned to the Activity's Hospital Police Section which is responsible for enforcing Federal and appropriate state criminal codes as well as Veterans Administration regulations relating to the physical protection of property of the United States Government and personal property on the Hospital grounds. They also control traffic and the parking of privately owned vehicles by enforcing parking regulations.

1/ The name of the Activity appears as amended at the hearing.

2/ A brief submitted by the Petitioner was untimely filed and, therefore, has not been considered.

The record reveals that 23 employees are assigned to the Hospital Police Section, including one GS-10 Supervisory Hospital Police Officer, three GS-6 Supervisory Hospital Police Officers, the classification in question herein, 18 GS-5 Hospital Police Officers and one GS-6 Detective. 3/ Based upon an internal ranking system, the GS-10 Supervisory Hospital Police Officer has been designated a captain while the employees in the disputed classification bear the rank of lieutenant. Special insignia are worn by the lieutenants and the captain denoting their respective ranks.

The Hospital Police Section maintains continuous 24-hour operations, divided into three shifts. The captain is permanently assigned to the day shift while the lieutenants and the other officers work on a rotating basis. Shift assignments for the lieutenants and the officers are made by the captain. Work assignments within each shift are made by the lieutenants. Generally, there are at least three officers per shift, although they may number as many as nine during the day. On occasion, when, due to manpower shortages, there are fewer than three officers assigned to a shift, the lieutenant on duty may perform regular police duties.

In addition to making work assignments, the record reveals that the lieutenants interview candidates for police officer positions, orient new officers or assign other more senior officers to train them, evaluate officers for transfer or promotion purposes, and evaluate probationary employees making recommendations as to their retention or dismissal, which recommendations are generally followed. 4/ The lieutenants also effectively recommend awards, sign off on within-grade increases, authorize overtime, adjust employee complaints, counsel, and, if necessary, admonish employees, and approve or disapprove leave.

Additionally, the lieutenants attend supervisory meetings during which operating policies are evaluated and discussed and have received supervisory training. The evidence further establishes that in the absence of the captain, lieutenants are authorized to act in his place and that this has, in fact, occurred on a number of occasions.

Based on the foregoing circumstances, I find that the lieutenants involved herein are supervisors within the meaning of Section 2(c) of the Order. In this regard, the evidence establishes that they utilize independent judgment in assigning work, authorizing overtime, approving

3/ The eligibility of the GS-6 Detective is not at issue in this proceeding.

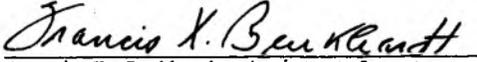
4/ On one occasion, the record reveals that the captain independently observed a probationary employee whose termination had been recommended by two lieutenants because of the serious nature of the act giving rise to the dismissal recommendation, but ultimately concurred in that recommendation.

leave and adjusting employee complaints, and that they effectively make recommendations with regard to employee evaluations, the retention or dismissal of probationary employees as well as the granting of awards. Accordingly, as the Activity's employees classified as Supervisory Hospital Police Officer, GS-083-6, are supervisors within the meaning of the Order, 5/ I shall order that they be excluded from the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, which is exclusively represented by the American Federation of Government Employees, Local 2798, AFL-CIO, be, and it hereby is, clarified by excluding from said unit employees classified as Supervisory Hospital Police Officer, GS-083-6.

Dated, Washington, D.C.
December 13, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

5/ Cf. General Services Administration, Region 3, Federal Protective Service Division, 7 A/SLMR 1057, A/SLMR No. 948 (1977); Department of the Interior, Bureau of Reclamation, Boulder Canyon Project, Boulder City, Nevada, 6 A/SLMR 413, A/SLMR No. 688 (1976); and U.S. Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, 5 A/SLMR 88, A/SLMR No. 481 (1975).

December 13, 1978

A/SLMR No. 1161

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES CUSTOMS SERVICE,
REGION VI, HOUSTON, TEXAS
A/SLMR No. 1161

UNITED STATES CUSTOMS SERVICE,
REGION VI, HOUSTON, TEXAS

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 143 alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by instituting a team concept for the assignment of its inspectional personnel without first affording the NTEU an opportunity to bargain over the procedures management would observe in taking the action involved and its impact on adversely affected employees, and by unilaterally changing certain established terms and conditions of employment without first negotiating in good faith with the NTEU.

The Administrative Law Judge found that the Respondent had engaged in conduct violative of Section 19(a)(1) and (6) of the Order when it changed the workday, workweek and frequency of shift rotation without first bargaining in good faith on these matters which he concluded were within the ambit of Section 11(a) of the Order. He also found that while the decision to adopt a team concept was a reserved management right within the meaning of Section 11(b), the Respondent violated Section 19(a)(1) and (6) of the Order by implementing the new procedure without first affording the NTEU an opportunity to bargain over its implementation and impact.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered the Respondent to cease and desist from the conduct found violative of the Order and take certain affirmative actions.

Respondent

and

Case No. 63-7593(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 143

Complainant

DECISION AND ORDER

On September 28, 1978, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, as modified herein.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Customs Service, Region VI, Houston, Texas, (El Paso District) shall:

1. Cease and desist from:

(a) Changing the regular workday, the regular workweek, and the frequency of shift rotation without first notifying the National Treasury Employees Union and NTEU Chapter 143, the exclusive representative of its employees, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such changes.

(b) Unilaterally implementing a team concept for the assignment of its inspectional force without first notifying the National Treasury Employees Union and NTEU Chapter 143, the exclusive representative of its employees, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact and implementation of the decision to effectuate such a policy.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Rescind the changes set forth in paragraph 1(a) above, effective January 2 or 3, 1977, and restore all conditions of employment regarding these matters which were in effect prior to January 2 or 3, 1977, in the Port of El Paso.

(b) Notify the National Treasury Employees Union and NTEU Chapter 143 of any intended decision to implement a team concept for the assignment of its inspectional force and, upon request, meet and confer, to the extent consonant with law and regulations, on the impact and implementation of such decision.

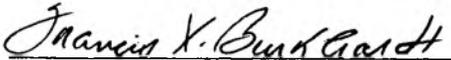
(c) If, following negotiations with the National Treasury Employees Union and NTEU Chapter 143, in accordance with paragraph 2(b) above, it is determined that any employee was adversely affected by the Respondent's failure to meet and confer concerning the procedures to be utilized and the impact of its decision to implement a team concept for the assignment of its inspectional force, such employee shall be made whole, including reimbursement for any loss of monies occasioned by such failure to meet and confer, consistent with applicable laws, regulations, and decisions of the Comptroller General.

(d) Post at its facilities in the Port of El Paso, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director and

shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(e) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
December 13, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended,

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT change the regular workday, the regular workweek, and the frequency of shift rotation without first notifying the National Treasury Employees Union and NTEU Chapter 143, the exclusive representative of our employees, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such changes.

WE WILL NOT unilaterally implement a team concept for the assignment of our inspectional force without first notifying the National Treasury Employees Union and NTEU Chapter 143, the exclusive representative of our employees, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact and implementation of the decision to effectuate such a policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind the changes set forth in paragraph 1 above, effective January 2 or 3, 1977, and restore all conditions of employment regarding these matters which were in effect prior to January 2 or 3, 1977, in the Port of El Paso.

WE WILL notify the National Treasury Employees Union and NTEU Chapter 143 of any intended decision to implement a team concept for the assignment of our inspectional force and, upon request, meet and confer, to the extent consonant with law and regulations, on the impact and implementation of such decision.

WE WILL, following negotiations with the National Treasury Employees Union and NTEU Chapter 143, as set forth in the preceding paragraph, make whole any employee who was determined to have been adversely affected by our failure to meet and confer concerning the procedures to be utilized and the impact of the decision to implement the team concept for the assignment of our inspectional force, including the reimbursement for any loss of monies occasioned by such failure, consistent with applicable laws, regulations, and decisions of the Comptroller General.

(Agency)

Dated: _____ By: _____
(Signature)

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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

Del Norte Bridge, b) the Bridge of the Americas, c) the Ysleta Bridge, d) the commercial import lot, and e) the commercial airport.

3. Prior to January, 1977, for purposes of assignment of work, each of the five separate work locations constituted a separate work assignment. Prior to January, 1977, the regular workday consisted of 8 hours and the normal work-week consisted of 40 hours; however, overtime, between the hours of 5:00 p.m. and 8:00 a.m. and on Sundays and on holidays, was frequently required. Prior to January, 1977, in order to man the border at all times, there were five overlapping shifts of eight hours per shift, Monday through Saturday; and six overlapping shifts of eight hours per shift on Sunday and holidays. These shifts were as follows:

Monday - Saturday

6:00 a.m.	to	2:00 p.m.
8:00 a.m.	to	4:00 p.m.
2:00 p.m.	to	10:00 p.m.
4:00 p.m.	to	12:00 midnight
12 midnight	to	8:00 a.m.

Sunday and Holidays

8:00 a.m.	to	4:00 p.m.
10:00 a.m.	to	6:00 p.m.
11:00 a.m.	to	7:00 p.m.
2:00 p.m.	to	10:00 p.m.
4:00 p.m.	to	12:00 midnight
12:00 midnight	to	8:00 a.m.

4. Prior to January, 1977, inspectors were individually assigned and rotated every four weeks. Rotation could consist of rotating from one shift to another shift at the same work location, from one shift to the same shift at another work location, or from one shift to another shift at another work location. The object and intent was to rotate each inspector through each shift and through all locations to maintain currency and proficiency in the various functions which differed at various work locations as to the nature of the work, that is whether chiefly "primary", or "secondary", or examination of merchandise, invoices and manifests, etc. At some time in the past, El Paso had used a wheel to determine rotation whereby the name of each inspector was placed on the spoke of the wheel and as that spoke moved to a number, which designated a work location and a shift, his rotation was thus determined; but this method had become unsatisfactory and had been abandoned and rotation for a considerable period of time had been determined by management, without any wholly fixed

pattern but based on knowledge of prior schedules, to achieve a fair and equitable assignment of inspectors to each shift, some of which were considered undesirable by most inspectors, as well as rotation through each work location. After each schedule was posted, inspectors were permitted to "trade" their respective assignments.

5. Prior to January, 1977, there had been a major exception to the requirement that inspectors rotate shifts and this was the special "school shift", whereby inspectors attending school were permanently assigned to a non-rotating "school shift" starting at 4:00 p.m. and ending at 12:00 midnight during the time that school was in session. When school was not in session their shifts rotated, for example, during summer vacation break, and when an inspector completed, or left school, he/she resumed shift rotation.

At any one time, between ten and twenty inspectors regularly attend college.

6. Prior to January, 1977, the individual rotation of inspectors resulted in each inspector working under various supervisors, indeed, prior to January, 1977, Complainant's witnesses represented that an average of four supervisors had imput on the annual performance evaluation of each inspector. In addition, each inspector tended to be assigned to work with many different inspectors.

7. In September, 1976, management in El Paso began consideration of a "team" concept for the assignment and utilization of inspectors whereby inspectors would be divided into permanent teams and each team, as a unit, would rotate. NTEU, by rumor, became aware that management was considering a "team" concept and Mr. Robert Malwitz, President of Chapter 143, by letter dated September 19, 1976, addressed to District Director William Hughes, demanded to negotiate,

"... regarding the proposed change, from the current situation whereby Inspectors are assigned to shifts to enable them to attend college ... to the proposed situation whereby Inspectors would be lumped into a pool, divided into teams with each team assigned to a different Supervisor, and then each entire team would be rotated to a different shift every four (4) weeks. This, also, affects leave, status, personnel relations, etc.

"... negotiations should commence by no later than October 4, 1976. NTEU Chapter 143 hereby renews its proposal of September 12, 1975. 1/ Since NTEU has already submitted proposals, please provide management's proposals to NTEU, sufficiently in advance to afford time for digestion and preparation for bargaining." (Res. Exh. 1).

8. By letter dated October 1, 1976, Acting District Director John M. Hudson responded to Mr. Malwitz' letter of September 19, 1976, and stated that:

"... since we have no specific proposal we are not at the place to notify you and discuss the questions with you. If the proposal gels into a specific plan, we would want to notify you and have some input and discussion with you.

"In the second paragraph of your letter you talk about a proposal of yours dated September 12, 1975. 2/ We have not been able to locate this proposal in our files. Please forward a copy to us for our information." (Comp. Exh. 1).

9. By letter dated November 19, 1976, Mr. John M. Hudson, for District Director Hughes, advised Mr. Malwitz, President of

1/ In September, 1975, Mr. Charles Easley, then Chief Inspector in El Paso, had mentioned the possibility of a "team" concept and had asked for NTEU's opinion. Mr. Malwitz, after conferring with bargaining unit employees, had advised Mr. Easley that NTEU proposed, as more beneficial, "slot rotation".

2/ It would appear that this proposal, indeed Mr. Easley's mention of a team concept as well, had been oral. Although it does not appear that Complainant ever "forwarded a copy" of its 1975 proposal in response to the letter of October 1, 1976, there is no dispute, as set forth hereinafter, that in 1976 Complainant proposed "slot rotation", which was substantially the method of assignment in effect prior to January, 1977, except that "slot rotation" would have been more precisely controlled essentially like "wheel rotation", a term Complainant uses as synonymous to "slot rotation", although, as Mr. Chapius testified, there may be some distinctions, depending on circumstances, between the two terms.

of Chapter 143; as follows:

"Attached is a circular proposing a change in work assignments for Customs Inspectors at the Port of El Paso, effective date December 5, 1976. (Emphasis supplied.) (Comp. Exh. 2).

The Circular stated, inter alia,

"Each team will rotate on a four-week basis. ..." (Comp. Exh. 2)

10. Mr. Malwitz, by letter dated November 26, 1976, acknowledged receipt of Mr. Hughes' letter of November 19, 1976, and stated:

"... NTEU and Chapter 143 wish to negotiate the concept and its impact upon the affected employees. We hereby renew our demand for negotiations sent to you on September 19, 1976.

"I will be willing to meet with you at a time and place convenient ... to establish ground rules for the negotiations." (Comp. Exh. 3)

11. Respondent responded by letter dated November 30, 1976, stating, in part, as follows:

"... The Director of Inspections & Control contacted you today, Tuesday, November 30, 1976, and it was agreed that NTEU and management meet on December 1, 1976. ... The purpose of the meeting will be to negotiate the impact and/or implementation of the inspectional team concept. ..." (Comp. Exh. 5). (Emphasis supplied.)

12. The parties met on December 1 and Mr. Malwitz opened the meeting by reading a statement (Comp. Exhs. 6, 7 and attachment to Comp. Exh. 8) which, inter alia, requested management to:

- a) advise the union in detail as to the substance and procedures of all contemplated changes;
- b) time and place for negotiations of ground rules.

- c) provide all information used or relied upon in proposing the change;
- d) implementation be deferred until completion of negotiations.

13. Respondent asserted that the following areas were inappropriate for negotiation:

- (a) ground rules for negotiation; and
- (b) background information.

Respondent further stated that only implementation and impact was negotiable (Comp. Exh. 8).

There then followed some discussion of some eleven aspects of problem areas that could arise with the team concept and the parties adjourned to reconvene on December 14, 1976. The minutes, taken by Mrs. Dorothy Clinton accurately reflect the events of December 1, 1976.

14. A letter dated December 8, 1976, from District Director of Customs Hughes addressed to Mr. Malwitz (Comp. Exh. 10) purported to submit the minutes of the December 1st meeting together with proposed duty assignment and a proposed master schedule. Mr. Malwitz did not receive the letter dated December 8, 1976, nor the attachments, until the meeting of December 14, 1976, when a copy was furnished by Mr. Chapuis (Res. Exh. 3).

15. The documents entitled "Duty Assignments" and "Master Schedule - One Year" received by Complainant on December 14, 1976, are particularly significant in that these documents disclosed, for the first time, that Respondent proposed changes in established working conditions which went far beyond the team concept of assignment of Inspectors. Thus, by way of example, the Duty Assignment document disclosed for the first time proposed changes of: a) starting times of all shifts, except the 12 midnight to 8:00 a.m. shift and the shifts at the Import Lot, by 30 minutes; and b) the regular workweek from 40 hours to 42 1/2 hours; and the Master Schedule disclosed, also for the first time, that rotation was to be monthly rather than every four weeks. In addition, the number of shifts was reduced and certain work assignments were changed.

Upon receipt of this information, Complainant requested, and was granted, a 30 minute recess and upon resumption of the meeting of December 14, 1976, requested bargaining on each of the proposed changes, i.e., workday, workweek, work

assignments, and rotation, of which Complainant was first informed on December 14, 1976. As noted hereinafter, there was never any negotiation, as requested, as to any of these proposed changes.

16. Respondent by letter dated November 30, 1976, had stated that the purpose of the meeting of December 1 was to "negotiate the impact and/or implementation of the inspectional team concept"; however, although the meeting of December 14, 1976, was a resumption of the discussions begun on December 1, 1976, both the minutes, as taken by Mrs. Clinton (Res. Exh. 3), and the testimony, demonstrated that the parties discussed at some length the proposed decision to adopt a team concept. Complainant, while not withdrawing its demand to negotiate ground rules, agreed not to make an issue of its demand for ground rules. Complainant urged slot rotation as a more acceptable alternative which would achieve all the objectives sought by management. Complainant's primary objections to the team concept proposed by Respondent were: a) loss of freedom to trade shifts; b) isolation of Inspectors, both as to Supervisors and other Inspectors; and c) loss of a school shift. Respondent replied that nothing in the team concept precluded the supervisor allowing changes of shifts and that a single supervisor for each team would permit better evaluation for promotion.

It became clear that the school shift was of controlling importance. Complainant wanted the existing 4-12 school shift and stated:

"... the Union will accept the team concept in its entirety if Customs will give them a school shift." (Res. Exh. 3, p. 8).

Both from the minutes, which I find accurately reflect in most respects, the substance of the meeting of December 14, 1976, and from the testimony of the parties, it is clear that when Complainant referred to the school shift it meant the 4-12 shift and no other. Indeed the minutes further reflect the following statement by Mr. Chapuis,

"Mr. Chapuis said ... that the union would accept the Team Concept with the modification of a 4/12 shift for students." (Res. Exh. 3, p. 10).

Mr. Chapuis testified that Complainant

"... never offered to agree to the midnight to 8:00 shift." (Tr. 215).

Respondent had offered as a solution to the school shift sought by Complainant: a) rotation of all shifts on an annual basis which would permit Inspectors desiring to attend school to schedule their classes, either during the day or at night for a complete term; or b) a 12 midnight to 8:00 a.m. school shift would be provided if Complainant would supply a minimum of 12 Inspector-students. Mr. Malwitz stated that he was without authority, based on the instructions of his members to agree on anything other than Complainant's proposed slot rotation or the team concept with a 4-12 midnight school shift and requested a 10 day recess in order to poll his members on the various alternatives, including Complainant's proposed slot rotation. Mr. Chapuis stated that he would agree to the requested ten day recess,

"If the pole(sic) is to be conducted only on those two propositions of the Team Concept as proposed or the Team Concept with the special schedule [12 midnight to 8:00 a.m.]. ..." (Res. Exh. 3, p. 10).

Mr. Malwitz refused to limit the poll to the two choices and the following dialogue occurred:

"Mr. Chapuis replied, Since you do not accept that, we will as management, notify you that the Team Concept will go into effect on January 3, 1977.

"Mr. Malwitz asked if management was willing to discuss the mechanics and implementation and impact on this thing.

"Mr. Chapuis replied we can discuss it at another meeting. Perhaps Thursday the 16th at 10:00 in my office.

"The meeting was adjourned at 4:45 p.m." (Res. Exh. 3, p. 10).

17. The parties did meet on December 16, 1976, in Mr. Chapuis' office at which time Mr. Malwitz testified:

"Mr. Chapuis delivered a prepared statement to the effect that it was management's understanding that negotiation had been completed on the 14th of

of December and that they would not continue to negotiate. All they would do is provide information from that point on.

* * * *

"We objected to that and said that we wanted to continue negotiation, that no agreement had been reached and that we still had many items that we wanted to negotiate." (Tr. 78).

The minutes of the December 16, 1976 meeting, taken by Mrs. Lilita Clark (Comp. Exh. 17) fully confirm Mr. Malwitz's testimony and further note, inter alia:

[Mr. Chapuis] "... there will be no further negotiations on impact or implementation.

* * * *

[Mr. Malwitz] "NTEU continues to want to negotiate regarding impact and implementation of the proposed scheduling change, specifically the two major concerns which focus upon employees attending school and work conditions and morale."

* * * *

"It is NTEU's position that this presents a fait accompli. NTEU requests good faith negotiations over the impact and implementation of the scheduling changes, and requests further negotiation sessions. ..."

[Mr. Chapuis] "It is management's position that negotiations on impact and implementation were completed last week when you were given management's decision that the team concept would go into effect January 2, 1977. At the meeting today we will be glad to provide you with any information we have, but there will be no further negotiation on impact or implementation.

[Mr. Malwitz] "On December 14, 1976, NTEU learned that the U.S. Customs Service management in El Paso contemplated a change whereby

shifts would cover 8 1/2 hour periods rather than the 8 hour periods as had been past practice. NTEU, Chapter 143, hereby demands to negotiate regarding this proposed change.

"It is our understanding that the subject matter of duty hours is negotiable. It is also our understanding, based upon recent decisions of the Assistant Secretary of Labor Management Relations that the status quo must be maintained until the negotiation agreements are met.

[Mr. Chapuis] "It is management's position that negotiations on impact and implementation were completed last week when you were given management's decision that the team concept would go into effect January 2, 1977. At the meeting today we will be glad to provide you with any information we have, but there will be no further negotiations on impact or implementation.

"Mr. Malwitz then asked how the proposed change (team concept) will be put into effect, how the teams will be selected and what provisions had been made to make this thing operational.

"Mr. Chapuis stated that management will do it in an equitable way. ..." (Comp. Exh. 17).

Mr. Chapuis testified that the minutes (Comp. Exh. 17) fairly represented what occurred at the meeting of December 16, 1976.

18. Respondent implemented the team concept, as it had proposed on November 19, 1976, without a school shift on January 2, 1977; and at the same time changed the hours of work and regular workweek as shown on the "Duty Assignment" document and changed the frequency of shift rotation from every 4 weeks to monthly as shown on the "Master Schedule", both documents having been disclosed to Complainant for the first time at the meeting of December 14, 1976.

19. By letters dated January 4, 1977 (Comp. Exh. 12) and January 10, 1977 (Comp. Exh. 13) addressed to District Director of Customs William F. Hughes, Mr. Malwitz renewed Complainant's

request "to negotiate the program management is unilaterally implementing on January 2, 1977 ... to negotiate regarding the impact and implementation of the scheduling change ... to negotiate regarding the change in work tours and hours of work." (Comp. Exh. 12); and "... NTEU Chapter 143 hereby formally requests that negotiation regarding the scheduling change ... be re-convened for the purpose of reaching an agreement acceptable to all parties." (Comp. Exh. 13).

20. Respondent replied to Complainant's letters of January 4 and 10, 1977, by letter dated February 15, 1977, in which it stated:

"It is the position of this office that negotiation on the impact and implementation of the team concept was concluded in our meeting of December 14, 1976. Therefore, no purpose could be served by reopening negotiations." (Comp. Exh. 14).

21. Respondent concedes, as it must as shown by the record, that the change of starting time, the increase in the regular workday and the corresponding increase in regular workweek, and the frequency of shift rotations, from every four weeks to monthly were never discussed on December 14, 1976, and Mr. Malwitz testified, without contradiction, that he requested bargaining as to each matter on December 14, 1976, when the proposed changes were first disclosed; that the request for bargaining on the proposed changes in duty hours was renewed on December 16, 1976; and that the request for bargaining on hours of work and work tours was repeated by Mr. Malwitz's letters of January 4 and 10, 1977.

Respondent asserts that, by Article VI, Section 1 g of the Basic Agreement, Complainant has waived all right to negotiate concerning the change in starting time, regular workday, regular workweek and frequency of shift rotation. Article VI provides as follows:

"MANAGEMENT RIGHTS

"1. In all actions and agreements, management reserves the right, in accordance with applicable laws and regulations, to:

[a-f are taken directly and, so far as material, in haec verba, from Section 12b(1)-(6) of the Order.]

"...

"g. establish hours of work and tours of duty; ..." (Res. Exh. 2, p. 9)

22. Mr. Chapuis' memorandum dated November 8, 1976, to Mr. Jeff Spinks, Chief, Labor Management Relations Program Branch (Res. Exh. 4, Attachment 1) transmitted a copy of a proposed circular, undated, subject: Inspection Teams (Res. Exh. 4, Attachment 2), and Mr. Spinks responded by letter dated November 15, 1976 (Res. Exh. 4). There is no indication in the memorandum, the proposed circular or in Mr. Spinks' reply of any intention to change the starting time, regular workday, regular workweek, or frequency of rotation. Indeed, as to frequency of rotation the proposed circular stated, "Each team will rotate on a four-week basis. ..." A considerably abbreviated version of the same circular, dated November 16, 1976, was delivered to Complainant by letter dated November 19, 1976 (Comp. Exh. 2), which also stated, "Each team will rotate on a four-week basis. ..."

23. The principal purposes of the 30 minute expansion of the regular workday, which did not apply to the graveyard shift (12 midnight to 8 a.m.) or change the regular hours of work at the commercial import lot, were: a) to permit inspection of uniforms prior to the beginning of the shift; and b) to disseminate information and instructions to Inspectors at team briefings. Previously, there had been no one period for briefings, inspection of uniforms, etc., and the supervisors had to give instructions to individual Inspectors. Chief Inspector Lewis M. Jones had been opposed, initially, to the expansion of the regular workday because he could see no advantage to it; but Mr. Jones testified that he had found the change most helpful because it had given supervisors a point at which badly needed information could be disseminated to Inspectors.

CONCLUSIONS

A. Decision to Adopt Team Concept was a Reserved Right of Management

Section 11(b) of the Order provides, in part, as follows:

"... the obligation to meet and confer does not include matters with respect to ... its organization; the number of employees; and the numbers, types, and grades of positions assigned to an organizational unit, ... or tours of duty ... This does not preclude the parties from negotiating agreements providing

appropriate arrangements for employees adversely affected by the impact of realignment of work forces. ..."

There is no dispute that the proposed team concept concerned "personnel policies and practices and matters affecting working conditions" as to which negotiations would have been required, pursuant to Section 11(a) of the Order, unless excepted from the obligation to bargain by Section 11(b) of the Order. 3/

By letter dated November 30, 1976, and at the first meeting on December 1, 1976, Respondent quite clearly asserted that "Only the implementation and impact on employees is negotiable. ..." which position was again asserted at the commencement of the meeting on December 14, 1976. Although the parties on December 14, 1976, plainly bargained on the proposed team concept, no agreement was reached and the fact that Respondent voluntarily bargained on a non-mandatory subject of bargaining did not make the matter a mandatory subject for bargaining. Accordingly, when Respondent on December 14, 1976, announced that, since no agreement had been reached, it would implement the team concept on January 3, 1977, Respondent did not thereby violate Section 19(a)(6) of the Order by refusing to bargain on the decision to implement the team concept if such matter were excepted from the obligation to negotiate pursuant to Section 11(b) of the Order as contended by Respondent. cf., Local 1485, National Federation of Federal Employees and Coast Guard Base, Miami, Florida, FLRC No. 75A-77, 4 FLRC 421, 424-425 (1976). Of course, Respondent was required, upon request, to negotiate in good faith on the impact and implementation of such decision even if the decision to change established conditions of employment were a reserved right of management pursuant to Section 11(b) of the Order. AFGE Local 1940 and Plum Island Animal Disease Laboratory, Department of Agriculture, Greenport, N.Y., FLRC No. 71A-11, 1 FLRC 101 (1971); Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656, 6 A/SLMR 237 (1976); Department of Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 814, 7 A/SLMR 255 (1977); Pennsylvania Army National Guard and Association of Civilian Technicians, Inc., A/SLMR No. 475, 5 A/SLMR 47 (1975).

3/ Respondent, both at the hearing and in its Brief, asserts that its obligation to bargain on the team concept decision is excepted by Section 11(b) of the Order; but Respondent has not asserted that such decision was a reserved right of management pursuant to Section 12(b) of the Order. Accordingly, no opinion is expressed as to whether Section 12(b) of the Order is applicable.

Complainant asserts that the change from slot rotation was merely a procedural variation to implement the basic management decision that employees would rotate; that the key words in applying the 11(b) staffing language are "numbers, types, and grades of positions of employees, work project or tour of duty" (Brief, pp. 28, 29); and that there was no change in the numbers, types and grades of employees. Accordingly, Complainant contends that both Respondent's proposed team concept as well as its counterproposal, slot rotation, were negotiable as neither proposal was determinative of the numbers, types and grades of positions or employees assigned to an organizational unit or tour of duty and, therefore, not exempted from the obligation to bargain of Section 11(a) of the Order. Complainant's position, which has been well and forcefully presented, must be rejected for the reason that the change was significantly more than a procedural variation for implementation of the basic management decision that employees would rotate.

Establishment of a team concept consisted of dividing the inspectional staff into six teams, each team to consist of one supervisor, one Senior Inspector, sixteen or more Inspectors and one Detector Dog Unit; and each team would then rotate through all Inspection and Control functions of the Port of El Paso. In addition the circular, dated November 16, 1976, and transmitted to Complainant by letter dated November 19, 1976, stated that, as part of the contemplated action, management would "streamline and consolidate the inspectional apparatus within the Port of El Paso." On December 14, 1976, Respondent's Duty Assignment spelled out, *inter alia*, the consolidation of duty assignments and reduction of the number of shifts (6:00 a.m. to 2:00 p.m. and 2:00 p.m. to 10:00 p.m. Monday through Saturday; 10:00 a.m. to 6:00 p.m.; 11:00 a.m. to 7:00 p.m.; 2:00 p.m. to 10:00 p.m. on Sunday and holidays were eliminated).

Even if viewed in isolation, Respondent's decision to divide its inspectional staff into permanent teams, each team under the supervision of a supervisor and with a Senior Inspector assigned to each team, directly related to the "organization" of the agency which is excepted from the obligation to bargain by Section 11(b) of the Order. Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, FLRC No. 72A-33, 1 FLRC 445 (1973); Local 1485, National Federation of Federal Employees and Coast Guard Base, Miami Beach, Florida, FLRC No. 75A-77, 4 FLRC 421 (1976). In the Coast Guard Base case, supra, the Council decision stated in pertinent part as follows:

"... section 11(b) ... excepts from the section 11(a) obligation to bargain matters with respect to, among other things, the agency's 'organization.' In this regard, the Council has previously stated in its Charleston decision, with respect to a proposal concerning 'assignment of each unit employee to one appropriate civilian supervisor,' as follows:

'In our opinion, the union proposal must be regarded as a subject within the above quoted provisions of section 11(b) of the Order, i.e., one about which the agency may, but is not required to negotiate. The supervisory structure of an agency and the designation of the supervisory positions to which nonsupervisory positions are assigned are essential parts of the overall organization of an agency, i.e., the administrative and functional structure of an agency.'
[1 FLRC at 448]

"In our view ... the instant disputed provision ["Such work shall be done under proper supervision"] also relates principally to the assignment of unit (non-supervisory) employees to supervisors. Hence ... we must find that such provision ... Deals with a matter with respect to the 'organization' of the agency and is excepted from the obligation to bargain under section 11(b) of the Order." (4 FLRC at 431-432)

Respondent's decision to institute a team concept not only concerned its "organization" but also concerned the number, types and grades of positions of employees assigned to an organizational unit - in this instance to each team. Thus, for example, one Senior Inspector was to be assigned to each team. Moreover, by setting up teams, Respondent could achieve better balance of experience and manpower on each team, all of which related to and was determinative of staffing for each work location and shift.

Viewed in whole, Respondent's team concept further contemplated, and provided for, the elimination of certain tours of duty and for realignment of duty assignments. Thus, Duty Assignment "A" was 12 midnight - 8:00 a.m. shifts at Paso Del Norte, Bridge of the Americas and Ysleta, plus private aircraft arriving at El Paso International Airport; Duty Assignment "B" was 7:30 - 4:00 p.m. shift at Paso Del Norte Bridge; Duty Assignment "C" was 3:30 - 12 midnight shift at Paso Del Norte and Ysleta; Duty Assignment "D" was 7:30 to 4:00 p.m. shift at Bridge of Americas; Duty Assignment "E" was 3:30 - 12 midnight shift at Bridge of the Americas; and Duty Assignment "F" was 8:30 - 5:00 p.m. shift at the Import Lot, Airport and Railroad and the 7:30 - 4:00 p.m. shift at Ysleta Station. In AFGE Local 1940 and Plum Island Animal Disease Laboratory, Department of Agriculture, Greenport, N.Y., FLRC No. 71A-11, 1 FLRC 101 (1971), the Council stated:

"It is plain ... that the establishment or change of tours of duty was intended to be excluded from the obligation to bargain under section 11(b)." (1 FLRC at 103)

In Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston, South Carolina, FLRC No. 71A-52, 1 FLRC 236 (1972), the Council further commented on its Plum Island decision as follows:

"... In the facts of that case [Plum Island], which dealt with a situation of round-the-clock operations and a work schedule of rotating tours of duty, the number and duration of the tours were integrally related to the numbers and types of workers assigned to those tours. Together they determined the agency's staffing pattern for accomplishing the work" (1 FLRC at 240).

In International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., FLRC No. 71A-30, 1 FLRC 323 (1973), the Council, after noting the adoption of the present language of 11(b) in E.O. 11491 and the accompanying explanation, Labor-Management Relations in the Federal Service (1971), stated:

"It is evident from the foregoing that, under both E.O. 10988 and E.O. 11491, the organization of

an agency, as well as its patterns of staffing that organization, were excluded from the obligation to bargain by the agency.

"The term 'organization' of an agency is customarily recognized to mean the administrative and functional structure or systematic grouping of work, of an agency to accomplish its mission. ..." (1 FLRC at 330).

Accordingly, Respondent's decision to institute the team concept, and Respondent's decision to eliminate certain shifts and to realign Duty Assignments to carry out its team concept concerned its organization and administrative and functional structure and was determinative of its staffing pattern. Therefore, such decisions were excepted from the 11(a) obligation to negotiate by the provisions of Section 11(b) of the Order. Further, Article VI 1.g. of the parties' Basic Agreement reserved to management the right to establish hours of work and tours of duty.

B. Change of the Regular Workday, the Regular Workweek and the Frequency of Shift Rotation were Mandatory Subjects for Bargaining

In NAGE Local R 12-183 and McClellan Air Force Base, California, FLRC No. 75A-81, 4 FLRC 354 (1976) it was stated:

"... the Council consistently has adhered to the principle that a proposal is excepted from the agency's obligation to bargain under section 11(b) if, in the circumstances of a particular case, such proposal is integrally related to and consequently determinative of the staffing patterns of the agency, that is, the numbers, type and/or grades of positions or employees assigned to an organizational unit, work project or tour of duty." (4 FLRC at 356).

The decisions of the Assistant Secretary are to like effect. See, Department of the Treasury, Internal Revenue Service, Chicago, District Office, Chicago, Illinois, A/SLMR No. 962 (1978).

In this case, Respondent increased the regular workday by 30 minutes and the regular workweek by 2 1/2 hours. However, desirable or beneficial such change may have been, such change was not integrally related to and did not determine or affect in any manner Respondent's staffing patterns, nor, of course, did the change of hours of work affect in any manner the numbers, type or grades of positions or employees assigned to any team or to any shift. That increase of work hours was not essential to implementation of a team concept was firmly shown by: a) the testimony of Chief Inspector Jones; b) the fact that inspection of uniforms and dissemination of information to Inspectors had been accomplished in the past without benefit of an inspection-briefing period prior to the beginning of each shift; and c) the absence of such inspection-briefing at the Import Lot and for the 12 midnight to 8:00 a.m. shifts.

Nor was the change in frequency of rotation integrally related to or determinative of Respondent's staffing patterns. Indeed, Respondent's proposal to Complainant (Comp. Exh. 2) specifically stated that "Each team will rotate on a four-week basis. ..." and it was not until Respondent produced its Master Schedule on December 14, 1976, that there was any indication that rotation was to be monthly, rather than every four weeks.

Recognizing that these changes were not, under the circumstances of this case, exempt from the obligation to negotiate, Respondent asserts that Article VI 1 g of the Basic Agreement constitutes an express waiver by Complainant of the right to negotiate concerning these matters. Article VI 1 g reserves to management the right to

"g. establish hours of work and tours of duty."

While a right to negotiate may be waived, the Assistant Secretary has made it clear that a waiver under the Order must be clear and unmistakable. NASA, Kennedy Space Center, Florida, A/SLMR No. 223, 2 A/SLMR 566, 569 (1972); Department of the Treasury, Internal Revenue Service, Southwest Region, Dallas, Texas, A/SLMR No. 858, 7 A/SLMR 523 (1977); Department of the Treasury, Internal Revenue Service, Chicago District Office, Chicago, Illinois, A/SLMR No. 962 (1978). Any intention to waive the right to bargain over so basic a right as the regular workday or the regular workweek would require language much more direct and specific than "establish hours or work and tours of duty". Such language does not indicate more than the right to establish the starting times and/or the number of shifts, an interpretation fully consistent with prior practice. As noted above, prior to January, 1977, Respondent had five shifts Monday through Saturday

and six shifts Sunday and holidays, each of which was 8 hours. The only regular workday which varied was the shift at the Import Lot which was 8:30 a.m. to 5:00 p.m. No evidence or testimony was presented as to the bargaining history, intent or purpose of subsection "g"; nor was there any evidence or testimony as to whether the work hours at the Import Lot had been in existence prior to negotiation of the Basic Agreement (effective September 13, 1972) or had originated thereafter or whether such work hours had resulted from negotiation.

The precise meaning of subsection "g" is, at best, ambiguous and subsection "g" does not, in my opinion, spell out a clear and unmistakable intention by Complainant to waive its right to bargain over a change in the established regular workday and regular workweek. Indeed, the qualification of Article VI, "in accordance with applicable laws and regulations, to: g. establish hours of work and tours of duty" appears to have been a restatement of Section 11(b) rights. Structurally, Article VI a-f restate the provisions of 12(b) of the Order and g-i restates the substance of 11(b) of the Order. Plum Island, supra, had stated that "... the establishment or change of tours of duty was intended to be excluded from the obligation to bargain under section 11(b) ... Clearly, the number of its work shifts or tours of duty, and the duration of the shifts, comprise an essential and integral part of the 'staffing patterns' necessary to perform the work of the agency." (1 FLRC at 103). The Basic Agreement was signed on August 18, 1972, and was approved September 13, 1972. The U.S. Naval Supply Center, Charleston South Carolina, case, supra issued thereafter on November 24, 1972, held that "Absent this integral relationship to staffing pattern, this proposal [to affirm Monday through Friday as the basic workweek] does not conflict with section 11(b), and Plum Island is inapposite." (1 FLRC at 240). So viewed, Article VI, subsection g is merely the incorporation of Section 11(b) as regards hours of work and tours of duty and, as the increase of the regular workday and regular workweek was not integrally related to Respondent's staffing pattern, "in accordance with applicable laws", Respondent was obligated to negotiate, as Complainant requested, prior to implementing the change in established regular workday and workweek. If, contrary to this conclusion, Complainant had waived its right to negotiate on the change of the established workday and workweek, Respondent was, nevertheless required to negotiate on the impact and implementation of such change, as Complainant had also requested. cf. New Mexico Air National Guard, Department of Military Affairs, Office of the Adjutant General, Santa Fe, New Mexico, A/SLMR No. 362, 4 A/SLMR 176 (1974).

Nor do I find in either Section 11(b) of the Order or in Article VI "g" of the Basic Agreement any basis whatever for exemption or waiver of Complainant's right to negotiate on Respondent's proposed change in frequency of rotation. Accordingly, as Complainant had requested bargaining on this change of established conditions of employment, Respondent was required to negotiate before implementing this change.

C. Respondent Did Not Bargain in Good Faith

Respondent was required to bargain in good faith on: a) the impact and implementation of the team concept, elimination of shifts and realignment of Duty Assignments; b) the proposed change of the regular workday and regular workweek and/or impact and implementation of such change; and c) the proposed change of frequency of rotation. Complainant requested such bargaining. For the reasons stated hereinafter, Respondent did not bargain in good faith.

With full recognition that there may be mutual benefit from early discussion of contemplated changes of established conditions of employment with representatives of its employees, Respondent was not required to do so and its refusal to do so was not a violation of any obligation under the Order.

Respondent delivered to Complainant on November 19, 1976, its Circular which announced its intention to establish a team concept effective December 5, 1976. Complainant requested negotiation and the first meeting began at 2:00 p.m. and ended at 4:45 p.m. As the testimony and minutes show, this meeting concerned, entirely, Respondent's position that only implementation and impact of the team concept was negotiable; rejection of Complainant's request for ground rules negotiation and rejection of Complainant's request for background information; presentation of Complainant's position; and outline problem areas that could arise from the team concept. Respondent did agree to defer the effective date of the team concept.

The second meeting was held on December 14, 1976, beginning at 10:00 a.m. and ending at 4:45 p.m. Neither in the Circular delivered to Complainant on November 19, 1976, nor at the meeting of December 1, 1976, had Respondent disclosed: a) any realignment of Duty Assignments or elimination of any shifts; b) any change of hours of work. c) any change in frequency of rotation. Indeed, the Circular specifically stated that "Each team will rotate on a four-week basis". However, at the December 14, 1976, meeting Respondent produced, and delivered to Complainant at the meeting, a Duty Assignment which disclosed for the first time the change of the regular workday and regular workweek, except at the Import Lot and on the

12 midnight to 8:00 a.m. shift; the realignment of duty assignments; the elimination of shifts (there were to be only three basic shifts: 7:30-4 p.m.; 3:30 to 12:00 midnight; 12:00 midnight to 8:00 a.m., rather than 5 shifts Mon. - Sat. and 6 on Sun. and holidays, plus the existing 8:30-5:00 p.m. shift at the Import Lot). At the same time, Respondent delivered to Complainant a Master Schedule which disclosed, contrary to the statement on the Circular, that rotation was to be monthly, rather than every 4 weeks. Complainant was granted a 30 minute recess to consider the information supplied and Mr. Malwitz testified that he requested negotiation on each item, i.e., change of the regular workday and workweek, frequency of rotation and realignment of duty assignments. These matters were not reached on December 14, 1976.

Although, for reasons set forth above, Respondent was not required to negotiate its decision to adopt a team concept, including realignment of duty assignments and elimination of overlapping shifts, Respondent was required to negotiate concerning the impact and implementation thereof. Respondent, notwithstanding its assertion that it would negotiate only impact and implementation of the team concept, in fact negotiated on the decision to adopt the team concept. It became clear that the primary roadblock to agreement on the team concept was a school shift for Inspectors. This affected about 1/5 of the Inspectional staff and, clearly, was a primary concern of Complainant. Inspectors attending school had, in the past, been assigned to the 4:00 p.m. to midnight shift. Complainant offered to agree to the team concept if the 4-12 school shift were retained. To be sure, Respondent made two counterproposals: First, that Inspectors all be assigned to a single shift for one year; Second, that the 12 midnight to 8:00 a.m. shift would be the school shift if Complainant could supply sufficient volunteers. Complainant objected to conditioning a school shift on its supplying volunteers; but, more important, Complainant's negotiator made it clear that his authority was limited to retention of the 4-12 shift as the school shift and requested a recess to permit a further poll of his members. Respondent offered a recess if the poll were based on questions suggested by it; Complainant refused to limit its poll of its members to only some alternatives whereupon Respondent refused to agree to a recess of negotiations and announced that, since Complainant refused its offer of a 12 midnight to 8:00 a.m. school shift, it was unilaterally implementing the team concept on January 3, 1977.

At this point, Mr. Malwitz asked if management was willing to discuss the mechanics and implementation and impact of the team concept and Mr. Chapuis replied "... we can discuss it at another meeting." and December 16, 1976, was agreed upon as the date for the next meeting. As noted above, beyond requesting bargaining on the change of the regular workday and

workweek and frequency of rotation, these matters had not been reached when the meeting of December 14, 1976, was terminated.

The parties assembled at 10:00 a.m. on December 16, 1976, to discuss the proposed team concept. Mr. Chapuis opened the meeting with the statement that,

"... it is management's position that negotiation on impact and implementation were completed last week when you were given management's decision that the team concept would be into effect January 2, 1977."

Complainant requested negotiation regarding impact and implementation on the team concept, specifically as to employees attending school, work conditions and morale; specifically requested bargaining on the change of duty hours; and requested information on how the team concept would be put into effect, how the teams would be selected, and what provisions had been made to make the team concept operational, to which Mr. Chapuis replied "management will do it in an equitable way". The meeting adjourned at 10:25 a.m.

By letters dated January 4 and 10, 1977, Complainant renewed its request for negotiations and Respondent by letter dated February 15, 1977, replied:

"it is the position of this office that negotiations on the impact and implementation of the team concept was concluded in our meeting of December 14, 1976. Therefore, no purpose could be served by reopening negotiations."

Throughout, Respondent was devious, to say the least. From the record, it is clear that, if not by November 16, 1976, when it prepared the Circular delivered to Complainant on November 19, 1976, at least prior to the meeting of December 1, 1976, it had decided on the realignment of duty assignments, the consolidation of shifts to three basic shifts, plus the existing shift at the Import Lot, change of frequency of rotation and to increase the regular workday from 8 to 8 1/2 hours and the regular workweek from 40 to 42 1/2 hours; but at no time prior to, or at the meeting of December 1, 1976, did it give Complainant any of the information relating thereto even though Complainant had requested, *inter alia*, "detail as to the substance and procedures of all contemplated changes". Indeed, on December 1, 1976, Respondent refused to provide Complainant with any information characterizing Complainant's

whole request as "background information", whereas, background information had been only a part of Complainant's request.

Although Respondent purported to have written a letter dated December 8, 1976, addressed to Mr. Malwitz which contained, as attachments, the minutes of the December 1st meeting, the proposed duty assignments and the master schedule, the record shows, and I find, that Mr. Malwitz did not receive the letter until a copy, with attachments, was delivered to him after the commencement of the December 14, 1976 meeting.

Under the circumstances, Respondent's bargaining on the team concept decision is highly suspect. The effect was that Respondent, by purporting to negotiate on the decision to adopt the team concept, diverted bargaining away from the change in the established workday, etc., and after ritualistic "bargaining" on the team concept decision, announced that, because Complainant had not accepted its offer, it was implementing the team concept on January 3, 1977.

For reasons stated hereinabove, the decision to adopt the team concept was a reserved right of management and Respondent's announcement on December 14, 1976, that it intended to implement the team concept was not, therefore, a refusal to bargain; however, Respondent was required to negotiate in good faith with regard to the impact and implementation of that decision. Even if the school shift were viewed as part of impact and implementation, Respondent did not bargain in good faith. To be sure, Respondent did make two offers. One was that all Inspectors remain on an assigned shift for one year, a proposal Respondent must have known would be rejected and which Respondent accorded scant attention. The other was that the midnight to 8:00 a.m. shift constitute the school shift. Complainant offered to agree to the team concept if the 4-12 shift were retained as the school shift. Respondent rejected Complainant's offer without stating any reason and when Complainant's chief negotiator, Mr. Malwitz, made it clear that he was without authority to agree to the team concept without retention of the 4-12 school shift and sought an adjournment to poll his members, Respondent refused to grant a recess unless the questions submitted to the membership were framed by Respondent and when Complainant refused to so limit its poll, Respondent announced that it was going to implement the team concept.

But as to impact and implementation of the team concept, Respondent, on December 14, 1976, recognizing that there had been no resolution and when Mr. Malwitz asked "if management was willing to discuss the mechanics and implementation and impact of the team concept", Mr. Chapuis replied:

"... we can discuss it at another meeting."

Complainant had not been informed of the proposed change of the regular workday, the regular workweek, or the frequency of rotation until after commencement of the December 14, 1976 meeting, and beyond requesting negotiations these matters were not reached on December 14, 1976.

Thus, at the conclusion of the December 14, 1976, meeting, there had been no bargaining on the proposed change of the regular workday and workweek or the frequency of rotation which, for reasons stated above, were mandatory subjects for bargaining; nor had there been any good faith bargaining on the impact and implementation of the team concept. Even if the change of the regular workday and workweek were deemed a reserved right of management by virtue of subsection "g" of Article VI of the Basic Agreement, there had not been any negotiations as to impact and implementation. Indeed, Respondent had not given Complainant any reasonable prior notice of such proposed changes and even if Complainant had not specifically requested bargaining on these matters until December 16, and Mr. Malwitz's testimony to the contrary, i.e., that he did request bargaining on December 14 after he was given the documents which disclosed, for the first time, such proposed changes, was uncontradicted and has been fully credited, Complainant's December 16, 1976, request to negotiate would have been timely.

Notwithstanding its agreement, at the conclusion of the December 14 meeting, to discuss impact and implementation at another meeting, which meeting was fixed for December 16, 1976, when the December 16, 1976 meeting opened, Respondent announced that "... negotiations on impact and implementation were completed last week ..." Respondent's only response to the renewal of Complainant's demand to negotiate on the change of the regular workday and workweek was to reiterate that "negotiations on impact and implementation were completed last week." When Complainant asked how the proposed team concept would be put into effect, how the teams were to be selected, etc., Respondent simply asserted that "management will do it in an equitable way."

The refusal of Respondent to negotiate with respect to the change of the regular workday and workweek and the frequency of rotation was, without more, a violation of 19(a)(1) and (6) of the Order and the refusal of Respondent to negotiate with respect to the impact and implementation of the team concept at all times on and after December 16, 1976, also, without more was a violation of Sections 19(a)(1) and (6) of the Order. Indeed, Respondent refused to discuss, or furnish any information

on December 16, 1976, concerning selection of the teams, provisions to make the team concept operational, or to consider any of the other matters which Complainant had outlined as problem areas on December 1, 1976. Respondent adhered to its position and, on February 15, 1977, in response to Complainant's letters of January 4 and 10, 1977, which renewed Complainant's request for negotiation, stated:

"It is the position of this office that negotiations on the impact and implementation of the team concept was concluded in our meeting of December 14, 1976. Therefore, no purpose could be served by reopening negotiations."

On January 2 or 3, 1977, Respondent implemented unilateral changes in terms and conditions of employment in violation of Sections 19(a)(1) and (6) of the Order. In order to effectuate the purposes and policies of the Order, Respondent will, pursuant to Department of the Treasury, Internal Revenue Service, Southwest Region, Dallas, Texas, A/SLMR No. 858, 7 A/SLMR 524, 525 n.1 (1977), be required to reestablish the terms and conditions of employment in existence prior to the unilateral changes and maintain such terms and conditions during the period in which the parties are engaged in bargaining with respect to the proposed changes.

RECOMMENDATION

Having found that Respondent has engaged in conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order hereinafter set forth which is designed to effectuate the policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Customs Service, Region VI, Houston, Texas, shall:

1. Cease and desist from:

a) Changing the regular workday, the regular workweek, or the frequency of shift rotation without notifying the National Treasury Employees Union and NTEU Chapter 143, the exclusive representative of its employees, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such changes.

b) Adopting a team concept for the assignment of its inspectional force, changing work assignments, eliminating overlapping shifts, eliminating the 4:00 p.m. to 12:00 midnight school shift, or otherwise implementing a team concept without notifying the National Treasury Employees Union and NTEU Local 143, the exclusive representative of its employees, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact and implementation of the decision to effectuate such changes.

c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and policies of Executive Order 11491, as amended:

a) Rescind the implementation, effective January 2 or 3, 1977, of a team concept for the assignment of its inspectional force, all changes of work assignments, all changes of shifts, the changes of the regular workday and regular work-week and the change of frequency of shift rotation and restore all conditions of employment in effect prior to January 2 or 3, 1977, in the Port of El Paso.

b) Notify the National Treasury Employees Union and NTEU Chapter 143 of any intended change in conditions of employment and, upon request, meet and confer in good faith, to the extent consonant with law and regulations on the decision and/or impact and implementation of the decision to effectuate such a change.

c) Post at its facilities in the Port of El Paso, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 28, 1978
Washington, D.C.

WBD/mm1

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT change the regular workday, the regular workweek, or the frequency of shift rotation without notifying the National Treasury Employees Union and NTEU Chapter 143, the exclusive representative of our employees, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such changes.

WE WILL NOT adopt a team concept for the assignment of our inspectional force, change work assignments, eliminate overlapping shifts, eliminate the 4:00 p.m. to 12:00 midnight school shift, or otherwise implement a team concept without notifying the National Treasury Employees Union and NTEU Chapter 143, the exclusive representative of our employees, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact and implementation of the decision to effectuate such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL rescind the implementation, effective January 2 or 3, 1977, of a team concept for the assignment of our inspectional force, all changes of work assignments, all changes of shifts, the change of the regular workday and regular workweek and the change of frequency of shift rotation and restore all conditions of employment in effect prior to January 2 or 3, 1977, in the Port of El Paso.

Appendix (cont'd)

WE WILL notify the National Treasury Employees Union and NTEU Local 143 of any intended change in conditions of employment and, upon request, meet and confer in good faith to the extent consonant with law and regulations, on the decision to effectuate such change.

United States Customs Service
Region VI
Houston, Texas

Dated: _____ By: _____
District Director

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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

December 26, 1978

A/SLMR No. 1162

UNITED STATES DEPARTMENT OF LABOR

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
57th FIELD MAINTENANCE SQUADRON,
NELLIS AIR FORCE BASE, NEVADA
A/SLMR No. 1162

DEPARTMENT OF THE AIR FORCE,
57th FIELD MAINTENANCE SQUADRON,
NELLIS AIR FORCE BASE, NEVADA

Respondent

and

Case No. 72-7525(CA)

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees Local 2497, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a) (1) and (3) of the Order by granting leave without pay to Harold McLeod, an electrical shop foreman, in order that he might serve as a National Vice-President of the AFGE.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2947

Complainant

The Administrative Law Judge concluded that, under the particular circumstances of this case, the Respondent had not violated Section 19(a) (1) and (3) of the Order. Accordingly, he recommended dismissal of the complaint.

DECISION AND ORDER

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

On November 17, 1978, Administrative Law Judge John V. Evans issued his Recommended Decision and Order in the above-entitled proceeding 1/, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

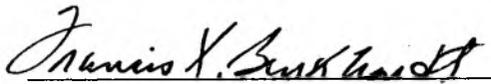
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

1/ A motion to intervene in this proceeding was filed at the hearing by Harold McLeod, on behalf of the American Federation of Government Employees, AFL-CIO, National Office. There being no objection, said motion was granted by the Administrative Law Judge.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-7525(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 26, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

San Francisco Regional Office
Suite 600 - 211 Main Street
San Francisco, California 94105



Area Code 415 556-0555

In the Matter of)
DEPARTMENT OF THE AIR FORCE)
57th FIELD MAINTENANCE SQUADRON)
NELLIS AIR FORCE BASE, NEVADA)
Respondent)
and)
AMERICAN FEDERATION OF GOVERNMENT)
EMPLOYEES, LOCAL 2947, AFL-CIO)
Complainant)

CASE NO. 72-7525(CA)

James E. Dumerer, Major, USAF
USAF Central Labor Law Office
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727 East Durango Boulevard
San Antonio, Texas 78206
For the Respondent

Marion J. Johnson,
Attorney at Law
Hairston, Webster & Johnson
Suite 200
Inglewood, California 90301
For the Complainant

Harold E. McLeod
National Vice-President
American Federation of Government
Employees
620 Contra Costa Boulevard
Suite 206
Pleasant Hill, California 94523
For the Intervenor

Before: JOHN V. EVANS
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under Executive Order 11491, as amended. Pursuant to the regulations of the Assistant Secretary of Labor for Labor-Management Relations, a Notice of Hearing on the Complaint was issued on August 4, 1978, with reference to alleged violations of section 19(a)(1) and (3) of the Order.

The case was initiated by a Complaint filed on May 25, 1978, by Edward R. McCrary, President of AFGE, Local 2947, AFL-CIO against Nellis AFB, 57th Field Maintenance Squadron, Department of the Air Force, Nellis AFB, Nevada.

A hearing was held in Los Angeles, California, on September 26, 1978, at which time a motion to intervene was filed by the American Federation of Government Employees National Office by H. E. McLeod, the National Vice President. There being no objection said motion to intervene was granted.

All parties were represented and were afforded full opportunity to be heard, adduce evidence, examine and cross-examine witnesses, and argue orally. Briefs by all parties were filed and have been considered. Upon the entire record, from observation of the witnesses and their demeanor, and from all of the testimony and evidence, the following findings, conclusions, and recommendations are made.

Facts

In May of 1974, Harold E. McLeod, who was employed as a work leader at Nellis Air Force Base, ran for the office of National Vice President of the American Federation of Government Employees Union and was elected. The election, however, was protested and was not decided by the Department of Labor for 13 months. During that interval Mr. McLeod was promoted to the rank of foreman of the Nellis AFB electric shop and served as foreman for six weeks prior to June of 1975, when he was again re-elected and installed as National Vice President.

Pursuant to his assuming office Mr. McLeod wrote a letter dated July 18, 1975 (Complainant's Ex. #7), requesting a leave of absence without pay and requesting certain benefits in accordance with AFR 40-630. Said benefits being credit for six months toward retirement and one year of continued coverage under the Federal Employees Group Life Insurance and Federal Health Benefits Act.

By letter, dated August 13, 1975 (Complaint's Ex. #8), Mr. McLeod's request for leave without pay was granted by Respondent.

Subsequently Mr. McLeod was re-elected in 1976 and 1978 for two-year terms and was granted further extensions of leave without pay by the Respondent.

In the election of 1978, Mr. McLeod was opposed by the Complainant Edward McCrary, the President of Local 2947 of the AFGE, CIO, located in Los Angeles. Mr. McCrary testified that during the 1978 election campaign he learned for the first time that Mr. McLeod had been a foreman at Nellis AFB in 1975, and that in his opinion this made Mr. McLeod a supervisory official and a part of management. Mr. McCrary further testified that he filed the complaint herein the day following his becoming aware of the fact that Mr. McLeod had been a foreman for six weeks in 1975.

It is to be noted that Mr. McLeod was not made a foreman until six weeks before being re-elected in 1975. At that time he became eligible for promotion to fill a re-established foreman's position. Mr. McLeod testified that the fact he had been a foreman for six weeks prior to his election in 1975 was well known to the union caucuses held prior to the union elections from 1975 through 1978 (Tr. 51).

Mr. McCrary's complaint charges the Respondent with violations of section 19(a) of Executive Order 11491, as amended, subsections (1) and (3). These sections provide as follows:

Sec. 19. Unfair labor practices. (a)
Agency management shall not--

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order; (3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status:

Evidence at the hearing consisted of testimony from Mr. McCrary, Mr. McLeod and Ruth Graves, the civilian personnel officer for Nellis Air Force Base. Ms. Graves testified that Mr. McLeod's status was that of an employee

with return rights upon expiration of his leave of absence without pay.

Complainant's Exhibit #5 is a copy of a letter dated June 27, 1978, from L. M. Pellarzi, General Counsel for the American Federation of Government Employees to the Compliance Offices of the U.S. Department of Labor, pointing out that the complaint was untimely filed and excoriating Mr. McCrary for filing the unfair labor practice complaint against Nellis Air Force Base.

Mr. Pellarzi in his letter states "it is nothing more than a thinly veiled attempt to utilize the processes of the LMSA to air an internal union dispute apparently arising from some personal disagreement between Mr. McLeod and Mr. McCrary. While the named respondent is Nellis AFB the real object of the action is Mr. McLeod." In effect, Complainant's own union questions and condemns his conduct of filing a complaint.

Issue

Did Nellis Air Force Base's action of promoting Mr. McLeod to a foreman for six weeks prior to his assuming his office of Vice President of the National Union in 1975 and its further action of granting him year to year leaves of absence constitute a violation of section 19(a)(1) and (3) of the Executive Order.

Conclusions

It became manifestly apparent from the testimony of Mr. McCrary that the complaint filed against Nellis Air Force Base was the result of a personal vendetta of Mr. McCrary against his opponent in an election for the office of Vice President of the National Union. The complaint was filed shortly prior to the election of June 1978, and the motivation of Mr. McCrary is highly suspect. In his testimony he resorted to innuendos and totally uncorroborated charges that Mr. McLeod's terms of office from 1975 to 1978 have resulted in loss of union members and a failure to vigorously pursue grievances at Nellis Air Force Base. He seeks to attribute the union's problems to the fact that Mr. McLeod was a foreman for six weeks in 1975 before his election. Curiously enough, Mr. McCrary testified that he previously voted for Mr. McLeod.

The record is totally devoid of any evidence establishing an unfair labor practice or violation of section 19(a)(1) and (3) of the Executive Order. The mere fact that Mr. McLeod, the National Vice President, was granted a leave of absence by the Respondent to fill his position as National Vice President of the union does not constitute

a violation. The fact that Mr. McLeod was a foreman for six weeks in 1975 does not provide any grounds for a finding that Nellis Air Force Base violated subsections (1) and (3) of section 19(a) of Executive Order 11491.

Recommended Order

Having found that Respondent has not engaged in conduct violating section 19(a)(1) and (3) of the Executive Order, it is recommended that the complaint be dismissed in its entirety.


JOHN V. EVANS
Administrative Law Judge

Dated: November 17, 1978
San Francisco, California

JVE:scm

December 26, 1978

A/SLMR No. 1163

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND DIRECTION OF ELECTION
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

ARMY AND AIR FORCE EXCHANGE SERVICE,
DALLAS, TEXAS
A/SLMR No. 1163

This case involved a petition for consolidation of units filed by the National Association of Government Employees (NAGE) seeking to consolidate 13 exclusively recognized units located at certain Army and Air Force Exchange Service (AAFES) activities for which certain of its constituent local chapters are the current exclusive representatives. Through the subject petition, the NAGE sought to establish a consolidated unit consisting of all the nonprofessional employees of the AAFES that the NAGE represents exclusively. The AAFES contended, essentially, that the proposed consolidated unit was not appropriate because it did not meet the criteria established by Section 10(b) of the Order.

The Assistant Secretary noted that in its review of appeals from certain of the Assistant Secretary decisions involving consolidation of units, the Federal Labor Relations Council (Council) has construed the Assistant Secretary's establishment of a presumption in favor of consolidation "as a recognition and affirmation of the strong policy in the Federal labor-management relations program of facilitating consolidation." Based on the facts and policy considerations involved, the Assistant Secretary found that the proposed unit was appropriate for the purpose of exclusive recognition under the Order. Thus, he found that the unit sought essentially included all nonprofessional employees at the various exchanges involved; that the employees shared a common mission, common overall supervision, essentially similar job classifications and working conditions; and that they are subject to similar personnel and labor relations policies which are established and coordinated by the AAFES headquarters. He noted that the parties had negotiated agreements covering 11 of the 13 units at the individual exchanges involved herein and that many of the subjects included in such agreements are dealt with uniformly.

Under these circumstances, the Assistant Secretary concluded that the employees in the petitioned for consolidated unit share a community of interest and that this more comprehensive bargaining unit would promote effective dealings and efficiency of agency operations consistent with the policy of the Order. Accordingly, he directed an election in the consolidated unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
DALLAS, TEXAS

Activity

and

Case No. 63-8363(UC)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer A. Jack Lewis. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Petitioner, National Association of Government Employees, herein called NAGE, filed the instant petition seeking to consolidate 13 Army and Air Force Exchange Service (AAFES) units for which certain of its constituent locals are the current exclusive representatives. Through the subject petition, the NAGE seeks to establish a consolidated unit consisting of all nonprofessional full-time and part-time AAFES employees, including off-duty military personnel, located in the Military District of Washington, D.C.; ^{1/} and at Walter Reed Army Medical Center, Washington, D.C.; Castle Air Force Base, California; Fort Polk, Louisiana; Fort Leonard Wood, Missouri; Fort Bragg, North Carolina; Fort Bliss, Texas; Fort Eustis, Virginia; Langley Air Force Base, Virginia; Fort Monroe, Virginia; Fort Belvoir, Virginia; and in the Washington Area Exchange Office, Alexandria, Virginia; excluding temporary employees of 90 days or less with no expectation of continued employment, professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

The AAFES contends that the proposed consolidated unit is not appropriate for the purpose of exclusive recognition because it does not meet the criteria established by Section 10(b) of the Order as the employees in the proposed unit do not share a separate and distinct community of interest. Further, the proposed consolidated unit is not geographically or administratively coherent and, therefore, would not promote or enhance effective dealings

^{1/} The record indicates that the NAGE represents exclusively two units in the Military District of Washington, in its Fort Myer/McNair Exchange and in its Cameron Station Exchange. In this regard, NAGE Local R4-49 represents a unit of barbers at both exchanges and NAGE Local R4-51 represents the remaining nonappropriated fund employees at the two exchanges.

and efficiency of agency operations. The AAFES also argues that the petition is based solely upon on the NAGE's extent of organization within the AAFES. 2/

The NAGE, on the other hand, argues that the proposed consolidation would merge 13 separate units into one and thus would eliminate redundancy and excessive time spent at the bargaining table, effectuate a more efficient bargaining process, and enable the parties to negotiate a master agreement as well as supplemental agreements covering activities below the level of recognition.

The AAFES is a nonappropriated fund instrumentality of the United States Government and a primary national subdivision of the Department of Defense. It has as its mission the providing of merchandise and services of necessity and convenience to authorized patrons at uniformly low prices and the generation of reasonable earnings to supplement appropriated funds for support of Army and Air Force welfare and recreation programs. The AAFES, a joint command of the Army and Air Force headquartered in Dallas, Texas, is under the command of an Air Force Major General and employs some 60,000 employees world-wide. It has approximately 25,000 employees represented in 111 bargaining units of which approximately 3,429 employees, all in the continental United States, are represented by the NAGE in the 13 exclusively recognized units which are the subject of the instant petition.

In the continental United States the AFFES is divided into five regions: the Alamo Exchange Region, the Capitol Exchange Region, the Golden Gate Exchange Region, the Ohio Valley Exchange Region, and the Southwest Exchange Region. Each region is headed by a regional chief who reports directly to the Commander of the AAFES, and is comprised of several area exchanges, each headed by a general manager who reports directly to the regional chief and each area exchange consists of several post or base exchanges headed by exchange managers. Regional chiefs have been delegated the responsibility for implementing AFFES personnel and labor relations policies, directives, and procedures within their respective regions. Attached to each region, except the Alamo Region, is a labor relations specialist who negotiates collective bargaining agreements on behalf of the exchanges and is responsible for labor relations matters within the region. 3/

As noted above, in this matter the NAGE is seeking to consolidate its 13 exclusively recognized AAFES units in the continental United States. The record indicates that of these 13 units, the NAGE exclusively represents all

2/ The AAFES requested that in the event the proposed consolidated unit is found to be appropriate, an election be held to determine whether or not the employees involved desire to be represented in the proposed consolidated unit by the NAGE.

3/ Representatives of the AAFES' General Counsel conduct labor relations negotiations for the Alamo Region.

nonappropriated fund employees at 12 post or base exchanges including two units in the Washington Military District (see footnote 1, above) and all nonappropriated fund employees in the Washington Area Exchange Office. Although the record reveals that AAFES activities may range in size and that some activities may provide certain services not available at other activities, the basic service of all of the activities is the sale of merchandise and services at uniformly low prices to support AAFES welfare and recreation programs and the employees covered by the subject petition have essentially similar job classifications and working conditions.

In its review of appeals from certain of the Assistant Secretary's decisions involving the consolidation of units, 4/ the Federal Labor Relations Council (Council) has construed the Assistant Secretary's establishment of a presumption in favor of consolidations "as a recognition and affirmation of the strong policy in the Federal labor-management relations program of facilitating consolidation." The Council noted that such affirmation accurately reflected its policy as set forth in its 1975 Report and Recommendations to facilitate the consolidation of existing units which conform to the appropriate unit criteria contained in Section 10(b) of the Executive Order.

Based on the foregoing facts and policy considerations, I find that the petitioned for consolidated unit is appropriate for the purpose of exclusive recognition under the Order. Thus, as indicated above, the unit sought encompasses all the employees within the AAFES represented by the NAGE and all of the various units alone, or in combination contain essentially all the nonprofessional employees at the various activities involved. 5/ Additionally, it is noted that all the employees within the petitioned for consolidated unit share a common mission, common overall supervision, essentially similar job classifications and working conditions, similar personnel and labor relations policies and practices as delegated in accordance with the AAFES' delegation of authority.

Under these circumstances, I find that the employees in the petitioned for unit share a clear and identifiable community of interest.

I find further that the petitioned for consolidated unit will promote effective dealings and efficiency of agency operations. Thus, the record reflects that Headquarters, AAFES, through AAFES regulations, promulgated

4/ See Education Division, Department of Health, Education and Welfare, Washington, D.C., 7 A/SLMR 312, A/SLMR No. 822 (1977), FLRC No. 77A-88; Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, 7 A/SLMR 357, A/SLMR No. 831 (1977), FLRC No. 77A-112; and Bureau of Field Operations, Office of Program Operations, Social Security Administration, Department of Health, Education and Welfare, Chicago Region V-A, 7 A/SLMR 633, A/SLMR No. 876 (1977), FLRC No. 77A-136.

5/ See Department of Health, Education and Welfare, Social Security Administration, Region V-B, Chicago, Illinois, A/SLMR No. 1082 (1978). Cf. Veterans Administration, A/SLMR No. 1016 (1978).

by the Departments of the Army and Air Force, and through the promulgation and administration of its own Exchange Service Manual, effectively develops agency policy in all matters relating to AAFES personnel policies and practices, including reduction-in-force, hiring, promotions and wage and salary determinations, etc., which are then disseminated to the field for implementation of those policies within the local framework. Moreover, although the record reflects that each region, with the exception of the Alamo Region, has a labor relations specialist who handles labor relations for that region, the evidence establishes that all agreements must be approved by the General Counsel's office located at AAFES Headquarters. In addition, the General Counsel's office advises the regional labor relations specialists on technical matters and, in the case of the Alamo Region, representatives of the General Counsel handle the actual negotiations for that region. Field exchanges must notify the General Counsel's office when requests are made to negotiate new agreements or to modify existing agreements, when requests are made to use the services of the Federal Mediation and Conciliation Service or the Federal Service Impasses Panel, when negotiability issues are appealed to the Council, or when Applications for a Decision on Grievability or Arbitrability are filed with the Assistant Secretary. Furthermore, when negotiated agreements provide for automatic renewal upon appropriate notice, such notices may not issue without the approval of the General Counsel's office. The record shows that the AAFES and the NAGE have negotiated six separate and two multi-unit agreements covering 11 of the units at the individual activities involved herein, 6/ and that there is a high degree of commonality between the agreements in that many of the individual subjects are dealt with uniformly. Thus, although the AAFES contends that the authority to negotiate agreements has been delegated to the regions in order to tailor local agreements to the particular needs of the region, area, base, or post exchange, the record shows a pattern of uniformity within the negotiated agreements.

Under all of these circumstances, I find that effective dealings and efficiency of agency operations would be promoted by the establishment of the proposed consolidated unit and that AAFES labor relations policies could remain essentially the same, as evidenced by the uniformity in current contract provisions, and might well be enhanced if the proposed consolidated unit were effectuated. In this latter regard, regional labor relations specialists and other field personnel specialists could continue to provide input into the negotiating process and the particular needs of individual field exchanges could be satisfied by the use of local supplemental agreements. 7/ Moreover, I find that as the proposed consolidated unit, covering all of the employees represented by the

6/ There is a multi-unit agreement covering the NAGE's two units located in the Military District of Washington's Fort Myer/McNair Exchange and Cameron Station Exchange and another multi-unit agreement covering the NAGE's exclusively recognized units at the Fort Eustis Exchange, the Fort Monroe Exchange, and the Langley Air Force Base Exchange.

7/ Cf. AFGE Council of Prison Locals, 5 FLRC 516, FLRC No. 76A-38 (1977).

NAGE in the AAFES, will provide for bargaining in a single unit, rather than in the existing 13 bargaining units, it will promote a more comprehensive bargaining unit structure and is consistent with the policy of the Executive Order set forth above. 8/

Accordingly, I find that the following employees constitute a unit appropriate for the purpose of exclusive recognition under Executive Order, 11491, as amended: 9/

All full-time and part-time employees of the Army and Air Force Exchange Service, including off-duty military personnel, located in the Military District of Washington, D.C. (Fort Myer/McNair Exchange and Cameron Station Exchange); Walter Reed Army Medical Center, Washington, D.C.; Castle Air Force Base, California; Fort Polk, Louisiana; Fort Leonard Wood, Missouri; Fort Bragg, North Carolina; Fort Bliss Texas; Fort Eustis, Virginia; Langley Air Force Base, Virginia; Fort Monroe, Virginia; Fort Belvoir, Virginia; and the Washington Area Exchange Office, Alexandria, Virginia; excluding temporary employees of 90 days or less with no expectation of continued employment, professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

DIRECTION OF ELECTION

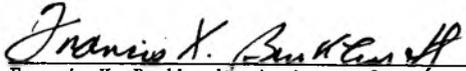
An election by secret ballot shall be conducted among the employees in the unit described above, as early as possible, but not later than 60 days from the date below. The appropriate Area Administrator shall supervise the election, subject to the Assistant Secretary's Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on

8/ The fact that the proposed consolidated unit applies only to existing units does not render such unit inappropriate inasmuch as it is noted that consolidation procedures apply only to situations where there is no question concerning representation and the unit herein meets the criteria specified in Section 10(b) of the Order and will promote a more comprehensive bargaining unit structure. See A/SLMR No. 1016, cited above in footnote 5, and FLRC No. 77A-88, cited above in footnote 4.

9/ Insofar as the actual state of the exclusively recognized units at the time of the consolidation election may differ, if at all, from the unit found appropriate herein, such unit descriptions should be so modified.

vacation or on furlough, including those in the military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether or not they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the National Association of Government Employees.

Dated, Washington, D.C.
December 26, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

December 27, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES COAST GUARD HEADQUARTERS
A/SLMP No. 1164

This case involved a petition filed by the American Federation of Government Employees, Local 3313, AFL-CIO (AFGE) in which it sought to amend its certification and clarify its unit. The sole unresolved issue was the AFGE's contention that the employees of the U.S. Coast Guard Oceanographic Unit and the OMEGA Navigation System Operations Detail (ONSOD) should be accreted to its exclusively recognized unit of Coast Guard Headquarters employees. The Activity contended that the employees of the Oceanographic Unit and the ONSOD do not share a community of interest with the Headquarters employees and noted that the two organizational entities in question were in existence at the time of the AFGE's certification for the Headquarters unit and their employees did not participate in the election resulting in the certification.

The Assistant Secretary found that there was insufficient evidence to support the proposed accretion sought by the AFGE. In this regard, he noted particularly that there had been no reorganization affecting the identities of the Oceanographic Unit and the ONSOD which resulted in an accretion to the AFGE's existing unit. Under all of the circumstances, he concluded that the employees of the Oceanographic Unit and the ONSOD do not share a community of interest with the Headquarters employees and that the proposed accretion would not promote effective dealings or efficiency of agency operations.

Accordingly, the Assistant Secretary ordered that the aspect of the petition involved in the instant proceeding be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES COAST GUARD HEADQUARTERS

Activity

and

Case No. 22-08998(AC/CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3313, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Bridget Sisson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, including briefs filed by the parties, the Assistant Secretary finds:

The American Federation of Government Employees, Local 3313, AFL-CIO, herein called AFGE, filed a petition for clarification of unit (CU) seeking to clarify its existing exclusively recognized unit of professional and nonprofessional employees of the U.S. Coast Guard Headquarters, Washington, D. C., by including the employees of the U.S. Coast Guard Oceanographic Unit and the OMEGA Navigation System Operations Detail (ONSOD). 1/

1/ On September 12, 1978, pursuant to a Report and Findings of the Regional Administrator arising out of the instant petition, the certification of the unit in question was amended to reflect a change in the designation of the exclusive representative. In addition, the unit was clarified to include certain employees whose job location had changed. The foregoing actions by the Regional Administrator, upon which no request for review of the Assistant Secretary was filed, leaves as the sole remaining issue herein whether or not the certified unit should be clarified to include the employees of the Oceanographic Unit and the ONSOD.

The AFGE claims that the employees of the Oceanographic Unit and the ONSOD should be included in its existing unit of Headquarters employees essentially because they are serviced by the same personnel office and are covered by the same recently instituted Equal Employment Opportunity (EEO) Plan. The Activity takes the position that the employees of the Oceanographic Unit and the ONSOD do not share a community of interest with the Headquarters employees and, therefore, should not be included in the existing exclusively recognized unit.

The AFGE was certified on July 11, 1972, as the exclusive representative for a unit including essentially all employees of the United States Coast Guard Headquarters, Washington, D. C. 2/ At the hearing, the parties stipulated that the employees of the Oceanographic Unit and the ONSOD did not vote in the election resulting in the AFGE's certification. 3/

Each of the three organizational entities of the Coast Guard involved herein is under the direction of an individual commanding officer who reports directly to the Commandant of the Coast Guard, and each is responsible for a different mission. 4/ There is no evidence of any interchange among their respective employees. While some transfers have taken place, the record reveals that such transfers have involved only clerical employees.

The Headquarters employees work in two locations, the "NASSIF" Building and the Trans Point Building, both in Washington, D. C. The ONSOD employees have also been located at the Trans Point Building since 1974. 5/ The Oceanographic Unit employees are located in the Navy Annex in Southwest Washington, D. C., where they were located at the time of the AFGE's certification for the Headquarters unit.

Civilian personnel services are provided to the Oceanographic Unit and the ONSOD by the Headquarters Civilian Personnel Office based on a servicing agreement between the respective commanding officers and the Headquarters Civilian Personnel Officer. 6/ All three organizational

2/ At the time of the hearing in this matter, the parties had not negotiated an agreement covering the employees in the certified unit.

3/ There was no provision for them to vote in such election.

4/ The Coast Guard Headquarters essentially provides administrative services to the Commandant and the Coast Guard nationwide. The Oceanographic Unit is responsible for the Coast Guard's oceanographic operations and studies. The ONSOD is responsible for the direction of the OMEGA navigation system, worldwide.

5/ The record reflects that the ONSOD employees were located in Washington, D. C., in a different building at the time of the AFGE's certification. Thereafter, they were moved to Hawaii and subsequently relocated back to Washington, D. C., in 1974.

6/ While each of the organizational entities involved normally would have its own EEO plan, the record reflects that the most recent EEO plan of the Coast Guard Headquarters included all three due to an error on the part of the Headquarters EEO Officer.

entities have their own areas of consideration for merit staffing with respect to positions through GS-11. ^{7/} The competitive area for reductions-in-force is the metropolitan Washington, D. C., area, which includes the employees of all three organizational entities.

The evidence establishes that each of the three activities employs civilians to suit its organizational needs. In this regard, the Oceanographic unit employs some 18 civilians, most of whom are in scientific and technical classifications and whose specialities are oceanographic related. The ONSOD employs some 13 civilians, most of whom are in the scientific and technical classifications and whose specialities are navigation related. The Coast Guard Headquarters employs approximately 1300 employees in varied classifications representative of the general administrative functions performed in most government agencies at the headquarters level. ^{8/}

Based on the foregoing, I find insufficient basis upon which to conclude that the employees of the Oceanographic Unit and the ONSOD have accreted into the unit represented by the AFGE. Thus, there has been no reorganization affecting the identity of the Oceanographic Unit and the ONSOD which resulted in the employees involved accreting into the AFGE's unit. ^{9/} Further, the evidence establishes that both of the Coast Guard organizational entities sought to be accreted were in existence at the time the AFGE was certified as the exclusive representative of the Headquarters employees. While the employees of the two organizational entities involved are serviced by the same personnel office as the Headquarters employees, the record reveals that each entity is under the independent direction of its own commanding officer and is responsible for its own separate and distinct mission. In addition, the employees of each entity generally have their own functional job classifications and there is no employee interchange and minimal transfer of personnel with the Coast Guard Headquarters.

Under these circumstances, I find that the employees of the Oceanographic Unit and the ONSOD do not share a community of interest with the Headquarters employees. Nor, in my view, based on the facts outlined above, would the proposed accretion promote effective dealings and efficiency of agency operations.

^{7/} The area of consideration for GS-12 and 13 positions is Coast Guard-wide and for GS-14 and above, Department of Transportation-wide.

^{8/} Included in these categories are budget analysts, program analysts, management analysts, operations research analysts, accountants, computer programmers, military pay clerks, attorneys, engineers, and clerical employees.

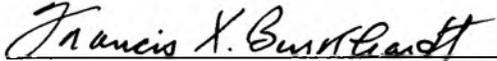
^{9/} Compare Department of the Army, Fort McPherson, Georgia, 5 FLRC 398, FLRC No. 76A-32 (1977).

Accordingly, I shall order that the aspect of the petition involved in the instant proceeding, with respect to the proposed accretion of the Oceanographic Unit and ONSOD employees, be dismissed.

ORDER

IT IS HEREBY ORDERED that the aspect of the petition in Case No. 22-08998(AC/CU) involved in the instant proceeding be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 27, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

December 27, 1978

A/SLMR No. 1165

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS -
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

OFFICE OF THE SECRETARY,
DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE
A/SLMR No. 1165

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 41 (AFGE) alleging that the Respondent violated Section 19(a)(6) of the Order by eliminating previously agreed upon provisions in reproducing the printed version of the parties' negotiated agreement.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety on the ground that the Complainant had failed to sustain its burden of proof. In this regard, the Administrative Law Judge credited testimony that the AFGE's chief negotiator had agreed to eliminate the disputed language in order to gain Section 15 approval of the negotiated agreement.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OFFICE OF THE SECRETARY,
DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE

Respondent

and

Case No. 22-08670(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 41

Complainant

DECISION AND ORDER

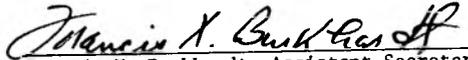
On October 31, 1978, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-08670(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 27, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1/ The Complainant filed untimely exceptions to the Administrative Law Judge's Recommended Decision and Order which have not been considered.

U.S. DEPARTMENT OF LABOR
 OFFICE OF ADMINISTRATIVE LAW JUDGES
 Suite 700-1111 20th Street, N.W.
 WASHINGTON, D.C. 20036



The Respondent in a complaint filed on December 27, 1977 was charged with having violated Section 19(a)(6) of the Order by refusing to confer and negotiate in good faith as to publication and distribution of a General Agreement which left out or altered certain changes that the parties had agreed upon. 1/

Upon the basis of the entire record, including the evidence adduced, the briefs submitted by the parties and my observation of the witnesses and judgment of their credibility, I make the following findings, conclusions and recommendations.

Findings of Fact

1. At all pertinent and material times herein, the Complainant was the exclusive representative for a bargaining unit of all non-professional General Schedule and Wage Grade employees of the Office of the Secretary, Department of Health, Education and Welfare, located in the District of Columbia Metropolitan Area. Complainant was certified as the exclusive representative on January 24, 1973.

1/ The complaint alleged: "Local 41 charges management with violations of 19(a)(6) of the Executive Order in refusing to confer and negotiate as required by the Order. Section 11(a) requires the parties to meet and confer in good faith on personnel policies, practices and matters affecting working conditions. Management officials have printed and distributed a General Agreement which alleges to be the agreement negotiated between OS management and Local 41. However, in the printing of the Agreement, provisions which were agreed upon, initialed, approved and ratified by both parties were left out or altered. Therefore, the changes that management made were never effectively incorporated in the agreement. The assertion that the 'Union did have an opportunity to review the galleys of the Agreement prior to their submission to the printer', does not effectively abrogate the Agreement that had been reached and endorsed by the parties. To print an altered version and to maintain that the Union is thereupon bound by the printed text is a breach of the Agreement and constitutes a failure to negotiate in good faith. The Union does not, cannot negotiate changes in an agreement through inaction, through failing to note changes in the galley proof of the text. Management has subsequently refused to resolve the complaint".

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 In the Matter of :
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 OFFICE OF THE SECRETARY, DEPARTMENT :
 OF HEALTH, EDUCATION AND WELFARE :
 Respondent :
 and :
 AMERICAN FEDERATION OF GOVERNMENT :
 EMPLOYEES, LOCAL 41 :
 Complainant :

Case No. 22-08670 (CA)

Maurice B. Jones, Esquire
 James Bachman, Esquire
 330 Independence Avenue, S.E.
 Washington, D.C. 20201
 For the Respondent

Eric E. West, Esquire
 330 Independence Avenue, S.W.
 Washington, D.C. 20201

Joseph E. Cook, Jr.
 Vice-President
 AFGE Local No. 41
 Department of Health, Education and
 Welfare
 200 Independence Avenue, S.W.
 Washington, D.C. 20201
 For the Complainant

Before: RHEA M. BURROW
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is an unfair labor practice proceeding in which a formal hearing of record was held on July 16, 1978, in Washington, D.C., pursuant to Executive Order 11491, as amended, (hereinafter referred to as the Order).

2. Beginning in 1975 representatives of AFGE Local 41 and Respondent commenced negotiations to consummate a contract agreement. An agreement between the Chief Negotiating Officers of AFGE Local 41 and Respondent was reached on March 21, 1977; copies of the draft agreement were forwarded to the approving official in March 23, 1977. Richard Hacker, Director of the Health, Education and Welfare Labor Management Relations Staff advised Respondents Chief Negotiator on April 13, 1977 of certain items in the agreement that did not appear to be consonant with the Order or agency policies and regulations. Mr. Hacker had been asked by the approving official to staff the Section 15 review. Some 9 items were questioned as being violations of the provisions of Section 15 of the Order. The matter was referred to Maurice B. Jones, Respondent's Chief Negotiator for discussion and negotiation with the Union's Chief Negotiator, Joseph Cook. The Chief Negotiators entered into an agreement on April 18, 1977 wherein four of the nine items that had been objected to in the early agreement were corrected or deleted and five which the Union negotiator insisted should not be changes remained in the agreement. The agreement was submitted for approval on April 18, 1977.

3. On April 22, 1977 AFGE Local 41 Chief Negotiator Joseph Cook was advised that approval of the agreement had been withheld because of five cited specific violations of Executive Order 11491 and HEW regulations contained in the OS Headquarters Agreement.

4. Members of Departmental LMR Staff, the OS Labor Relations Officer, a representative from the National Office of AFGE and a Federal Mediator met to discuss the five items cited in the April 22 letter advising that approval of the agreement had been withheld. As a result of the discussion, Section G of Article 11, Section 11 was modified and a waiver of the remaining violations was obtained. The agreement was then approved without requiring changes to those provisions.

5. The cited items were contained in a Memorandum dated April 22, 1977 from the Assistant Secretary, for Management and Budget, Department of Health, Education and Welfare to the Director of Administration, OASMB. 2/ The memorandum stated in part

2/ Office of the Assistant Secretary for Management and Budget.

"The agreement has been reviewed for conformance with applicable laws, Executive Order 11491, existing published agency policies and regulations, and regulations of other appropriate authorities. Such review revealed the specific violations cited below. Therefore, approval of the subject agreement is hereby withheld.

"The following is a listing of agreement provisions which do not conform with law, policy or regulation -- requiring either modification or deletion to permit approval of subject agreement:

(a) Article 3, Section 12(A) 3/ deals with a matter outside the obligation to bargain on personnel policies and practices and matters affecting working conditions under Section 11(a) of E.O. 11491. This section 11(a) obligation has been construed by the Federal Labor Relations Council (FLRC No. 74A-71, Report Number 100) to confine bargaining to those policies and practices which relate to positions within the bargaining unit. In addition, your authority as the Collective Bargaining Official is prescribed by HEW Personnel Instruction 711-1-20C and 711-1-110A as being limited to your administrative discretion in the administration of labor-management matters within the bargaining unit.

(b) Article 6, Section 7, First Sentence provides that the Assistant Secretary for Management and Budget agrees to an annual meeting as cited above concerning Article 3, Section 12A; the obligation to bargain is limited by section 11(a) of the Order,

3/ Article 3, Section 12 provides:

- A. The Employer agrees to train supervisors in accordance with requirements of the FPM.
- B. Working instructions will be conveyed to employees through established supervisory chambers.
- C. Employees can only be supervised by Civil Service Employees.

and HEW Personnel Instruction 711-1-20C and 711-1-110A to matters within your discretion as the head of the certified bargaining unit. Thus, the union has no standing to demand, nor do you have any authority to agree to, the commitment of resources beyond your own discretion. 4/

"c. Article 11, Section 11G, last sentence usurps management's right to select, thereby violating section 12(b)(2) of E.O. 11491. The Federal Labor Relations Council has repeatedly ruled that section 12(b) rights cannot be negotiated away at the bargaining table by management. While we recognize the right to negotiate procedures to be used in making selections, such procedures cannot be so specific as to deny management's basic right of selection as is done by the provision of your agreement. 5/

"d. Article 17, Section 6, Step 3 establishes the Assistant Secretary for Management and Budget as the Step 3 deciding official. For the same reasons cited above concerning Article 6, Section 7, you cannot commit authority and resources beyond your own discretion. 6/

4/ Article 6, Section 7, first sentence, states: "The Assistant Secretary for Management and Budget (ASMB), agrees to meet with the union annually."...

5/ Article 11, Section 11G relates to downgrading in a position classification and the last sentence states: The parties agree that this agreement shall be suspended to insert Proposal No. 1 or 2 contained in Appendix D of this agreement for Article 11. Section 11G dealing with promotion of downgraded employees of the Agency or the FLRC declares it to be negotiable. Also, see, Appendix D to the General Agreement, Respondent Exhibit No. 1, page 96.

6/ Article 17, Section 6, Step 3, provides: If the employee is dissatisfied with the decision rendered in Step 2, the grievance may be presented in writing with a copy of the Stage 1 and 2 decisions to the Assistant Secretary for Management and Budget or his designee within seven (7) workdays. Within five (5) workdays after receipt of the written grievance, not counting the day of receipt, the 3rd Stage officials or (continued on next page)

"e. Article 18, Section 1 establishes the Assistant Secretary for Management and Budget as a deciding official in the arbitration process. For the same reason cited above concerning Article 6, Section 7, you cannot commit authority and resources beyond your own discretion. 7/

"When the the parties have executed an agreement to correct the above cited violations, please provide us with an amended copy of the changed articles for review under HEW Personnel Instruction 711-1-150."

An Agreement was subsequently reached and published in galley form for review by the parties. 8/ After review the negotiated General Agreement was published and distributed on or about September 7, 1977.

6/ Continued.

his/her designee will arrange for a conference with the employee and his/her representative, if any, and other parties, if appropriate. The 3rd Stage Official or his/her designee shall render a written decision within fourteen (14) workdays not counting the day the conference was held. The decision will state specifically the reason(s) for the decision."

7/ Article 18, Section 1 of the General Agreement provides in part:

A. A grievance processed under Article 17 or a disciplinary action processed under Article 19 of this Agreement, if unresolved may be referred to arbitration as provided for in this Article.

"B. Either party may bring to the other's attention a matter of concern regarding the interpretation or application of any of the provisions of this Agreement. These issues or interpretation and application of the Agreement, before being submitted to arbitration, shall be discussed informally with the appropriate parties. If there is still no resolution, the President and/or the Vice President/OS or the Union and the Assistant Secretary for Management and Budget or his designee shall meet to resolve the issue. If the issue is not resolved, it may be submitted to arbitration."

8/ Testimony elicited at the hearing was to the effect that union representatives had the galleys for some six days before they were returned with corrections for publication and distribution. The Chief negotiator for the union testified that he only reviewed the Agreement for about a half day before returning it for final printing.

6. In October 1977, AFGE's Chief Negotiator for Local 41, Joseph Cook reported that there were certain alleged discrepancies consisting of either changes or deletions in the negotiated contract between the parties. When called to Respondent's attention it was management's position that the changes and deletions had been made pursuant to negotiations with Complainant and reviewed by the parties prior to publication and distribution of the general agreement in September 1977. The Unfair Labor Practice Complaint was subsequently filed.

7. The four changed or deleted items construed to be in issue 9/ are:

- (a) The change of the term Office of the Secretary (OS) to Agency;
- (b) The deletion of the sentence dealing with cash payments of union dues reading: "In lieu of payroll deductions employees may make direct cash payments."
- (c) The addition to the signature page of the contract to include the AFGE Local Union 41 President;
- (d) Article 20, Section 2 relating to Maintaining the Stability of the Workforce was cited as a violation because it did not conform to the Federal Personnel Manual as the provisions were taken out of context.

8. The negotiating authority under Section 11 of the Order and the approval authority under Section 15 of the Order were not to the same official. The official who had the negotiating authority under Section 11, was the Director of Administration, Office of the Secretary Headquarters. The authority who had approval for Section 15 approval was the Assistant Secretary for Management and Budget.

Discussion and Conclusion

Section 19 of Executive Order 11491 relates to Unfair Labor Practices and provides in part, as follows:

9/ Despite insistence at the hearing for Complainant to briefly and clearly delineate and enumerate the four items charged or omitted from the agreement alleged to be the basis for the complaint, they were not all clearly depicted and I extracted them from the Complainant's and Respondent's presentation to best clarify, particularly item (d) above.

(a) Agency management shall not -

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order. 10/

The same obligation as is imposed upon Agency management in Section 19(a) (6) is also imposed on a labor organization by Section 19(b) (6).

The documentary and oral evidence clearly establishes that the items alleged to have been changed or omitted were in the Agreement negotiated in March 1977. However, when they were questioned as items not consonant with the Order prior to Section 15 approval, they were referred to the "Parties respective Chief negotiators" for further consideration before final submission. These were the same parties who had participated in previous discussions leading to the agreement and they were each intimately aware of the provisions of the contract. The reasons for further considering the subject items was also conveyed to them. When the agreement was returned after discussion of all of the cited items, there were four that had either been changed or dropped. The remaining five were contained in the agreement.

The term "Meet and Confer" contained in the parties own General Agreement effective June 24, 1977 is defined as follows: "Meet and Confer - The Term 'meet and confer', is intended to be construed as a synonym for 'negotiate.'"

Consult is also defined in the General Agreement as follows: "The parties meeting in good faith, after reasonable notification, for the purpose of providing information on proposed plans or actions and to provide reasonable opportunity for views in implementing such actions." These provisions were not then or now in dispute and were in the Agreement in March 1977.

10/ Complainant in its brief referred to violations of 19(a) (1) and (6) of the Order. However, neither the complaint or the Notice of Hearing specified a violation of Section 19(a) (1) and I have not considered it an issue in this proceeding.

The record clearly shows that the parties Chief Negotiators in this proceeding were meeting to negotiate items called to their attention as not consonant with the Order and to reconcile them prior to final action and approval. The items in issue are certainly not those that the "parties" Chief Negotiators did not have authority to consider and negotiate.

On a credibility basis I conclude that the AFGE Local's 41, Chief negotiator did agree to changes and/or deletions of the four items herein in issue. The belated claim after the contract is subsequently signed and approved with the changes and/or deletions that he did not have authority to negotiate and approve has no merit.

In United States Department of Agriculture and Agricultural Research Service and National Federation of Federal Employees, Local 552, A/SLMR No. 519, the Assistant Secretary based on 1969 and 1975 study committee reports and recommendations for acceleration of the approval process in association with the requirement of Section 11 imposing upon agencies and exclusive representatives "to meet at reasonable times and confer in good faith" stated:

"I find that the granting of approval authority to more than one level for review is inconsistent with the purposes and policies of the Order. Thus, to subject locally negotiated agreements to intermediate levels of approval would, in my judgement, result in an unsettling effect on labor relations in the Federal sector by impairing and substantially delaying the collective bargaining process. While clearly an Agency may choose to delegate its Section 15 approval authority to an intermediate level or, in the alternative, provide that an intermediate official review the executed agreement and forward that agreement, with any comments, to the 'approval' authority, I do not believe that the establishment of intermediate, independent approval authorities is consistent with the intent and purposes of Section 15. As demonstrated by the circumstances herein, where an agency seeks to delegate a portion of its approval authority to an intermediate level and still retains a portion of that authority in the agency head, an additional level of review and approval is created which is time consuming, lacks finality and, in effect, creates unreasonable delays in the consummating of negotiated agreements. Clearly the purposes of the Order are not

best served where, as here, an agency head or his representative who has been designated to have Section 15 approval authority, does not receive a locally executed agreement for approval until nearly nine months after the original signing because of the intermediate approval level's prior incomplete review and subsequent return of that agreement to the local level for modification." 11/

I find the facts of the case in this proceeding are materially different from those in United States Department of Agriculture and Agricultural Research Service and National Federation of Federal Employees, Local 1552, A/SLMR 519, in that there is no unreasonable delay evident, and the negotiating authority under Section 11 of the Order and the Approval Authority under Section 15 of the Order was not to the same official; likewise, items called to attention of the parties as not consonant with the Order or agency policy and regulations, were promptly considered and returned for appropriate action. Thereafter, approval of the Agreement was withheld because of five cited violations of the Order. I make no determination as to whether the review by Hacker for the Assistant Secretary for Management and Budget was proper because there was no question raised by the Union Chief Negotiator as to the Section 15 approval authority of the Assistant Secretary of Management and Budget. Likewise, there was no question raised as to the four items he and Management's Chief Negotiator had discussed and agreed to drop; further, it is not shown that these four items were again mentioned before the contract was reviewed and signed. I find no evidence of bad faith bargaining and as a matter of fact, it is alleged only by Complainant in retrospect rather than during the course of bargaining proceedings.

11/ With regard to the above, the Assistant Secretary further stated in footnote 4 to A/SLMR 519 decision that: "The subject case arose and was litigated prior to the recent amendments to Executive Order 11491. However, that the new 45 day requirement would not necessarily remedy the type of improper conduct which I find was involved herein. Thus, even under the current Order, an intermediate level of review and approval could disapprove an agreement within the prescribed 45 day period and the parties at the local level could not be assured, as demonstrated by the facts in the instant case, that conforming the agreement in accordance with the recommendation of the intermediate level would subsequently result in an approved agreement since the agency head or his designated representative had not yet received such agreement to ascertain whether it conforms to applicable laws, the Order, existing agency policies and regulations, and regulations of other appropriate authorities."

The principal issue herein, is whether the Complainant after negotiating and signing a contract can reopen and seek its reformation or modification under the guise of an unfair labor practice on matters considered during the negotiating process.

It is my opinion that where agreement has been reached on the substantive provisions of the contract, the refusal to consider changes, deletions, or additions to such agreement at this point does not constitute bad faith bargaining in violation of 19(a)(6). Obviously, there comes a time and point where negotiations must have some form of finality; reconsideration of previously resolved matters, absent mutual assent, does not permit such finality.

In Community Services Administration, A/SLMR No. 749, the Assistant Secretary for Labor Management Relations stated with reference to the disputed version of a contract provision which appeared in a draft copy of Amendment 11, initialed at an earlier date by the parties that:

"While I agree with the Administrative Law Judge that where the language of an agreement clearly does not reflect what the parties agreed to, it may be reformed, I do not view the evidence herein as clearly establishing that the language appearing in the final printed version of Amendment 11 did not reflect the parties agreement. Thus reformation of an agreement is a remedy accorded by courts of equity to parties only where the agreement fails through fraud or mutual mistake to express the real agreement or intention of the parties. In this regard, two rules have been firmly established in equity to avoid needless disputes: First, that the burden is on the complaining party to prove the mutual mistake, or the mistake of one party and the deceit, fraud, or inequitable conduct of the other upon which he relies for a modification or avoidance of the agreement; and, second, that in view of the written record of the terms of the agreement, a preponderance of the evidence is insufficient and nothing less than evidence that is plain and convincing beyond reasonable controversy will constitute such proof as will warrant modification of a written agreement." 12/

12/ Also, see, United States Department of the Air Force, 15th Air Base Wing, Hickam Air Force Base Hawaii, A/SLMR No. 1011.

In the instant proceeding even the testimony of Complainant's Chief Negotiator falls far short of establishing mutual mistake, or the mistake of one party and the deceit, fraud, or other inequitable conduct of the other upon which he relies for modification or avoidance of the agreement. Further, in view of the opportunities available to Complainant to bring up the subject after the four items were changed or deleted from the initial draft of the agreement until the time of the contract agreement was signed, the evidence is not so plain and convincing beyond reasonable controversy as to constitute proof sufficient to warrant modification, reformation of the contract or restoration in the contract of the four items in dispute herein. In this connection, there was bargaining and approval of the contract after the items at issue herein were changed and/or deleted.

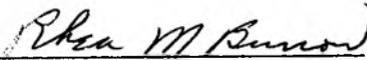
Thus even if preliminary consideration of the agreement by Richard Hacker for the Assistant Secretary for Management and Budget be considered an intermediate level of review the Complainant waived its right to stand on the agreement by bargaining on the questioned items with Respondent's Chief Negotiating Officer. An agreement contract properly approved is final and reformation, modification, or change in the absence of fraud, deceit, or mistake is not an appropriate remedy available under the guise of an alleged unfair labor practice.

From the foregoing, I conclude that:

- (1) The Respondent did not refuse to consult, confer, or negotiate with a labor organization as required by this Order;
- (2) The Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of Section 19(a)(6) of the Order.

RECOMMENDATION

Upon the basis of the above findings, conclusions, and the entire record, I recommend to the Assistant Secretary that the complaint in Case No. 22-08670(CA) is dismissed in its entirety.


RHEA M. BURROW
Administrative Law Judge

Dated: October 31, 1978
Washington, DC

RMB:dmb

December 27, 1978

A/SLMR No. 1166

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION,
BOSTON, MASSACHUSETTS

and

DEFENSE CONTRACT ADMINISTRATION
SERVICES MANAGEMENT AREA,
BINGHAMTON, NEW YORK
A/SLMR No. 1166

This case involved an RA petition filed by the Defense Contract Administration Services Region (DCASR), Boston, Massachusetts, and the Defense Contract Administration Services Management Area (DCASMA), Binghamton, New York, which would, in effect, sever the employees of the newly established Defense Contract Administration Services Plant Representative Office (DCASPRO), IBM Owego, New York, from the DCASMA, Binghamton, unit represented exclusively by the National Association of Government Employees, Local R2-56 (NAGE). The nucleus of employees assigned to the DCASPRO, IBM Owego, when it was established on February 1, 1978, had been working at that location for some time as a part of the DCASMA, Binghamton. The petition was filed because the Commander of the newly formed DCASPRO, IBM Owego, assumed an organizational status equal to that of the Commander of the DCASMA, Binghamton and the Activity-Petitioners contended that the organization of labor relations should parallel command responsibility. The NAGE took the position that the employees involved continued to be a part of its existing unit.

The Assistant Secretary found that the unit involved continued to remain appropriate for the purpose of exclusive recognition. In reaching this conclusion, he noted particularly that the reorganization did not result in any change in the day-to-day terms and conditions of employment of the employees involved, including their physical location, job function, and immediate supervision. Also, both the DCASMA, Binghamton, and the DCASPRO, IBM Owego, continued to report to the same organizational command, the DCASR Boston, they continued to be serviced by the same personnel office, they remained in the same areas of consideration for promotions and the same competitive area for reduction-in-force procedures, and they had an established history of collective bargaining. The Assistant Secretary further noted that the severance of the DCASPRO, IBM Owego, employees, which was sought by the petition, with the potential for the establishment of a new unit there, would tend to promote unnecessary unit fragmentation.

Accordingly, the Assistant Secretary ordered that the RA petition be dismissed.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION,
BOSTON, MASSACHUSETTS

and

DEFENSE CONTRACT ADMINISTRATION
SERVICES MANAGEMENT AREA,
BINGHAMTON, NEW YORK

Activity-Petitioners

and

Case No. 35-4895 (RA)

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, LOCAL R2-56,
OWEGO, NEW YORK

Labor Organization

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Dorothy Richardson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in the subject case, including a brief filed by the National Association of Government Employees, Local R2-56 (NAGE), the Assistant Secretary finds:

On June 12, 1968, NAGE Local R2-56 was recognized as the exclusive representative in a unit of essentially all nonprofessional employees of what is now the Defense Contract Administration Services Management Area (DCASMA), Binghamton, New York. Subsequently, the NAGE and the predecessor to the present DCASMA, Binghamton, entered into a three-year negotiated agreement dated February 14, 1974. At the hearing, the parties stipulated that this agreement has been renewed by the parties, and that its current termination date is February 14, 1979.

On February 1, 1978, the Defense Contract Administration Services Region (DCASR), Boston, established a Defense Contract Administration Services Plant Representative Office (DCASPRO) at the International Business Machines (IBM) plant in Owego, New York. Prior to this time, the IBM plant at Owego had been serviced by a branch of the Quality Assurance Group organizationally assigned to the DCASMA, Binghamton. On February 1, 1978, those DCASMA, Binghamton, employees who had been assigned to the IBM plant in Owego formed the nucleus of the newly formed DCASPRO, IBM Owego. The Activity-Petitioners contend that the Commander of the newly formed DCASPRO, IBM Owego, assumed an organizational status equal to that of the Commander of the DCASMA, Binghamton, thus giving both the same delegated authority with respect to personnel administration and labor relations, as well as other matters. Based on their position that the organization of labor relations should parallel command responsibility, the Activity-Petitioners filed the instant petition, which would have the effect of severing the employees of the DCASPRO, IBM Owego, from the DCASMA, Binghamton, unit represented exclusively by the NAGE. The NAGE contends that the employees of the DCASPRO, IBM Owego, continue to be part of its existing unit, as they have and continue to share a clear and identifiable community of interest with the employees of the DCASMA, Binghamton, they continue to be subject to common policies and procedures established by the DCASR, Boston, they continue to be subject to the same personnel policies, and they continue to share the same areas of consideration for promotions and area of competition for reduction-in-force proceedings.

The DCASR Boston is one of nine regions of the Defense Logistics Agency. With the establishment of the DCASPRO, IBM Owego, there are currently six DCASMA's and six DCASPRO's within the DCASR Boston. Each DCASMA has a geographic area of responsibility, providing contract administration services in support of the Department of Defense and other Federal agencies at various facilities within its area. The DCASPROs provide the same service at a single plant location which has a significant workload requiring both permanent on-site personnel and administrative responsibility.

As noted above, the record reflects that on February 1, 1978, the IBM Owego, Branch of the Quality Assurance Group, DCASMA, Binghamton, formed the nucleus of the DCASPRO, IBM Owego. This unit was established on that date because the IBM plant had been awarded contracts which necessitated the increase of the complement there. Some 20 unit employees of the DCASMA, Binghamton, were transferred in place as a result of the reorganization. Three other employees from other locations within the DCASMA, Binghamton, were reassigned to the DCASPRO, IBM Owego, at the time of the reorganization. Since that time, other employees have been hired by the DCASPRO, IBM Owego, from the DCASMA, Binghamton, from other facilities of the DCASR Boston, and from outside the Boston Region. Currently, there are 94 employees in the unit claimed to be appropriate by the NAGE, with 57 assigned to the DCASMA, Binghamton, and 37 assigned to the DCASPRO, IBM Owego.

With respect to the mission and duties performed by the employees of the DCASPRO, IBM Owego, the record reflects that the reorganization has not,

except for the imposition of a new command authority, essentially altered either the mission or type of duties performed, as the bargaining unit employees, for the most part, remain in the same location and continue to perform the same duties under the same immediate supervisors. Further, they are subject to the same personnel policies and practices established by the DCASR Boston, they remain in the same areas of consideration for promotions and the same competitive area for reduction-in-force procedures as the DCASMA, Binghamton, employees, and they continue to be serviced by the DCASR Boston Personnel Office concerning personnel matters. Primary responsibility and guidance for labor relations policies and personnel matters remain with the Personnel Office of DCASR in Boston. Further, the DCASR Boston provides Section 15 approval of all negotiated agreements, although both the DCASMA, Binghamton, Commander, and the DCASPRO, IBM Owego, Commander, have been delegated considerable authority for administering labor relations policies within their commands and are free to negotiate agreements and consult with exclusive bargaining representatives.

Under the circumstances outlined above, I find that the exclusively recognized unit continues to be appropriate for the purpose of exclusive recognition. 1/ In reaching this conclusion, I note particularly that the reorganization involved herein did not result in any change in the day-to-day terms and conditions of employment of the employees involved, including their physical location, job function, and immediate supervision. Also, both the DCASMA, Binghamton, and the DCASPRO, IBM Owego, continue to report to the same organizational command, the DCASR Boston, continue to be serviced by the same personnel office, remain in the same areas of consideration for promotions and the same competitive area for reduction-in-force procedures, and have an established history of collective bargaining. Further, in my view, the severance of the DCASPRO, IBM Owego, employees, which is sought by the subject petition, with the potential for the establishment of a new unit there, would tend to promote unnecessary unit fragmentation. Accordingly, I shall order that the petition herein be dismissed. 2/

1/ See Naval Aerospace and Regional Medical Center, Pensacola, Florida, et al., 6 A/SLMR 46, A/SLMR No. 603 (1976), FLRC No. 76A-18, 4 FLRC 369 (1976), and Chemical Systems Laboratory and Armament Research and Development Command, Chemical Systems Laboratory Support, Aberdeen Proving Ground, Maryland, A/SLMR No. 1029 (1978).

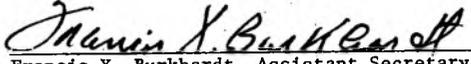
2/ While it has been found that the exclusively recognized unit herein continued, after the reorganization, to be appropriate for the purpose of exclusive recognition, such a finding would not preclude the filing of an appropriate petition for amendment of recognition in order to conform the recognition to the existing circumstances.

ORDER

December 28, 1978

IT IS HEREBY ORDERED that the petition in Case No. 35-4895(RA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 27, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION HOSPITAL,
BUTLER, PENNSYLVANIA
A/SLMR No. 1167

This case involved an unfair labor practice complaint filed by the National Association of Government Employees, Local R3-74 (Complainant) alleging, in essence, that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to negotiate concerning the Complainant's proposal that the parties' negotiated agreement be modified to permit employees in the Nursing and Dietetic Service to have every third weekend off.

At the hearing, the Complainant called no witnesses. The only evidence presented was the parties' negotiated agreement. The Administrative Law Judge concluded that where, as here, no evidence is presented in support of the allegations of a complaint, a complainant has not sustained its burden of proof and the complaint must be dismissed. He therefore recommended that the complaint in the instant case be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions, and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.



UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,
BUTLER, PENNSYLVANIA

Respondent

and

Case No. 21-05891(CA)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R3-74

Complainant

DECISION AND ORDER

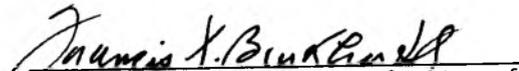
On November 1, 1978, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 21-05891(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 28, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

In the Matter of

VETERANS ADMINISTRATION HOSPITAL
Respondent

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R3-74
Complainant

Case No. 21-05891(CA)

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Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding under Executive Order 11491, as amended (hereinafter also referred to as the "Order"), was initiated by a charge filed on, or about, August 28, 1977, and a Complaint, filed October 25, 1977 (Asst. Sec. Exh. 1) which alleged violations of Sections 19(a)(1) and (6) of the Order. Notice of Hearing issued May 16, 1978, pursuant to which a hearing was duly held before the undersigned on June 20, 1978, in Pittsburgh, Pennsylvania.

The Complaint alleged that on July 27, 1977, Complainant wrote to Mr. Morris, Hospital Director, and requested that he negotiate with the local relative to a local proposal previously submitted that would give employees of the Hospital's Nursing and Dietetic Services one (1) weekend in three (3) off. By letter dated August 4, 1977, he refused to negotiate. ..."

Complainant declined to call any witnesses and the only evidence presented was the parties' collective bargaining agreement, effective April 21, 1975 (Jt. Exh. 1). Mr. Harry Breen, Complainant's National Vice President and Complainant's representative at the hearing, stated Complainant's position. Mr. Breen made it clear that Respondent's only statement concerning Complainant's proposal on, or after, February 28, 1977, had been the Hospital Director letter of August 4, 1977, which, in pertinent part, stated as follows:

"Our decision on this particular issue has not changed. The proposals previously advanced are not considered negotiable since Management reserves the right to establish tours of duty and to determine the numbers and grade levels assigned to each tour

to effectively operate the service. However, we are available to discuss matters which are negotiable within this Article." 1/

Although Complainant adduced no evidence or testimony to support Mr. Breen's statement of position, Mr. Breen asserted that on January 27, 1976, Complainant requested an amendment to the 1975 collective bargaining agreement to give employees of the Hospital's Nursing and Dietetic Services [Butler, Pennsylvania] one weekend in three off; that on March 15, 1976, Respondent said it would agree to Complainant's proposal and would sign an amendment on March 19, 1976; that Respondent cancelled the March 19, 1976 meeting; that on March 29, 1976, Respondent refused to agree to Complainant's proposal; that on April 13, 1976, Respondent advised Complainant in writing that it would not negotiate on Complainant's proposal because the proposal was non-negotiable. Mr. Breen also stated that a representative of Respondent on June 2, 1976, said that the employees involved should vote on the issue, i.e., whether or not they wanted every third weekend off; that the employees voted in favor of the proposal; that, nevertheless, Respondent continued to assert, for example on November 19, 1976, and January 10, 1977, that the proposal was non-negotiable; and that mediation, requested by Complainant, had been unsuccessful.

Complainant has not requested an agency head's determination as to negotiability of its proposal; nor has Complainant sought to bargain on any other proposal than its January 27, 1976, proposed amendment.

Respondent has moved that the Complaint be dismissed.

At the close of the hearing, July 22, 1978, was fixed as the date for filing briefs; however, upon subsequent request of Complainant the time was extended, on July 18 and, again on July 27, 1978, to August 7, 1978, and briefs, timely mailed were received on August 14, 1978, and have been carefully considered.

1/ Mr. Breen read this portion of the letter of August 4, 1977, into the record; however, because the transcript, including the text of this letter, is so replete with errors, I have used a copy of the actual letter submitted to the Regional Administrator, even though the letter was not offered as an Exhibit, since the quality of the transcript is so poor as to be thoroughly unreliable.

Discussion and Conclusions

Complainant presented no evidence or testimony in support of the allegations of the Complaint and has not therefore, sustained the burden of proof imposed by Section 203.15 of the Regulations, 29 C.F.R. § 203.15, namely, that:

"A complainant in asserting a violation of the order shall have the burden of proving the allegation of the complaint by a preponderance of the evidence."

Where no evidence is adduced in support of the allegation in a complaint, the complaint must be dismissed. Department of Defense, Air National Guard, 147th Fighter Group, Texas Air National Guard, Austin, Texas, A/SLMR No. 667, 6 A/SLMR 308 (1976); Department of Housing and Urban Development, Detroit Area Office, Detroit, Michigan, A/SLMR No. 474, 4 A/SLMR 480 (1974).

Even if it were assumed that Complainant's statement of position constituted probative evidence, and I specifically do not consider statements of position to constitute probative evidence, nevertheless, the unfair labor practice, if any, occurred in 1976. Complainant's position is that Respondent on March 15, 1976, stated that it would agree to Complainant's proposed amendment to the parties' collective bargaining agreement; that on March 29, 1976, Respondent refused to agree on Complainant's proposal; and on April 13, 1976, advised Complainant in writing that it would not negotiate on Complainant's proposal because the proposal was non-negotiable. It is Complainant's further position that Respondent suggested that the concerned employees vote on the proposal; that after the employees had voted in favor of the proposal, Respondent, in 1976, again refused to negotiate on the proposal because it was non-negotiable. Whether such conduct, if proved, would or would not constitute an unfair labor practice is not determined, but if Respondent, by virtue of such conduct, committed an unfair labor practice, it did so in 1976 and no charge was filed within six months of the occurrence thereof, as required by Section 203.2(a)(2) of the Regulations to constitute the basis for an unfair labor practice, nor was a complaint filed within nine months of the occurrence thereof, as required by Section 203.2(b)(3) of the Regulations. Accordingly, any unfair labor practice proceeding with respect to acts which occurred in 1976 are barred by the Regulations. Department of Housing and Urban Development, Detroit Area Office, Detroit, Michigan, supra. Although Respondent has continued to assert that Complainant's proposal is non-negotiable, the specific conduct stated by

Complainant with regard to initial agreement, withdrawal, suggested vote by concerned employees (presumably Complainant's position inferred that Respondent would agree to its proposal if the employees voted for it) and refusal to agree were not continuing violations. If Respondent, by such conduct, committed an unfair labor practice it did so in 1976.

Finally, Respondent from April 13, 1976, even by Complainant's statement of position, has consistently asserted that Complainant's proposal was non-negotiable. Respondent has changed no established conditions of employment. The assertion by an agency in negotiations that a proposal is non-negotiable is not reviewable under the unfair labor practice procedures of the Order. Army and Air Force Exchange Service, Keesler Consolidated Exchange, A/SLMR No. 144, 2 A/SLMR 170 (1972). Section 11(c) of the Order provides for the resolution of such issues and the Assistant Secretary in the Keesler Consolidated Exchange case, supra, stated:

"... In my view, Section 11(c) of the Order provides the exclusive method for resolving such a dispute. ..." (2 A/SLMR at 175-176).

Although the Executive Order was amended in 1975 to assign to the Assistant Secretary express authority to resolve certain negotiability determinations (Sections 6(a)(4), 11(d)), it is perfectly clear that such authority is expressly limited to those situations where: "an alleged unilateral act by one of the parties requires an initial negotiability determination" (Section 6(a)(4)); "as the result of an alleged unilateral change in, or addition to, personnel policies and practices or matters affecting working conditions, the acting party is charged with a refusal to consult, confer ... the Assistant Secretary may, in the exercise of his authority under Section 6(a)(4) of the Order, make those determinations of negotiability as may be necessary to resolve the ... unfair labor practice. ..." (Section 11(d)). Not only is the language of the Order, as amended, clear, directive and wholly free of ambiguity in this regard, but the accompanying Report and Recommendation of the Federal Labor Relations Council on the Amendment further reaffirms the intention that negotiability disputes which arise in connection with negotiations be resolved under the procedures prescribed by Section 11(c) and not otherwise. Thus, the Report states:

"Thus, if in connection with negotiations, a dispute arises over the negotiability of a proposal and that dispute meets the

conditions prescribed in section 11(c) of the Order, it shall be resolved by the Council. ...

* * * *

The amendments which we propose would affirm the authority of the Assistant Secretary ... to resolve negotiability issues ... so long as these issues do not arise in connection with negotiations between the parties but rather as a result of a respondent's alleged refusal to negotiate by unilaterally changing an established personnel policy or practice, or matters affecting working conditions." (Labor-Management Relations in the Federal Service, Report and Recommendation, 1975, pp. 59-61).

Here, Complainant, in negotiations, submitted a proposal to amend the collective bargaining agreement; Respondent refused to negotiate Complainant's specific proposal because Respondent determined that proposal non-negotiable. Respondent stated that it was "available to discuss matters which are negotiable" but Complainant: a) submitted no other proposal; and b) sought no review of the negotiability issue pursuant to Section 11(c) of the Order. Accordingly, even if Respondent's refusal to negotiate on a proposal it first determined was non-negotiable on April 13, 1976, and has consistently thereafter determined the same proposal to be non-negotiable, were assumed to be a continuing refusal to negotiate within the reach of the Complaint, such refusal to negotiate is neither reviewable under the unfair labor practice procedures of the Order nor is the assertion of non-negotiability a violation of Section 19(a)(6) of the Order. Environmental Protection Agency, Washington, D. C., Environmental Protection Agency, Research Triangle Park, North Carolina, A/SLMR No. 943, 7 A/SLMR 1022 (1977); Cf., Environmental Protection Agency, Region VII, Kansas City, Missouri, A/SLMR No. 668, 6 A/SLMR 314 (1976), FLRC No. 76A-87, 4 FLRC 646 (1976).

Of course, Respondent asserts that Complainant's proposal does integrally relate to Respondent's reserved right to establish tours of duty and to determine the numbers and grade levels assigned to each tour to effectively operate its Nursing and Dietetic Services. Respondent's negotiability determination is subject to review pursuant to Section 11(c) of the Order, but is not subject to review under the unfair

labor practice procedures of the Order, when, as here, Respondent has made no change in, or addition to, any personnel policies or practices or matters affecting working conditions.

RECOMMENDATION

Having found that Complainant has not proved the allegations of the Complaint by a preponderance of the evidence, indeed Complainant failed and refused to adduce any evidence in support of the allegations of the Complaint; and further, having found that even if Complainant's statement of position were assumed, for the purpose of discussion to be true, nevertheless Respondent has not even pursuant to Complainant's statement of position engaged in certain conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended, and accordingly, I recommend that the Complaint herein be dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 1, 1978
Washington, D.C.

WBD/mml

December 28, 1978

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE,
OFFICE OF THE SECRETARY
A/SLMR No. 1168

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1802, AFL-CIO (AFGE) alleging that the Respondent, Department of Health, Education and Welfare (HEW), Office of the Secretary, violated Section 19(a)(1) and (6) of the Order by advertising positions in a newly established Training Institute outside the minimum area of consideration as specified in the negotiated agreement between the AFGE and the Respondent's regional office, Region VIII. The Respondent took the position that the new positions were outside the bargaining unit and, as a result, there was no obligation to abide by the terms of the agreement.

The negotiated agreement in question contained a provision pertaining to the filling of new or vacant positions. One procedure that was outlined specified that for certain grade levels, the minimum area of consideration used to solicit applicants would be region-wide. On August 16, 1977, the Respondent issued the vacancy announcement herein and posted it nationwide.

The Administrative Law Judge noted that a determination as to whether or not the Respondent violated the Executive Order was predicated on a finding that the Institute positions had accreted into the existing bargaining unit. Finding that the Institute employees shared a community of interest with other unit employees, and that the inclusion of such employees would lead to effective dealings and efficiency of agency operations by reducing the possibility of unit fragmentation, the Administrative Law Judge found that the Institute employees accreted into the existing unit. As such, he concluded that the Respondent's conduct, in posting the announcement nationwide, contravened the terms of the parties' negotiated agreement in violation of Section 19(a)(1) and (6) of the Order.

Contrary to the Administrative Law Judge, the Assistant Secretary found that the inclusion of the Institute employees into the Region VIII bargaining unit would not equally satisfy the criteria contained in Section 10(b) of the Order. Noting that the Institute had no organizational relationship with HEW, Region VIII, but, instead, was administratively under the control of its headquarters component in Washington, D.C., and that the Institute was physically located in Region VIII only

because of its geographic proximity to those employees for whom it would provide training, and not because of any organizational relationship, the Assistant Secretary found that effective dealings and efficiency of agency operations would not be promoted by including the Institute employees in the unit. Having found that the disputed positions did not accrete into the existing unit, the Assistant Secretary found that the Respondent's conduct in advertising the positions nationwide did not constitute a violation of the Order. In his view, the issue involved essentially a matter of interpretation of the negotiated agreement, rather than a clear and patent breach thereof. Under these circumstances, he noted that the aggrieved party's remedy for such a matter was within the grievance/arbitration machinery of the negotiated agreement, rather than through the unfair labor practice procedures. Accordingly, the Assistant Secretary ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE,
OFFICE OF THE SECRETARY

Respondent

and

Case No. 22-08683(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1802, AFL-CIO

Complainant

DECISION AND ORDER

On October 6, 1978, Administrative Law Judge Henry B. Lasky issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations, only to the extent consistent herewith.

The complaint herein alleged, in essence, that the Respondent, Department of Health, Education and Welfare (HEW), Office of the Secretary, violated Section 19(a)(1) and (6) of the Order by advertising new positions outside the minimum area of consideration as specified in the negotiated agreement between the Complainant and HEW, Region VIII (Region). The Respondent took the position that the positions involved were outside the bargaining unit and, therefore, it had no obligation to abide by the terms of the agreement.

The Complainant and the Region are parties to a negotiated agreement which became effective on October 26, 1976. The agreement contains a provision pertaining to the filling of new or vacant positions and outlines the various methods by which such positions may be filled. One procedure involves a solicitation of applications from a specified "minimum area of consideration." For positions at the GS-9 to GS-13 levels, the minimum area of consideration is region-wide. 1/

In July 1977, a Training Institute (Institute) was established for the purpose of providing training for employees of the HEW, Office of Civil Rights (OCR) and for those other employees whose duties involve the enforcement of and compliance with civil rights matters. The Institute, which is physically located in the Region, is organizationally a part of the OCR. The OCR, headquartered in Washington, D.C., has ten regional offices, including one in Region VIII, each headed by a regional director. The employees of the OCR assigned to the Region are part of the existing bargaining unit represented exclusively by the Complainant. The Director of the Institute reports to the Director of the OCR's Training Division in Washington, D.C., who, in turn, reports to the Office of the Deputy Director, Compliance and Enforcement. The Regional Director of OCR, Region VIII, reports to this latter Office as well. The evidence establishes that there is no organizational relationship between the Institute and OCR, Region VIII. 2/

A vacancy announcement for four Equal Opportunity Specialist positions, at grades GS-9 through GS-12, in the Institute was posted nationwide by the Respondent on August 16, 1977. 3/ Following the closing date of the announcement, the Complainant contacted officials of the Respondent, as well as the Region's Personnel Office, asserting that the vacancy announcement should have been issued by the Regional Personnel Office which, by the terms of the negotiated agreement, had the appointing authority for bargaining unit positions. In essence, the Respondent replied that the positions were not administratively under the control of the Regional Office and that the classification and appointing authority for such positions was being retained by the Respondent. 4/

1/ The agreement specifies certain exceptions to the minimum area of consideration, but they are not material to the circumstances involved herein.

2/ The only relationship which exists between the Institute and OCR, Region VIII, is that of certain training provided by the former to the latter's employees.

3/ The parties were in dispute as to whether or not the vacancy announcement was posted in Region VIII.

4/ Subsequent to the closing date of the announcement, one employee was reassigned laterally to the position of Equal Opportunity Specialist, GS-11, at the Institute. The announcement with respect to the GS-12 and GS-13 positions was cancelled and the positions had not been filled as of the date of the hearing in this matter.

In reaching his conclusion that the Respondent had violated the Executive Order, the Administrative Law Judge noted that such determination was predicated on a finding that employees of the Institute had accreted into the existing bargaining unit, and that, consequently, the Institute was subject to the provisions of the negotiated agreement. He made such a finding of accretion noting that the inclusion of the employees of the Institute in the exclusively recognized unit satisfied each of the appropriate unit criteria enumerated in Section 10(b) of the Order. 5/ Having found that the Institute's employees had accreted into the exclusively recognized unit, the Administrative Law Judge further found that the Respondent's nationwide posting of the vacancy announcement contravened the terms of the parties' negotiated agreement and was, therefore, violative of Section 19(a)(1) and (6) of the Order. 6/ I disagree.

It has previously been held that unit determinations in cases involving claimed accretions must equally satisfy all three criteria set forth in Section 10(b) of the Order. 7/ In the instant case, although the Administrative Law Judge found factors supporting a finding that a community of interest existed between employees of the Institute and unit employees, he relied essentially on the policy pronouncement of the Federal Labor Relations Council in its Report and Recommendations, dated January 1975, favoring the creation of comprehensive bargaining units, in order to find that the accretion of the Institute employees into the existing unit would promote effective dealings and efficiency of agency operations.

In my view, the evidence presented in the record is insufficient to establish that effective dealings and efficiency of agency operations would be promoted if the Institute employees were included in the existing unit. Thus, the record indicates that there is no organizational relationship between the Institute and OCR, Region VIII, or other organizational components of the Region, and that the Regional Director of OCR, Region VIII, exercises no administrative control over the Institute. With the exception of such services as procurement and personnel for the Institute's clerical staff provided by the Region, all administrative and programmatic control over the Institute is retained by headquarters

5/ Section 10(b) of the Order provides, in pertinent part: "A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations."

6/ The Administrative Law Judge also found that, while the posting was purportedly nationwide, the vacancy announcement had not, in fact, been posted in the Region.

7/ See, in this regard, Department of the Army, Fort McPherson, Georgia, A/SLMR No. 1005 (1978), FLRC No. 76A-82 (1977).

in Washington, D.C. As noted above, the Director of the Institute reports directly to the head of the Training Division in OCR headquarters, not to any regional authority. Furthermore, as indicated by the Respondent, the location of the Institute was chosen, not because of any organizational relationship between it and the Region, but because of the Institute's geographic proximity to those employees for whom it will provide training. In this regard, the record reveals that the employees being served will come not only from the Region but from regional offices throughout the country.

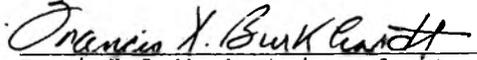
Under these circumstances, I find that the inclusion of employees of the Institute in the existing exclusively represented bargaining unit will not promote effective dealings or efficiency of agency operations. Therefore, such employees do not constitute an accretion to the existing bargaining unit. In light of this conclusion, the question as to whether or not the provisions of the negotiated agreement apply to positions outside the unit, i.e., positions within the Institute, becomes one of contract interpretation. It is well established, in this regard, that alleged violations of a negotiated agreement which, as here, concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute a clear and patent breach of the agreement, are not violative of the Order. 8/ In such circumstances, it has been found that the aggrieved party's remedy for such matters lies within the grievance/arbitration machinery of its negotiated agreement, rather than through the unfair labor practice procedures.

Under the circumstances of this case, I find that as the issue in the instant proceeding involves essentially differing and arguable interpretations of the parties' negotiated agreement, the Respondent's conduct did not violate Section 19(a)(1) and (6) of the Order. I shall, therefore, order that the instant complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-08683(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 28, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

8/ See, e.g., Department of Army, Watervliet Arsenal, Watervliet, New York, 6 A/SLMR 127, A/SLMR No. 624 (1976); Federal Aviation Administration, Muskegon Air Traffic Control Tower, 5 A/SLMR 457, A/SLMR No. 534 (1975); and General Services Administration, Region 5, Public Buildings Service, Chicago Field Offices, 5 A/SLMR 424, A/SLMR No. 528 (1975).

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036

Suite 600 - 211 Main Street
San Francisco, California 94105

In the Matter of

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE, OFFICE OF THE
SECRETARY

Respondent

and

AMERICAN FEDERATION OF GOVERN-
MENT EMPLOYEES, LOCAL 1802,
AFL-CIO

Complainant

CASE NO. 22-08683(CA)

Grover Sherman
Labor Relations Officer
Region VIII, Department of
Health, Education and Welfare
For the Respondent

Kenneth Bull
National Representative
5001 South Washington Street
Englewood, Colorado 80110
For the Complainant

Before: HENRY B. LASKY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Pursuant to a notice of hearing issued on June 13, 1978, by the Regional Administrator for Labor-Management Services Administration for the U. S. Department of Labor, Philadelphia Region, a hearing was held on August 8, 1978, in Denver, Colorado.

This proceeding was initiated under Executive Order 11491, as amended (hereinafter called the Order), by the filing of a complaint dated January 4, 1978, on January 10, 1978, by American Federation of Government Employees, Local 1802, AFL-CIO (hereinafter called the Complainant),

which alleged that the Department of Health, Education and Welfare, Office of the Secretary (hereinafter called the Respondent), violated sections 19(a)(1) and (6) of the Order when Respondent advertised in Washington, D. C., the availability of new and vacant positions in the Office for Civil Rights at their Training Institute in Denver, Colorado. Complainant is the exclusive collective bargaining representative of all employees, as defined in the collective bargaining agreement. The existing agreement between Complainant and the management of Health, Education and Welfare, Regional Office, Denver, Colorado, dated October 26, 1976, contains an article which provides for the filling of new and vacant positions.

Complainant contends that Respondent, by advertising these positions outside the bargaining unit, violated the agreement and in effect, changed the conditions and terms of the agreement without negotiations. Respondent denies violating the Order and alleges that the employees and vacancies in the Training Institute, Office for Civil Rights, are not part of the recognized bargaining unit represented by Complainant and therefore Respondent's action in advertising the positions in Washington, D. C. was not a violation of the negotiated agreement.

The issues forwarded by the Regional Administrator for decision are, whether the employees located in the Training Institute, Office for Civil Rights, in Denver, Colorado, are part of the recognized bargaining unit represented by AFGE Local 1802, and if so, whether the Respondent's action in posting a vacancy announcement for the filling of these positions in the Training Institute constituted a violation of sections 19(a)(1) and (6) of the Order.

At the hearing both parties were represented and afforded full opportunity to be heard, to present evidence, and to examine and cross-examine the witnesses. Post-hearing briefs were allowed to be filed by posting by mail no later than September 25, 1978. The Complainant and the Respondent filed briefs with the undersigned within the time required, which have been duly considered.

Upon the entire record herein, from my observation of the witnesses, and their demeanor, and from all the evidence presented at the hearing, I make the following findings, conclusions, and recommendations.

Findings of Fact

In 1977, the Department of Health, Education and Welfare, Office of the Secretary, issued vacancy announcement 77-242 soliciting applications for employment for four new positions at the Training Institute, Office for Civil Rights located in Denver, Colorado. The nationwide posting occurred from August 16, 1977 through September 7, 1977, and was posted in Washington, D. C. Although there is conflicting evidence, I conclude, based upon the credibility of the witnesses, that Respondent failed to post nationwide because the vacancy announcement was not posted in Respondent's Region VIII, Denver, Colorado. Of the four new positions, three are still vacant, and one was filled as a result of a lateral assignment, and not as a result of the announcement.

After September 7, 1977, the chief steward of the Complainant was called by employees in Denver, complaining that they heard that the vacancy announcement for these new positions was posted in Washington, D. C., and expressed dissatisfaction that they were not made aware of these vacancies until after the solicitation period had expired. The steward unsuccessfully attempted to locate the announcement in Denver, and on September 12, 1977, she ultimately secured a copy from an employee who had obtained the copy in Washington, D. C. The steward contacted the Region VIII personnel officer of the agency in Denver, who acknowledged he was not aware of the particular vacancy announcement and admitted it was not advertised by the Denver Regional Office. The Region VIII personnel officer further acknowledged that the posting of vacancy announcements for positions is normally done outside his office and he never observed it at any time during the posting period.

The organizational chart of Respondent's Office for Civil Rights was admitted into evidence. This office is divided into ten regions nationally, with Region VIII in Denver. The employees of Region VIII are within the bargaining unit. The Regional Office for Civil Rights is organizationally under the control of the Office of Compliance and Enforcement. The Training Institute, in Denver, which is the subject of this case, is part of the Division of Training and is also organizationally within the ambit of the Office of Compliance and Enforcement.

The Office for Civil Rights, Region VIII, is housed in the Denver Federal Building. Respondent argues that the Training Institute is not part of the bargaining unit because it is located in the Blue Cross Building; it is

not covered by the collective bargaining agreement because it did not exist at the time of the agreement; the appointing authority for the filling of vacancies in the Training Institute is in Washington, D. C.; there is allegedly no community of interest between the Training Institute and the Regional Office for Civil Rights.

The Training Institute, established July 21, 1977, was designed to train employees for the regional offices of the Office for Civil Rights, including Region VIII. Article 15, section 4(b), of the collective bargaining agreement, provides that new or vacant positions may be filled under various authorities and methods but that applications will be solicited from employees in a specific area called a "minimum area of consideration". A minimum area of consideration is the area in which the agency should reasonably expect to locate enough highly qualified candidates to fill the vacancy and is the smallest area in which a job must be announced. For GS-9/13, the area of consideration is region-wide subject to certain exceptions which are not applicable.

The chief steward of the Complainant, after finally obtaining a copy of vacancy announcement 77-242, immediately sent a mailgram, dated September 13, 1977, to Respondent setting forth the Complainant's position that the posting of the vacancy announcement in Washington, D. C., and not within Region VIII, was a violation of the collective bargaining agreement. In a letter, dated October 12, 1977, Respondent replied that since the positions of the Training Institute are new, no determination has been made as to whether the positions would be in the bargaining unit, and that the appointing and classification authority for the positions is placed in the headquarters component of the Office of the Secretary. However, it was not until November 14, 1977, long after the posting period for the vacancy announcement had expired, that the Respondent withdrew the delegation of authority, and revoked the regional authority to appoint the new positions by reinstating the authority of the Office of the Secretary.

The Training Institute is in the Denver Blue Cross Building, which also contains the Bureau of Hearing and Appeals, whose employees are part of the bargaining unit. The evidence further established that the position descriptions for the Training Institute are similar to the position descriptions for the Regional Office for Civil Rights. The basic knowledge and skills required, with minor variation, render the positions interchangeable. The clerical positions of the Training Institute are part

of the bargaining unit and the Region VIII personnel office is permitted to do lower level hiring for the Institute. Although there was conflicting evidence, I conclude, based upon credibility of the witnesses, that the Training Institute and the Office for Civil Rights, Region VIII, share services of the procurement office for supplies and equipment, services of the Region VIII personnel office for clerical help, access to HEW credit union, and other personnel practices and working conditions.

Both the Training Institute as well as the Office for Civil Rights, Region VIII, share the overall common mission which is as follows:

The primary mission of the Office for Civil Rights is to eliminate unlawful discrimination and to ensure equal opportunities for the beneficiaries or potential beneficiaries of federal financial assistance.

In addition, the Training Institute has the function of developing and directing civil rights training programs for the regional offices of the Office for Civil Rights, including Region VIII.

The bargaining unit includes both professional employees of Health, Education, and Welfare, Region VIII, except those professionals in the Food and Drug Administration, and non-professional employees of the Department of Health, Education and Welfare, Region VIII in enumerated organizational components.

Discussion and Conclusions

Complainant herein urges that the few positions sought to be filled by the posting of vacancy announcement 77-242 are part of the bargaining unit represented by AFGE Local 1802. Such assertion is well founded. The appropriateness of a unit must satisfy the criteria of ensuring a clear and identifiable community of interest among the employees concerned and promote effective dealings and efficiency of agency operations. The fact that the positions at the Training Institute were not in existence at the time of the negotiated agreement does not preclude their being part of the bargaining unit for such positions are accretions to the established bargaining unit.

In order to determine whether or not employees are an accretion to an existing bargaining unit, the factors which must be considered include geographic proximity,

the physical, functional and administrative integration of units, substantially similar job classifications, similar terms and conditions of employment, common supervision, whether or not the new employees and those in the existing unit are interchangeable, and the role of the new employees in the operations of the existing unit, if any.

It is a combination of factors, rather than any one factor, which dictates whether the Training Institute positions constitute an accretion to the existing bargaining unit. The employees of the Training Institute are located in the same city with Region VIII employees of the Office for Civil Rights who are members of the unit. Admittedly, they occupy different buildings. However, this distinction is without significance because the Training Institute is housed in the Blue Cross Building with other Department of Health, Education and Welfare employees (Bureau of Hearings and Appeals), who are part of the unit. The Training Institute employees, for all practical purposes, share similar terms and conditions of employment with the employees of Office for Civil Rights, Region VIII, as well as with the other department employees in their same building. The Training Institute and the Office for Civil Rights, Region VIII, share an overall common mission, and more importantly, it is the Training Institute which provides training for the regional employees of the Office for Civil Rights. In addition, the employee classifications for the Training Institute are very similar to those classifications of existing unit employees of the Office for Civil Rights, Region VIII, with only minor variation. Consequently, the position descriptions for the Training Institute are substantially the same as those of the Office for Civil Rights, and but for minor variations, the job skills required for the two respective offices are almost interchangeable. Both the Training Institute and the Regional Office for Civil Rights share a common organizational superior as both offices are under the Office of Compliance and Enforcement.

Respondent argues that the Training Institute operates under the supervision of the headquarters office rather than the regional office. This distinction is insufficient, by itself, to negate the clear and identifiable community of interest resulting from the existence of the other factors. The promotion of effective dealings and efficiency of agency operations requires that the Training Institute employees be part of the existing bargaining unit. To hold otherwise, would result in needless artificial fragmentation and impede, rather than promote, effective dealings and efficiency of agency operation.

The fragmented organization of the Respondent's Office for Civil Rights does not require the fragmentation of the bargaining unit. To the contrary, it is the fundamental policy of the Federal Labor Relations Council that the creation of more comprehensive units is a necessary evolutionary step in the development of a labor-management relations program which best meets the needs of the parties in the federal labor-management relations program and best serves the public interest.

We believe that the policy of promoting more comprehensive bargaining units and hence of reducing fragmentation in the bargaining unit structure will foster the development of a sound Federal labor-management relations program. Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491 as amended, January, 1975.

Accordingly, the employees of the Training Institute have a clear and identifiable community of interest with the other employees of the bargaining unit and their inclusion within the bargaining unit will promote effective dealings and efficiency of agency operations as required by section 10(b).

The posting by the Respondent of vacancy announcement 77-242 in Washington, D. C., regardless of whether posted in Denver, was accomplished by Respondent in total disregard of the negotiated agreement with Complainant. Complainant acknowledges that the agency has authority to determine the authority of the regional personnel office; but it cannot do so in an effort to circumvent the negotiated agreement between the union and the activity.

The record herein clearly established that Respondent attempted, by unilateral implementation, to fill the new vacancies in the Training Institute by apparent nationwide posting, thereby superseding and modifying the terms of the negotiated agreement. No adequate explanation for such action was offered by Respondent. The withdrawal of authority of the Region VIII personnel office to fill the vacancies at the Training Institute, after the posting period of the vacancy announcement had expired, was an attempt to legitimate Respondent's prior posting of the vacancy announcement in violation of the negotiated agreement. Not only did Respondent circumvent the negotiated agreement by its actions with reference to the posting, but it is also clear from the record, that the failure to post in Denver, Colorado, constituted a failure to comply

with the announcement's own expressed terms that the solicitation of applications be nationwide. The aforesaid factors suggest an intent to avoid applications, for the few new positions, from the Denver area.

It should be noted that when acts are practiced which constitute unfair labor practices by "agency management" as defined in section 2(f) of the Order, there is no basis for drawing artificial distinctions between organizational levels of such agency management in order to relieve them of the responsibility for their acts, which would otherwise be violative of the Order. Naval Air Rework Facility, Pensacola, Florida, and Secretary of the Navy, Washington, D.C., A/SLMR No. 873. Therefore the acts of the Office of the Secretary, Department of Health, Education and Welfare are not immune from a finding of an unfair labor practice under the terms of negotiated collective bargaining agreement entered into by a lower organizational level of agency management.

Respondent relies on the case of Department of Health, Education and Welfare, Social and Rehabilitation Service, A/SLMR No. 632, for the proposition that employees sought to be added to a bargaining unit, who in fact had not been hired, are speculative, and should not be added to the unit. Such reliance is misplaced. In A/SLMR No. 632, no appropriated funds had been made available for the newly established entity and it was a "paper organization." Under the evidence herein, the Training Institute is not a paper organization, but rather a going concern.

It would be inconsistent with the purposes and policies of the Order to permit a higher level of agency management to unilaterally change matters effecting working conditions established by a negotiated agreement when such a change is not required by law or regulations of an appropriate authority. The Department of Transportation, Federal Aviation Administration, Metropolitan Washington Airport Service, Dullis International Airport; and Director, Metropolitan Washington Airports, Federal Agency Administration, A/SLMR No. 1062. Accordingly, the Respondent's actions in posting the vacancy announcement 77-242 was a violation of Article 15, section 4(b) of the collective bargaining agreement and section 19(a)(1) of the Order. The unilateral conduct of the Respondent, additionally, constitutes a failure to meet and confer in good faith with respect to personnel policies and practices and matters affecting working conditions within the meaning of section 11(a) of the Order. Such conduct violated section 19(a)(6) of the Order. I therefore recommend adoption of the following order.

Recommended Order

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education and Welfare, Office of the Secretary shall:

1. Cease and desist:

(a) Refusing to accord appropriate recognition to American Federation of Government Employees, AFL-CIO, Local 1802, as the appropriate bargaining unit of employees of the Training Institute, Office for Civil Rights, located in Denver, Colorado.

(b) Changing existing policies and practices or other matters affecting the working conditions of unit employees without first giving appropriate notice to, and meeting and conferring with, the American Federation of Government Employees, AFL-CIO, Local 1802.

(c) Interfering with, restraining or coercing employees in the exercise of their rights under the existing negotiated agreement, Article 15, or interfering with the rights of unit employees to apply for new or vacant employment positions.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights protected by the Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of Executive Order 11491, as amended:

(a) Accord appropriate recognition to American Federation of Government Employees, AFL-CIO, Local 1802, as the appropriate bargaining unit of employees of the Training Institute, Office for Civil Rights, located in Denver, Colorado.

(b) Post at all Department of Health, Education and Welfare, Region VIII, Denver, Colorado facilities and installations, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor, Labor-Management Relations. Upon receipt of such forms they shall be signed by the Director of Personnel of the Respondent and shall be posted and maintained by him for 60 consecutive days thereafter, in

conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure such notices are not altered, defaced or covered by any other material.

(c) Pursuant to section 203.27 of the regulations, notify the Assistant Secretary within 30 days from the date of this Order as to what steps have been taken to comply herewith.


HENRY B. LASKY
Administrative Law Judge

Dated: October 6, 1978
San Francisco, California

Attachment

HBL:vag

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to accord appropriate recognition to American Federation of Government Employees, AFL-CIO, Local 1802, as the appropriate bargaining unit of employees of the Training Institute, Office for Civil Rights, located in Denver, Colorado.

WE WILL NOT refuse to honor all of the terms of the existing negotiated agreement with American Federation of Government Employees, AFL-CIO, Local 1802, as it pertains to the filling of new or vacant positions at the Training Institute, Office for Civil Rights, Denver, Colorado.

WE WILL NOT refuse to meet, confer and negotiate in good faith regarding proposed changes in the procedures for filling new or vacant positions without first notifying the American Federation of Government Employees, AFL-CIO, Local 1802, or other exclusive representative, a reasonable time prior to the institution of any such changes and affording said exclusive representative the opportunity to meet, confer and negotiate to the extent consonant with law and regulations, concerning the implementation by management of any such procedures and the impact of such proposed procedures on union employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights assured by the Executive Order by failing to honor the terms of the existing negotiated agreement relating to the filling of new or vacant positions and any changes in the procedures for filling new or vacant positions shall only be accomplished after meeting, conferring and negotiating in good faith with the American Federation of Government Employees, AFL-CIO, Local 1802, or other

exclusive representative, concerning the implementation by management of any such changes and procedures and the impact of such proposed procedures on union employees.

(Agency of Activity)

Dated: _____ By: _____

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for the Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 3535 Market Street, Room 14120, Philadelphia, Pennsylvania, 19104.

December 28, 1978

A/SLMR No. 1169

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
CLEVELAND, OHIO
A/SLMR No. 1169

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE,
CLEVELAND, OHIO

Respondent

and

Case No. 53-10241(CA)

ALBERT A. LATAILLE

Complainant

This case involved an unfair labor practice complaint filed by an individual alleging that the Respondent, through its supervisory employee, the Officer in Charge of the Cincinnati Office, engaged in activity in violation of Section 19(a)(1) and (2) of the Order by various acts described as "a systematic scheme designed to harass, isolate and discredit Complainant."

The Administrative Law Judge found that the Respondent had not engaged in the unfair practices alleged in the complaint and recommended that the complaint be dismissed. In this regard, the Administrative Law Judge found that there was not a scintilla of evidence on the record to establish anti-union animus on the part of the Respondent. He also credited the explanation of the Officer in Charge with respect to numerous instances alleged by the Complainant to be attempts to harass and discredit him. In conclusion, the Administrative Law Judge found that there was no evidence in the record that established that the Respondent violated the Order.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

DECISION AND ORDER

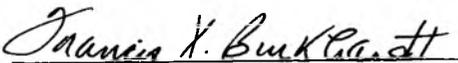
On October 24, 1978, Administrative Law Judge Peter McC. Giesey issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 53-10241(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 28, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of :
 :
 :
 UNITED STATES DEPARTMENT OF JUSTICE :
 IMMIGRATION AND NATURALIZATION SERVICE :
 CLEVELAND, OHIO :
 Respondent :
 :
 and :
 :
 ALBERT A. LATAILLE :
 Complainant :
.....
Case No. 53-10241 (CA)

Michelle A. Egan, Esquire
United States Department of Justice
Immigration and Naturalization Service
Federal Building, Fort Snelling
Twin Cities, Minnesota 55111
For the Respondent

Mr. Sherman G. Miller, National
Representative
1132 Fuhrman Road
Cincinnati, Ohio
For the Complainant

Before: PETER McC. GIESEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under Executive Order 11491, as amended (hereafter "the Order") by Albert Lataille, formerly an employee of respondent at its Cincinnati office and steward for the labor organization representing employees in a unit appropriate for collective bargaining purposes.

He complains that respondent, through its supervisory employee, the Officer in charge at the Cincinnati office, engaged in activity in violating of Sections 19(a) (1) and (2) 1/ of the Order by various acts described as "a systematic scheme designed to harrass, isolate and discredit" complainant.

A hearing was held in Cincinnati, Ohio on June 20, 1978. Briefly, the record shows the following.

Statement of the Case

Mr. Lataille testified that he was the only immigration examiner assigned permanently to the Cincinnati office of Immigration and Naturalization during the relevant period. 2/ There were 1300 to 1500 cases pending in that sub-office. Beginning in December, 1976 the (new) officer in charge ("O in C") began to transmit "little handwritten notes" and, later, "full blown directives" to Mr. Lataille directing him to process certain cases. Mr. Lataille testified that he attempted to have the O in C "realign or reassign these cases in the priority in which he wanted them", but he continued to send memos "asking another case be done earlier or later than the one that he already sent in."

Further, he testified that when he began to reply in writing to his supervisor's notes concerning case handling, he was told to cease doing so on pain of being charged with insubordination.

Discussions of work load, priorities and congressional inquiries, according to Lataille, became "a tirade and talk always loud enough ... to make sure everybody in the area heard what was going on." He stated that he felt these occasions were "demeaning ... degrading."

1/ Viz; Sec. 19 Unfair labor practices. (a) Agency management shall not-

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment;

2/ From December, 1976 until Mr. Lataille was separated from the service.

He stated that in late August 1977, "several people informed me that they had been told they could no longer come to me for any kind of advice or anything else [-] I was to be left strictly alone." When he asked his O in C about this, the supervisor explained that "this was so I would have more time to work on my cases." According to Lataille, when reminded that he was the Union steward and therefore needed information and contact with fellow employees, the O in C told him on several occasions "that [neither] the Union nor [Lataille] ran the Office [-] [he] wouldn't discuss it at all with me."

In February, 1977, the O in C delivered a "memorandum of meeting of February 16, 1977" to Mr. Lataille. It stated;

This is written in reference to our discussion on February 16, 1977, concerning your use of government time to conduct Union business and to further prepare your recently filed grievance.

As I stated at the time of our discussion in the late afternoon of February 16, 1977, in no case are you to conduct internal Union business on official time. Additionally, as on December 27, 1976, you took two hours of official duty time to prepare a grievance, you were then advised and on February 16, 1977, again advised that you were not to further use official duty time in preparation of that grievance. You were further reminded on February 16, 1977, that you are not to use the government telephones to conduct Union business or to further discuss your grievance with your Union representatives.

It is hoped that in the future you will conduct your Union business in a professional manner consistent with the INS/AFGE Negotiated Agreement.

Mr. Lataille also asserted that "on at least three occasions" the O in C interrupted his "lunch period" to discuss business, an asserted conflict with a provision of the collective bargaining agreement providing for uninterrupted lunch periods.

Concerning the grievance mentioned, supra, Mr. Lataille testified that he heard that upon its filing in the district office, the director of that office "approached a number of persons in [that] office and disseminated the information that was in it and questioned the propriety of a Union Steward filing a grievance in the name of the Union."

Three fellow employees and the O in C corroborated many of the facts to which Mr. Lataille testified, such as the numerous memos and the arguments between the O in C and Mr. Lataille. An immigration inspector trainee who worked with Mr. Lataille at the time of the events recited by him remembered only one argument between the O in C and Lataille in which voices were raised " and I think they adjourned to the Officer in Charge's office."

The president of the labor organization, employed in the Cleveland office, testified that within three months of the arrival of the new O in C in Cincinnati the union had a great increase in membership in the office. She testified that when the union members heard that Mr. Lataille had filed an unfair labor practice charge and learned the nature of the charge, "many members threatened to quit" and "the district representative of the union recommended "to keep peace ... we continue to support Mr. Lataille but that the Cleveland District not take any active part."

The O in C, Cincinnati, testified that he had sent many memos to Mr. Lataille concerning overage cases only after discovering that his verbal directives were ignored, that he directed Lataille to cease replying in writing to these memos because his replies included discussions of internal disagreements between personnel of the Service and were an improper inclusion in aliens' files. He further stated that he had restricted Mr. Lataille's use of the office telephone for internal union business and that, after Mr. Lataille explained that his inability to process cases as requested was in part owing to frequent interruptions by fellow employees, he instructed several employees to stop taking their questions to Lataille and address them to O in C. He explained that Mr. Lataille frequently ate his lunch at his desk and that on two or three occasions when he stopped at Lataille's desk to ask him a question, Lataille became "very irate" and "holler[ed] at me that I was interrupting his

lunch period." The O in C explained that "it was hard to tell" when Lataille was engaged in his lunch period because he sat at his desk and, at the times referred to, there was no food in sight. He also testified that, when told by Lataille that he was engaged in his lunch period, he immediately ceased his conversation and left the room.

Findings of Fact and Conclusions of Law

Having considered the entire record including the testimony, exhibits and briefs of the parties and having observed the demeanor of the witnesses, I make the following findings of fact, conclusions of law and recommended decision and order based thereon.

At the beginning of the hearing, the parties stipulated that there were nine "allegations that are at issue here."

First, whether the specifications brought against Mr. Lataille were motivated by "a pervasive antiunion animus".

Second, whether the "use of written directives involving immigration cases assigned Mr. Lataille ... were borne out of antiunion animus."

Third, whether "meetings ... and other personal contact with [the O in C] in front of other employees ... were used to bait and upset [complainant], thus discouraging union membership."

Fourth, whether the O in C told employees "not to talk to Mr. Lataille in order to isolate him from employees he was supposed to represent as union steward."

Fifth, whether "depletion in union membership on or about September of 1977 was due to the overall antiunion sentiment in the office."

Sixth, whether "restrictions were placed on Mr. Lataille regarding ... telephone [use] for union business."

Seventh, whether complainant was "interrupted during lunch periods" in violation of the collective bargaining agreement.

Eighth, whether the O in C "directed [claimant] to discontinue written memoranda responses ... inhibit[ing] Mr. Lataille's authority to perform his work."

Ninth, whether the District Director discussed with employees an unfair labor practice charge filed by Mr. Lataille.

It is unnecessary to the decision here to address the doubtful question of whether several of these "allegations that are at issue" if established would constitute unfair labor practices. I will assume that, given certain other circumstances, each would.

The first is dependent upon the establishment of some evidence of antiunion animus on the part of management. This is also true of numbers two, three, and four. Not a scintilla of substantial evidence on this record indicates that management harbored any such animus. Moreover, when shorn of adjectives, speculation and descriptions of subjective feelings, the only testimony indicating the existence of antiunion animus was that of the president of the labor organization. Thus, she described the antiunion reaction of employees when they learned that their bargaining agent might become involved in the litigation of an unfair labor practice charge against their employer filed by Mr. Lataille. Nothing in this record indicates that their threats to quit were motivated by anything other than judgment of the subject matter of the charge.

The fifth allegation, that "depletion of union membership, etc." fails simply because the only evidence of record concerning union membership is the union president's testimony that, following the O in C's arrival in Cincinnati "we had a great increase in membership in Cincinnati."

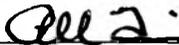
The O in C's credible explanation and the written notice concerning Mr. Lataille's use of the agency's telephone for internal union business (Compl. Exhib. #1) effectively dispose of allegation number six since section 20 of the Order provides in part that "internal business of a labor organization shall be conducted during non-duty hours...."

Allegation number seven must fail simply because the interruptions alleged did not occur in the manner and under the circumstances asserted. The O in C's explanation was credible and demonstrates circumstances undenied by complainant.

The circumstances constituting allegation number eight were similarly explained in a credible and reasonable manner by the O in C. That complainant did not fully understand the O in C's reasons for his action is regrettable, but in no way the responsibility of the O in C who explained his action in clear, unambiguous terms to complainant at the time and on the record at hearing.

Finally, there is no credible evidence on the record that the District Director ever "discussed" the earlier unfair labor practice charge with any employee. Assuming that he remarked concerning the propriety of complainant's presumption in filing such a charge on behalf of the labor organization rather than by himself as an individual, he simply reflected the concern of the employees themselves - who threatened to quit the union because of this matter, according to complainant's witness. In any case, discussion, as here, of such matters under non-coercive circumstances in a manner not tending to denigrate the labor organization's status does not constitute an unfair labor practice.

Accordingly, I recommend that the Assistant Secretary dismiss the complaint in its entirety.


PETER McC. GIESEY
Administrative Law Judge

Dated: October 24, 1978
Washington, D.C.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, BUREAU OF RETIREMENT
AND SURVIVORS INSURANCE, NORTHEASTERN
PROGRAM SERVICE CENTER
A/SLMR No. 1170

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1760 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally implementing new parking rules relating to certain parking spaces without bargaining with respect to the impact and implementation of the change.

The Assistant Secretary found, in agreement with the Administrative Law Judge, that the Respondent did not improperly fail to bargain on the impact and implementation of a change in rules concerning the use of certain parking spaces at the Respondent's facility, as alleged in the complaint. In making this finding, the Assistant Secretary noted that at the June 20, 1977, meeting between representatives of the Respondent and the Complainant, the Respondent's representative notified the Complainant that it intended to change the rules governing certain parking spaces used by unit employees to prohibit parking of personal vehicles; that the Respondent sought and received the Complainant's comments and proposals on the change in parking rules, which it considered and rejected; and that the Complainant was advised that if it wished to bargain on the parking issue, it could contact the Chief of the Facilities Management Branch (FMB). The evidence established that the Complainant never contacted the Chief of the FMB. Rather, the record revealed that the subsequent meeting of July 11, 1977, at which time the Complainant was notified that the change in parking rules would be put into effect on July 14, 1977, was called by the Chief of the FMB and was not in response to any request to bargain by the Complainant.

Under these circumstances, the Assistant Secretary found that on June 20, 1977, the Complainant had received ample notice of the Respondent's intent to change the parking rules prior to the change on July 14, 1977, and that the Complainant bargained with the Respondent on the impact and implementation of such change at the June 20, 1977, meeting. Furthermore, he found that after the June 20, 1977, meeting, the Complainant did not diligently seek bargaining with the Respondent. Therefore, he concurred with the Administrative Law Judge that the Respondent had not engaged in conduct violative of Section 19(a)(1) and (6) of the Order and ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, BUREAU OF RETIREMENT
AND SURVIVORS INSURANCE, NORTHEASTERN
PROGRAM SERVICE CENTER

Respondent

and

Case No. 30-08170(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1760

Complainant

DECISION AND ORDER

On October 19, 1978, Administrative Law Judge Louis Scalzo issued his Recommended Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the parties filed exceptions to the Administrative Law Judge's Recommended Decision and the Complainant filed an answering brief to the Respondent's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision, and the entire record in this case, including the exceptions filed by the parties and the answering brief to the Respondent's exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

In agreeing with the Administrative Law Judge that the Respondent did not improperly fail to bargain on the impact and implementation of a change in rules concerning the use of certain parking spaces at the Respondent's facility, as alleged in the complaint, I note that at the June 20, 1977, meeting between representatives of the Respondent and the Complainant, the Respondent's representative notified the Complainant that the rules governing certain parking spaces used by unit employees would soon be changed to prohibit parking of personal vehicles; that the Respondent sought and received the Complainant's comments and proposals on the change in parking rules which it considered and rejected; and

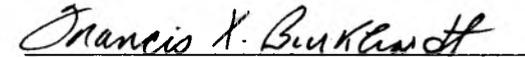
that the Complainant was informed that if it wished to bargain on the parking issue, it could contact the Chief of the Facilities Management Branch (FMB). The evidence establishes that the Complainant never contacted the Chief of the FMB. Rather, the record reveals that the subsequent meeting of July 11, 1977, at which time the Complainant was notified that the change in parking rules would be put into effect on July 14, 1977, was called by the Chief of the FMB and was not in response to any request to bargain by the Complainant.

Under these circumstances, I find that on June 20, 1977, the Complainant received ample notice of the Respondent's intent to change parking rules prior to the effectuation of the change on July 14, 1977. Further, the Complainant bargained with the Respondent on the impact and implementation of such change at the June 20, 1977, meeting, and the Complainant did not thereafter diligently seek further to bargain in this regard with the Respondent. Accordingly, I concur with the Administrative Law Judge's conclusion that the Respondent's conduct herein was not violative of Section 19(a)(1) and (6) of the Order. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-08170(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 28, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1/ See U.S. Department of Air Force, Norton Air Force Base, 3 A/SLMR 175, A/SLMR No. 261 (1973). In view of the above rationale, I find it unnecessary to determine whether the July 11, 1977, meeting was called by the Respondent merely to notify the Complainant of the change or whether bargaining actually took place at this meeting as determined by the Administrative Law Judge.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
WASHINGTON, D.C. 20036



and (6) of the Order by unilaterally implementing new parking rules relating to certain parking spaces utilized in connection with the main building of the NEPSC without negotiating with respect to the implementation and adverse impact of the change.

Respondent contends that the labor management agreement binding the parties provides for consultation rather than negotiation at the Local level, that management has no obligation to negotiate at the Local level, that management met its obligation to consult, and lastly that the change implemented was simply necessary enforcement of existing General Services Administration (GSA) regulations.

Findings of Fact

1. Stipulations

The following stipulations, among others, offered for the record as Joint Exhibit 1, and/or as oral stipulations, are accepted as true:

1. BRSI has six program service centers, one in each of six major cities. The one involved herein, the NEPSC, is located in Flushing, New York.
2. These centers are responsible for review and adjudication of retirement and survivors' claims, health insurance entitlement, supplementary medical insurance premium collection, certification of benefit payments, and maintenance of retirement and survivors' insurance beneficiary rolls.
3. The management team in each of the six program service centers is headed by a Director, with assistance from a Director of Management and Operations.
4. The Director of Management in each program service center has among his primary duties, the responsibility to deal with the Union Local on a day to day basis on appropriate labor management matters.
5. Program service centers utilize from 1,640 to 2,470 permanent employees, the average being approximately 2,100 employees for each.

In the Matter of:

Department of Health, Education & Welfare
Social Security Administration
Bureau of Retirement and Survivors Insurance
Northeastern Program Service Center
Respondent

and

American Federation of Government Employees
AFL-CIO, Local 1760
Complainant

Francis X. Dippel
Management Representative
Bureau of Retirement and Survivors
Insurance
Social Security Administration
6401 Security Boulevard
Baltimore, Maryland 21235
For the Respondent

Herbert Collender, President
AFGE Local 1760
P.O. Box 626
Corona, Elmhurst, New York 11373

RECOMMENDED DECISION

Statement of the Case

This case arises under Executive Order 11491 as amended, (hereinafter referred to as the Order). It was initiated by the filing of an unfair labor practice complaint on October 17, 1977, by Local 1760, American Federation of Government Employees, AFL-CIO (herein referred to as the Complainant, Local or Union) against the Northeastern Program Service Center (NEPSC), Bureau of Retirement and Survivors Insurance (BRSI), Social Security Administration, Department of Health, Education and Welfare (herein referred to as Respondent or management). It alleged that Respondent violated Sections 19(a)(1)

- 6. The National Office of the American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals) is the exclusively recognized representative for a bargaining unit consisting of all nonsupervisory employees (except management officials and employees engaged in federal personnel work other than clerical) in the Social Security Administration's six program service centers.
- 7. The American Federation of Government Employees National Council of Social Security Payment Center Locals serve their respective memberships at each of six payment centers, with Local 1760, being the Local at the NEPSC.
- 8. The National Council of Social Security Payment Center Locals, through six affiliated Locals, has exclusive representation rights for the nonsupervisory employees in the six program service centers.
- 9. On June 29, 1971, the first negotiated Master Agreement between the parties became effective, and subsequently a renegotiated Master Agreement between the parties was approved and became effective on November 20, 1972. The third negotiated Master Agreement between the parties became effective on March 15, 1974, and is currently in effect.

2. General

The record reflects that a lease executed by GSA and the LSS Leasing Corporation provided parking "space for ten (10) government vehicles in the parking area located in the rear of 96-05 Horace Harding Expressway...." (Joint Exhibit 3 at page 9 of lease dated February 5, 1970). These ten spaces, situated to the rear of the main building of the NEPSC, were made available to NEPSC management, together with an additional ten parking spaces located elsewhere, and provided to the NEPSC in a separate lease agreement executed on June 4, 1965, by GSA and a private lessor. Only six of the ten spaces provided in the February 5, 1970,

lease pertain to the unfair labor practice complaint being considered. These were assigned to the Chief of the NEPSC Facilities Management Branch (FMB) for use by that Branch. 1/

The FMB has the task of providing maintenance and service at the Center. It has responsibility for supervising approximately a dozen contractors who visit the facility. The six spaces were provided to the FMB to accommodate the need for parking vehicles visiting the NEPSC on official business related to the work of the Center. A Vice President of Local 1760 acknowledged that the six spaces were allocated to the FMB to provide accommodations for "official government vehicles." (Tr. 41). Counsel for the Complainant acknowledged that terminology in the lease providing the space in question meant that space was designed for vehicles purchased by the government, or vehicles being used in pursuit of government business. (Tr. 144-145).

3. FMB Employees Allowed to Utilize Six Parking Spaces

Officials responsible for the management of FMB established a practice of allowing FMB employees to park their personal vehicles in the six spaces allocated to FMB. However, in the late spring or early summer of 1975, the Chief of the FMB complained to officials of the Local that undesirable traffic congestion was being generated in the parking area as a result of the practice, that parking regulations were being violated, and that management was going to have to discontinue the practice of allowing FMB employees to use the six spaces. 2/ An agreement was

1/ The six are designated as spaces thirty through thirty-five on Respondent's Exhibit 4. The record indicates that four of the ten provided in the February 5, 1970 lease were not located at the rear of 96-05 Horace Harding Expressway, and that these four, together with the ten parking spaces provided in the lease executed on June 4, 1965, have, under the authority of the NEPSC Director, been permanently assigned to top management personnel located at the NEPSC.

2/ The meeting was attended by Eric Schlesinger, Chief of the FMB, and James Armet and Jack Katzker, officials of Local 1760.

reached whereby all FMB employees were to be permitted the option of parking in the six spaces on a biweekly rotational basis. This system was designed to facilitate the interests of the Respondent as well as employees. The practice continued without interruption for approximately two years. Approximately sixteen FMB employees were involved in the rotation scheme.

4. June 20, 1977 Meeting Relating to Parking Space Issue

Testimony disclosed that problems posed by the use of the six spaces by FMB personnel began to surface in the summer of 1977. Julian Bergman, a labor relations specialist was instructed by the Respondent to take up the problem with the Local, as management intended to issue a memorandum prohibiting the use of the six spaces for non-government vehicles.

On June 20, 1977, Mr. Bergman attended a meeting with representatives of Local 1760 to discuss various subjects, including the parking issue. The Union was represented by Mr. Collender, Mr. Armet, and Mr O'Leary, all officials of the Local. The record disclosed that discussion of the parking issue was sought by Mr. Bergman to elicit the concerns of employees; to determine the impact of the proposed decision to discontinue the parking of personal vehicles in the six spaces; to discuss issues relating to implementation; and to seek the views of the Local regarding implementation.

The Union was advised that a memo was being drawn up which would have the effect of prohibiting use of the six spaces for the parking of personal vehicles. The reasons for the intended action were explained with reference being made to the lease and GSA regulatory provisions relating to parking generally, traffic congestion caused by the practice, obstruction of government vehicles moving through the area, blockage of loading docks, and difficulty in finding parking space for vehicles entering the area to provide services to the NEPSC.

A key problem discussed related to inconvenience to individuals renting nearby space from an Employees Activities Association. The Association leased a block of thirty-five spaces in the general area wherein the six spaces in question were located. The record established that the

use of the rotation plan was interfering with individual users of Employees Activity Association parking spaces. 3/

Mr. Bergman requested the comments of the Local on the proposal to discontinue the practice of using the space by FMB employees, and Union Representatives made certain proposals in response. It was suggested that the same parking practice be continued with Mr. Armet, as a Union official, being given jurisdiction to administer the rotation system. In this regard, the Union proposed that Mr. Armet be provided with more official time than was then provided in the Master Agreement so that he would be able to police the area. It was also suggested that those abusing the practice be controlled and that parking by FMB personnel be allowed to continue. These proposals were rejected by the Respondent, and the Union was advised that the Respondent intended to implement the change in the very near future.

In response to a request to bargain concerning the parking issue, the union representatives were advised that they could contact Mr. Schlesinger further concerning the issue since the change concerned the operations of the FMB, or that Mr. Schlesinger would contact them. Mr. Schlesinger was not contacted by the Union.

5. July 11, 1977, Meeting Relating to Parking Space Issue

The record disclosed that about a week prior to July 11, 1977, Mr. Bergman suggested to Mr. Schlesinger that he contact union representatives about the change previously discussed. Mr. Schlesinger was told to do this when Mr. Schlesinger received written instruction concerning the change contemplated.

On July 11, 1977, a memorandum outlining the proposed change and the reasons for it was received by Mr. Schlesinger from William F. Kuntz, Director of Management. (Assistant Secretary Exhibit 1). The memorandum, dated July 11, 1977,

3/ The Employees Activity Association concession was not a government activity. Due to the interference outlined, the Association was having some difficulty collecting rent for spaces leased. Two Association parking spaces were immediately adjacent to the six spaces provided for government vehicles.

outlined the problems posed by the practice and noted the fact that the six spaces were originally set aside for the purpose of parking official government vehicles, and for use by suppliers or scheduled visitors. It informed that as of July 14, 1977, the space would be used only for government vehicles and/or official government business.

On July 11th, the date of receipt of the Kuntz memorandum, Mr. Schlesinger phoned Mr. Jack Katzker to advise that he wished to consult with the Union regarding the parking space issue. On the same date Mr. Schlesinger and another FMB management official met with Mr. Katzker, who together with two union stewards, represented the Local.

A copy of the memorandum was supplied to the Union and its content was discussed. It was announced that the policy would not be put in operation immediately, but that the policy would be effectuated on July 14, 1977. Through the testimony of Mr. Katzker it was established that the meeting involved more than a mere discussion. The transcript reflects the following:

By Mr. Dippel:

Q. . . . Now, wasn't it really just a discussion between you and Mr. Schlesinger along with the people you mentioned who were there on July 11?

A. I think no. There was some bargaining that went on at the session, sir, I don't think it was just a discussion. (Tr. 30).

Ensuing portions of Mr. Katzker's testimony make it clear that Mr. Katzker understood that he was negotiating with Mr. Schlesinger concerning the issue. However, Mr. Schlesinger indicated that the policy would be implemented as planned, and that there would be no further delay. Mr. Katzker responded that if the policy were to be implemented it should be administered fairly and without favoritism. Mr. Katzker informed Mr. Schlesinger that he intended to refer the matter to the president of the Local. Thereafter, Respondent made arrangements to implement the new policy on July 14, 1977.

Conclusions of Law

The Respondent contends that the national office of the American Federation of Government Employees is the bargaining agent for the employees of the six program service centers, that the Respondent had no obligation to negotiate with Local 1760 except as to supplemental agreements referred to in Article 30 of the written agreement, and further that management's responsibility is limited under the agreement (Article 2, Section (e), and Article (6)) to conferring and consulting with affiliated locals. (Joint Exhibit 2). These arguments must be rejected in the light of recent decisions involving the same parties and essentially the same issues. Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 1101; Department of Health, Education and Welfare, Social Security Administration, Bureau of Retirement and Survivors Insurance, A/SLMR No. 1022; Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 984.

It should be noted that the decision of Administrative Law Judge William Naimark in Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 1101 is, without more, completely dispositive of the issue raised with respect to the claimed limitation on Respondent's obligation to bargain.

The Assistant Secretary has had occasion to consider similar factual situations in at least two other cases. Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 828; and General Services Administration, Region 3, Public Buildings Service, Central Support Field Office, A/SLMR No. 583. These cases clearly hold that parking privileges are working conditions concerning which management, under Section 11(a), has an obligation to negotiate. 4/ However, in this case the Complainant merely alleges a failure to participate in bargaining

4/ Respondent claims that GSA regulations which were then in effect (as of July 1977) operated to preclude the parking practice in question. These regulations imposed responsibility on GSA for "determining what space in and around existing government-owned properties under its custody and control may be utilized for vehicle parking purposes." (41 CFR §101-20.111-1, July 1, 1977, edition). They also provided for GSA establishment of a rigid order of priority placing the parking of privately owned vehicles of employees not otherwise accommodated, far below parking relating to what may be characterized as official government purposes. (41 CFR §101-20.111-2, July 1, 1977 edition).

with respect to implementation and adverse impact of management's discontinuance of the parking practice. It is unnecessary to determine whether there has been a failure to negotiate concerning the decision to change the practice in the first instance.

Under the provisions of Section 203.15 of the regulations of the Assistant Secretary, 29 CFR §203.15, the Complainant must prove the allegations of the complaint by a preponderance of the evidence. A careful analysis of the record discloses a failure of proof. The evidence indicates that a pattern of good faith bargaining did occur despite the position taken by Respondent with respect to negotiability. In this regard, reference must be made to Respondent's assignment of Mr. Bergman to discuss the issue with representatives of the Local; to the convening of a meeting with key Local officials on June 20, 1977, for the purpose of determining the impact of the proposed decision, and to discuss issues relating to implementation; to Mr. Bergman's request for the views of the Local; to consideration given to Union proposals on June 20, 1978; and lastly to a similar pattern of bargaining with representatives of the Local on July 11, 1977.

An official of the Local called to testify by the Complainant brought out the fact that bargaining continued at the July 11, 1977, meeting. In fact, the record developed indicates that at the July 11th meeting, a representative of the Local acquiesced in the change contemplated provided the change were implemented without favoritism.

4/ (continued)

Although the policy articulated in the cited regulatory provisions would appear to impose restrictions on the Respondent, it is noted that the regulations in question were not applicable to parking space acquired by lease. The regulations were restricted in application to "government-owned properties." Since the space in question was not "government-owned," the regulations cited may not be construed as a limitation upon the obligation to bargain in this case. Moreover, even assuming the applicability of these regulations, the Assistant Secretary has held that, although an illegal practice may be discontinued unilaterally by a government agency, there is a residual obligation to meet and confer on the procedures to be utilized in enforcing the law, and on the impact of such discontinuance on adversely affected employees. Department of the Army, Dugway Proving Ground, Dugway, Utah, A/SLMR No. 745.

Although there is considerable evidence of uncertainty on the part of Respondent with respect to the issue of negotiability, the record does establish that the Respondent actually did engage in good faith bargaining to the extent requested. A review of the evidence relating to the conduct of the parties convinces that whatever Respondent may have said concerning the negotiability of the parking space issue, and however the parties characterized their own conduct, what actually occurred constituted bargaining in good faith. Such is sufficient to meet Respondent's obligation under the Order and labor management relations agreement.

RECOMMENDATION

Having found that Respondent has not engaged in conduct prohibited by Sections 19(a)(1) and (6) of the Order, it is recommended that the complaint herein be dismissed in its entirety.

Louis Scalzo
Louis Scalzo
Administrative Law Judge

Dated: October 19, 1978
Washington, D.C.

December 28, 1978

A/SLMR No. 1171

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER CLARIFYING UNIT
OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

U.S. ARMY RESERVE, 166th SUPPORT GROUP,
FORT BUCHANAN, PUERTO RICO
A/SLMR No. 1171

This case involved a petition for clarification of unit filed by American Federation of Government Employees, AFL-CIO, Local 2614 (AFGE) seeking to clarify the unit eligibility of eight employees in four job classifications. The Activity contended that all the employees involved should be excluded from the AFGE's exclusively recognized unit.

The Assistant Secretary found the Budget Analyst, GS-9, not to be a management official, confidential employee, or supervisor. Further, he found that two incumbents classified as Staff Training Assistant, GS-9, located in the 448th Engineer Battalion and the 346th Transportation Battalion of the Activity, not to be management officials or supervisors. Finding insufficient evidence on the record to make a determination as to the supervisory status of the Staff Training Assistant, GS-11, and the Staff Training Assistant, GS-9, of the 2nd Maneuver Training Command, the Assistant Secretary made no finding as to their unit eligibility. The Assistant Secretary also found the two incumbents of the classification Staff Administrative Assistant, GS-9, to be supervisors, and the Public Information Officer, GS-9, to be a management official.

Accordingly, the Assistant Secretary clarified the unit consistent with his findings.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY RESERVE, 166th SUPPORT GROUP,
FORT BUCHANAN, PUERTO RICO

Activity

and

Case No. 37-02017(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2614,
BAYAMON, PUERTO RICO

Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Marcelino Rodriguez Ruiz. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Assistant Secretary finds:

The Petitioner, American Federation of Government Employees, AFL-CIO, Local 2614 (AFGE) seeks to clarify the unit eligibility of eight employees in four job classifications. 1/ The Activity contends that

1/ At the hearing in this matter, the parties stipulated that the employee classified as Military Personnel Officer, GS-11, is engaged in Federal personnel work in other than a purely clerical capacity and, therefore, should be excluded from the unit. In the context of a unit clarification petition, such a stipulation is viewed as a motion to amend the petition in order to delete and, in effect, withdraw the petition as to the stipulated job classification. Under these circumstances, the motion to amend is hereby granted, and I therefore find it unnecessary to clarify the status of the employee in the stipulated job classification. Cf. Sheppard Technical Training Center, 3750th Air Base Group, Sheppard Air Force Base, Texas, A/SLMR No. 1000 (1978).

The parties stipulated further that no temporary employees are presently employed by the Activity. Under such circumstances, I find that it would not effectuate the purposes and policies of the Order to clarify a unit in the absence of facts relating to actual employees. Accordingly, the subject petition, insofar as it seeks to clarify the unit status of temporary employees, is hereby dismissed. Cf. Army and Air Force Exchange Service, Golden Gate Exchange Region, Storage and Distribution Branch, Norton Air Force Base, California, 2 A/SLMR 424, A/SLMR No. 190 (1972).

the employees in the job classifications of Staff Administrative Assistant and Staff Training Assistant should be excluded from the AFGE's exclusively recognized unit 2/ as they are management officials and supervisors; that the Public Information Officer should be excluded as either a management official or confidential employee; and that the Budget Analyst should be excluded as a management official, confidential employee or supervisor. The AFGE contends that the employees in the job classifications in question are eligible for inclusion within its unit.

The Activity, headquartered at Fort Buchanan, Puerto Rico, is subdivided into two battalions and various support units consisting of approximately 26 subordinate units located throughout the Commonwealth of Puerto Rico. Its civilian mission consists of the necessary planning, preparing, training, budgeting, and personnel management with regard to its various subordinate units in order to support the military mission.

Staff Administrative Assistant, GS-9

The Activity contends that the two incumbents in this position are management officials and supervisors. The incumbents are Staff Administrative Assistants (SAA) for the respective Commanders of two Station Hospitals. The record reveals that each SAA assists in the formulation of his unit's policy in the areas of training, maintenance, supply and administration. Each is a GS-9, and has working under him a Staff Administrative Specialist, GS-7, an Administrative Supply Technician, GS-6, and an Administrative Supply Technician, GS-5. The incumbents approve leave, assign work and effectively recommend awards for these employees. The evidence establishes that the foregoing exercise of authority is not of a merely routine or clerical nature but requires the use of independent judgment.

Under these circumstances, I find the incumbent SAA's to be supervisors within the meaning of Section 2(c) of the Order who should be excluded from the exclusively recognized unit. 3/

Staff Training Assistant, GS-9 and GS-11

The Activity contends that the four incumbents are management officials and supervisors. The GS-11 Staff Training Assistant (STA) is employed in the Operations and Training Section of the Activity's headquarters. The

2/ The AFGE was granted exclusive recognition for the unit herein on December 23, 1977. The record indicates that the unit is composed of all (civilian) employees of the 166th Support Group, U.S. Army Reserve in Puerto Rico, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined by the Order.

3/ In view of the above disposition, it was considered unnecessary to decide whether the two SAA's should be excluded from the unit on the basis that they are management officials.

record reveals that the GS-11 STA serves as the technical advisor to the Commanding General of the Activity regarding all phases of training within the Activity, and oversees the technical performance of STA's in the subordinate units. The three GS-9 STA's serve as technical advisors to their respective unit commanders regarding training within their units. The record reveals that the role of the incumbents of this classification does not go beyond that of an expert or professional rendering resource information. Thus, such employees do not effectively influence the making of policy within their respective units regarding personnel, procedures, or programs. 4/

Under these circumstances, I find that the four disputed employees are not management officials within the meaning of the Order and, therefore, should be included in the exclusively recognized unit. 5/

Public Information Officer, GS-9

The Activity contends that the employee in this position is either a management official or a confidential employee. The Public Information Officer is on the personal staff of the Commanding General of the Activity. The employee's immediate supervisor is the General's Supervisory Staff Administrative Assistant. The principal mission of this civilian position is to serve as the Commanding General's representative and spokesman for all internal and public relations matters. In this connection, the record shows that the Public Information Officer develops internal and external information programs, is responsible for developing and coordinating the Activity's civic action program, and serves as the General's liaison with local government agencies, Federal agencies in Puerto Rico, the Puerto Rico National Guard, the Coast Guard, and the other military services in Puerto Rico. The incumbent writes news items for Activity publications, calls press conferences, and is otherwise responsible for the release of information to the public.

The evidence establishes that the incumbent, in essence, determines the Activity's policies regarding public information, command information, and community relations, as they apply locally, with some guidance from

4/ See Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, 2 A/SLMR 83, A/SLMR No. 135 (1972).

5/ At the hearing, the Activity conceded that the two GS-9 STA's located in the 448th Engineer Battalion and the 346th Transportation Battalion are not supervisors. Having found that these two incumbents are not management officials, I conclude that they should be included in the exclusively recognized unit. With regard to the GS-11 STA and the GS-9 STA assigned to the 2nd Maneuver Training Command, in view of the lack of sufficient evidence to make a determination regarding their supervisory status, I will make no finding in this regard as to their unit eligibility.

higher level directives. In this connection, the Public Information Officer works in close concert with the Commanding General and the record further reveals that the General usually approves the incumbent's policy recommendations.

Based on the foregoing, I find that the functions performed by the incumbent align the interests of such an employee more closely with that of personnel who formulate, determine, and oversee policy than with personnel who carry out the resultant policy. Moreover, the role performed by the incumbent goes beyond that of an expert or professional rendering resource information, but, rather, consists of active participation in the ultimate determination of policy. Accordingly, I find that the Public Information Officer is a management official within the meaning of the Order and, as such, should be excluded from the exclusively recognized unit. 6/

Budget Analyst, GS-9

The Activity contends that the incumbent should be excluded from the unit as management official, supervisor, or confidential employee. The record reveals that although the incumbent's grade level is GS-9 and his job title and job description are that of a Budget Analyst, the employee is performing the duties of a GS-11 Budget Officer. His military supervisor is the Activity's Comptroller, who visits the office once a month to perform his duties as a reservist. The incumbent's civilian, day-to-day supervisor is the Commanding General's Supervisory Staff Administrative Assistant.

The record indicates that the Office of the Comptroller is responsible for developing and executing the Activity's budget. The incumbent performs these responsibilities by analysis, rationalization, and application of guidelines coming from the Commanding General of the Activity and from higher headquarters. The guidelines are detailed, setting forth established priorities. The incumbent's other duties include reconciliation of unliquidated obligations, matching manpower requirements versus authorizations, and helping to prepare manpower surveys within the Activity.

Under the foregoing circumstances, I find that the incumbent is not a management official within the meaning of the Order. Although the record reveals that the incumbent necessarily exercises discretion and independent judgment in the performance of his duties, I find that his role is limited to rendering resource information or recommendations, rather than active participation in the ultimate determination of what policy, in fact, will be. 7/

6/ Cf. 926th Tactical Airlift Group, U.S. Air Force Reserve, Naval Air Station, Belle Chasse, Louisiana, 2 A/SLMP 557, 561-62, A/SLMP No. 221 (1972). In view of the above, it was considered unnecessary to decide whether the Public Information Officer should be excluded from the unit on the basis that the incumbent is a confidential employee.

7/ Cf. Internal Revenue Service, Officer of the Regional Commissioner, Southeast Region, 5 A/SLMR 625, 628, A/SLMR No. 565 (1975).

Nor do I find the incumbent to be a confidential employee. Although he has free access to the Commanding General pursuant to his budgetary responsibilities, the evidence establishes that the incumbent has no duties in regard to labor relations matters, no access to confidential records or memoranda regarding employees, and otherwise does not deal with personnel matters or records.

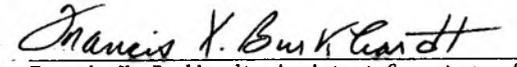
With respect to the Activity's assertion that the subject employee is a supervisor, the record indicates that a GS-4 Budget Clerk works in the Office of the Comptroller along with the incumbent. However, in this regard, the record reveals that the incumbent does not exercise supervisory authority, or effectively recommend action in regard to any of the supervisory indicia set forth in Section 2(c) of the Order. 8/

As the evidence does not establish that the incumbent either exercises supervisory authority requiring the use of independent judgment, or effectively recommends such action, I find that he is not a supervisor within the meaning of Section 2(c) of the Order. Accordingly, having found the Budget Analyst, GS-9, not to be a management official, confidential employee, or supervisor, I find that the subject employee should be included in the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit to be clarified herein, for which American Federation of Government Employees, AFL-CIO, Local 2614, was certified on December 23, 1977, be, and it hereby is, clarified by including in said unit the Budget Analyst, GS-9, and the two incumbents in the classification Staff Training Assistant, GS-9, located in the 448th Engineer Battalion and the 346th Transportation Battalion, and by excluding from said unit the two incumbents in the classification Staff Administrative Assistant, GS-9, and the Public Information Officer.

Dated, Washington, D. C.
December 28, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

8/ It was noted particularly that the evidence does not establish that the incumbent assigns work to the Budget Clerk in other than a merely routine manner. Thus, the incumbent does not schedule the work of the Budget Clerk; rather the latter works independently, performing general clerical work within general guidelines.

December 28, 1978

A/SLMR No. 1172

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

INTERNAL REVENUE SERVICE,
SOUTH CAROLINA DISTRICT
A/SLMR No. 1172

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when it interviewed a bargaining unit employee, who was a potential witness in an upcoming arbitration hearing, without affording the Complainant notification of the interview and an opportunity to be present.

The Administrative Law Judge recommended that the complaint be dismissed. He concluded that the interview was not a formal discussion within the meaning of Section 10(e) of the Order, and thus the Respondent was under no obligation to afford the Complainant an opportunity to attend.

Contrary to the Administrative Law Judge, the Assistant Secretary found that, under the circumstances of this case, the interview between management representatives of the Respondent and an employee who at all times material was a bargaining unit member, concerning a pending grievance, constituted a formal discussion within the meaning of Section 10(e) of the Order. Accordingly, he concluded that the Complainant was entitled to be represented at the interview and that the Respondent's failure to afford the Complainant such an opportunity violated Section 19(a)(1) and (6) of the Order.

Under these circumstances, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
SOUTH CAROLINA DISTRICT

Respondent

and

Case No. 40-8709 (CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

On October 2, 1978, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Respondent filed an answering brief to the Complainant's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and supporting brief and the Respondent's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation, only to the extent consistent herewith.

The instant complaint alleges, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order when it interviewed a bargaining unit employee, who was a potential witness in an upcoming arbitration hearing, without affording the exclusive representative notification of the interview and an opportunity to be present.

The essential facts of the case are set forth, in detail, in the Administrative Law Judge's Recommended Decision and Order, and I shall repeat them only to the extent necessary.

In early August 1977, an attorney for the Complainant telephoned Ben Smith, a unit employee, and asked him to be a witness at the arbitration hearing. Shortly thereafter, the Staff Assistant to the Respondent's Regional Counsel, Robert Remes, requested a meeting with Smith. Although

the Complainant had not formally submitted the employee's name as a prospective witness at that point, Remes testified that he thought it likely that Smith would be called. The requested meeting took place in the Group Manager's office, approximately a week before the hearing. It was attended by Smith, the Respondent's Chief of Personnel, and Remes, who questioned the employee about his knowledge of, and involvement in, the events precipitating the filing of the grievance which was at issue in the arbitration hearing.

The Administrative Law Judge recommended that the complaint be dismissed. He found that the interview of employee Smith was not a formal discussion within the meaning of Section 10(e) of the Order. 1/ While noting that the Assistant Secretary had held in United States Air Force, McClellan Air Force Base, California 7 A/SLMR 350, A/SLMR No. 830(1977), FLRC No. 77A-56(1977) that, in the particular circumstances of that case, the labor organization was entitled to be represented at interviews of unit witnesses in connection with the processing of a pending grievance, the Administrative Law Judge concluded that the McClellan decision was not dispositive of the subject case. Thus, as distinguished from the McClellan case, he noted that the interview at issue herein had been conducted well in advance of the hearing and prior to notification by the Complainant that it intended to call the employee as a witness for the grievant. Further, he noted that the questioning was confined to necessary trial preparation. Under these circumstances the Administrative Law Judge concluded that the meeting with Smith was not a formal discussion within the meaning of Section 10(e) of the Order, and therefore, the Respondent's failure to afford the Complainant an opportunity to be represented at such meeting was not violative of Section 19(a)(1) and (6) of the Order.

I disagree. In my view, when an employee who is a member of the bargaining unit at all times material to a pending grievance 2/ is interviewed by management representatives concerning the events surrounding the grievance, Section 10(e) of the Order grants the exclusive representative

1/ Section 10(e) provides, in pertinent part:

"When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit... The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances...."

2/ Compare United States Department of the Treasury, Internal Revenue Service, 7 A/SLMR 371, A/SLMR No. 833 (1977), which involved interviews of an employee concerning events which occurred during a period of time in which the employee was an acting supervisor and thereby excluded from the exclusively recognized unit.

the right to be represented at such a formal discussion. As the Assistant Secretary stated in the McClellan case, cited above, an exclusive representative has a legitimate interest in being represented at the interviews of unit employees conducted by management in connection with the processing of a pending grievance, and the representational responsibilities conferred by Section 10(e) of the Order in this regard outweigh any impact its presence might have on management's preparation of its case for arbitration. 3/ Under these circumstances, I conclude that by failing to afford the Complainant an opportunity to be represented at the interview of employee Smith, the Respondent violated Section 19(a)(1) and (6) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, South Carolina District, shall:

1. Cease and desist from:

a. Conducting formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without affording the National Treasury Employees Union, the employees' exclusive representative, the opportunity to be represented at such discussions.

b. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

a. Notify the National Treasury Employees Union of, and afford it the opportunity to be represented at, formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

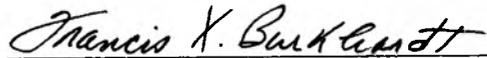
b. Post at its facility at Columbia, South Carolina, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the District Director, South Carolina District, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

3/ Contrary to the Administrative Law Judge, I find it immaterial that the interview in the instant case was conducted well in advance of the arbitration hearing and prior to notification by the Complainant that it intended to call the employee as a witness for the grievant, or that the interview was non-coercive in nature.

c. Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.

December 28, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT conduct formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without affording the National Treasury Employees Union, the employees' exclusive representative, the opportunity to be represented at such discussions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL notify the National Treasury Employees Union of, and afford it the opportunity to be represented at, formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(Agency or Activity)

Dated _____ By _____
(Signature)

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



In the Matter of :

INTERNAL REVENUE SERVICE :
SOUTH CAROLINA DISTRICT :
Respondent :

and :

Case No. 40-8709 (CA)

NATIONAL TREASURY EMPLOYEES :
UNION :
Complainant :

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HARRY G. MASON, ESQUIRE
Staff Assistant to the
Regional Counsel
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding, under Executive Order 11491, as amended (hereinafter also referred to as the "Order"), was initiated

by a charge, filed on, or about, December 22, 1977, and a complaint, filed on February 24, 1978 (Asst. Sec. Exh. 1), alleging violations of Sections 19(a)(1) and (6) of the Order by the interview of a bargaining unit employee, who was a potential witness in an arbitration case then pending, by the attorney representing Respondent in the arbitration case. The attorney representing the grievant in the arbitration case interviewed the same witness thereafter and did call the witness in question as a witness for the grievant.

Notice of Hearing issued on May 5, 1978, pursuant to which a hearing was duly held before the undersigned on July 11, 1978, in Charleston, South Carolina. At the close of the hearing August 29, 1978, was, at the request of the parties, and for good cause shown, fixed as the date for mailing briefs and briefs, timely mailed, were received on August 31, 1978. Thereafter, Respondent on August 31, 1978, mailed a corrected page 14 and such corrected page is hereby substituted for page 14 of Respondent's original brief on which a line of type had inadvertently been omitted. In addition, Respondent submitted with its original brief a Motion to Correct Transcript. The errors noted by Respondent are, obviously, transcription errors; Respondent's proposed corrections are wholly correct and proper; and, accordingly, Respondent's motion is granted and the transcript is hereby corrected as requested. 1/

All parties were represented by able counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to present evidence and testimony. The briefs were excellent and have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I hereby make the following findings, conclusions and recommendation:

1/ The transcript of hearing of July 11, 1978, is hereby corrected as follows:

<u>Page</u>	<u>Line</u>	<u>Delete</u>	<u>Insert</u>
6	13	30342	30301
12	17	Mr. Hunter	Judge Devaney
35	11	within it the	identical
35	12	which	and
50	8, 10, 18	clerk	F.L.R.C.
51	1	counsel	Council
52	4, 6	Boyden	Gordon

FINDINGS OF FACT

1. On January 25, 1977, Group Manager George T. Close of Respondent's Charleston, South Carolina, office called a meeting with three GS-11 Revenue Officers in the Charleston Office, namely, Messrs. Michalk, Smith and Nance, and advised them that it had been determined that there was a staffing imbalance and that a GS-11 Revenue Officer would be transferred from the Charleston office to Beaufort, South Carolina. There is no dispute that the established practice, which was followed, was to seek a volunteer; and that, pursuant to the Multi-District Agreement, "When an involuntary transfer or reassignment is necessary due to a staffing imbalance, the employee at the affected post of duty with the least IRS length of service will be transferred." (Art. 28, Section 1). Mr. D.W. Nance had the least IRS length of service, and, if an involuntary transfer, or reassignment, became necessary, was the employee subject to involuntary transfer.

2. Mr. Close met individually with each of the three Revenue Officers on January 25, 1977. Messrs. Michalk and Nance declined to volunteer and Mr. Benjamin C. Smith on January 25, 1977, told Mr. Close:

"I was not particularly interested in going to Beaufort, but that if it fell my lot, that I would go." (Tr. 23)

3. On January 26, 1977, Mr. Smith told Mr. Close:

"I was tentatively volunteering for the Beaufort Post of Duty, and that I would like to meet with him and discuss it further sometime later in the day." (Tr. 24, 26)

4. Mr. Smith met with Mr. Close later in the morning of January 26th and told him:

"Well, in that sense, it appears that the transfer is not cast in concrete, that I would withdraw my willingness to go." And I wrote him a Bucksliip later that day and gave it to him the next morning, which said that I was not willing to volunteer at this time. The reason for that was that it was my understanding that the matter had not been settled and that I did

tell him that in the event that it was definitely decided that somebody had to go, that I would go rather than Nance." (Te. 27)

Mr. Smith's Bucksliip, dated January 27, 1977, was introduced into evidence as Complainant's Exhibit 4 and states, "I do not wish to volunteer for reassignment at this time."

5. Mr. Nance was notified of his involuntary transfer, or reassignment, on February 22, 1977, and on March 7, 1977, filed a grievance (Comp. Exh. 1). Respondent's decision at the Fourth Step of the negotiated grievance procedure was dated May 12, 1977 (Comp. Exh. 2); arbitration was involked on, or about, June 5, 1977; and the arbitration hearing was held on August 23, 1977.

6. In early August, 1977, Mr. Steven P. Flig, an NTEU attorney, called Mr. Smith. Mr. Smith testified,

"Mr. Flig, who was the Union attorney called me sometime in the early part of August and asked me to be a witness and said that he would be calling me later on in the month to set up a time when we could meet together prior to the hearing." (Tr. 29)

7. Sometime shortly after Mr. Flig had called Mr. Smith, Group Manager Stribling told Mr. Smith that Mr. Robert A. Remes, then Staff Assistant to the Regional Counsel, would like to talk to him. Mr. Smith told Mr. Stribling that he had already had a call from Mr. Flig.

8. On, or about, August 16, 1977, Mr. Henry O. Lamar, Chief of Respondent's Personnel Branch, Columbia District, and Mr. Remes met with Mr. Smith in the Group Manager's office and Mr. Remes asked a number of question related to Mr. Smith's relationship with Mr. Close and the circumstances surrounding the transfer, whether or not Mr. Smith had volunteered and whether Mr. Smith considered himself a volunteer. Mr. Lamar asked no questions. Mr. Smith testified that he did not feel coerced; that the meeting was cordial; that Mr. Remes did not ask what, or whether, he had discussed with the Union; and Mr. Smith did not request union representation at the interview.

9. Mr. Smith later met with Mr. Flig and told Mr. Flig that he had already talked to Mr. Remes.

10. Neither Mr. Flig nor Mr. Remes had handled Mr. Nance's grievance prior to invocation of arbitration.

11. Neither Mr. Smith nor Respondent advised Complainant of the interview of Mr. Smith by Mr. Remes; although, as noted, Mr. Smith advised Mr. Flig that he had talked to Mr. Remes. Both interviews, i.e., by Messrs. Remes and Flig, took place on August 16, or Mr. Flig interviewed Mr. Smith on August 17, 1977. At the time Mr. Remes interviewed Mr. Smith on August 16, 1977, Complainant had not submitted any request to Respondent that Mr. Smith appear as a witness for the grievant, although Mr. Remes stated that he thought it was a very good likelihood that Mr. Smith would be a Union witness.

CONCLUSIONS

Whether a violation of the Order occurred in this case depends on the meaning of Section 10(e) of the Order which, in relevant part, provides as follows:

"... The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

Is the interview of a potential witness in an arbitration case by an agency attorney a "formal discussion" concerning a "grievance"? In United States Air Force, McClellan Air Force Base, California and American Federation of Government Employees, Local 1857, AFL-CIO, A/SLMR No. 830, 7 A/SLMR 351 (1977), the Assistant Secretary held that:

"... interviews conducted by Respondent's counsel ... constituted a formal discussion concerning a grievance within the meaning of Section 10(e) of the Order." (7 A/SLMR at 352).

But in United States Department of the Treasury, Internal Revenue Service and National Treasury Employees Union, Chapter 81, Western Region, A/SLMR No. 833, 7 A/SLMR 372 (1977), the Assistant Secretary held that the interviews by Respondent's counsel,

"... were not formal discussions within the meaning of Section 10(e) of the Order." (7 A/SLMR at 373).

In each case a witness was interviewed; in each case the witness was a bargaining unit employee; in each case the interview was in preparation for an arbitration hearing; and in each case the interview was associated with the processing of a grievance. Obviously, the information discussed in the interview of any witness could potentially affect the disposition of any pending grievance in which the witness may testify. 2/

If the interview of a bargaining unit witness in association with the processing of a grievance is a formal discussion, then, pursuant to Section 10(e), "The labor organization shall be given the opportunity to be represented" at such formal discussions. Moreover, as the Assistant Secretary stated in McClellan Air Force Base, supra, the Union, as the exclusive representative of employees in the unit, would, with respect to any interview of any bargaining unit employee, have the same "legitimate interest in being represented at the interview of the unit employees involved which were conducted in connection with the processing of a pending grievance" as "clearly, the information discussed could potentially" affect "the disposition of the pending grievance." (7 A/SLMR at 352). But, of course, the Assistant Secretary in Internal Revenue Service, supra, held that the interview of a bargaining unit witness under the circumstances of that case was not a formal discussion and, necessarily, that the Union had no legitimate interest in being represented at the interview of the unit employee there involved even though the interview was conducted in connection with the processing of a pending grievance and the information discussed would potentially affect the disposition of the pending grievance.

By his decision in Internal Revenue Service, supra, the Assistant Secretary made clear that McClellan Air Force Base, supra, was not a per se rule that any interview with a prospective witness during the pendency of a grievance is a "formal discussion" within the meaning of Section 10(e) of the Order, otherwise the interview of the bargaining unit witness in Internal Revenue Service, supra, notwithstanding that

2/ Any discussion by management with grievants, whether at the informal or formal stage of the grievance procedure are formal discussions, Internal Revenue Service, Southeast Service Center, Chamblee, Georgia and National Treasury Employees Union and NTEU Chapter 070, A/SLMR No. 448, 4 A/SLMR 749 (1974); U.S. Department of the Treasury, Internal Revenue Service Pittsburgh District, Pittsburgh, Pennsylvania and National Treasury Employees Union and NTEU Chapter 34, A/SLMR No. 498, 5 A/SLMR 208 (1975).

the interview concerned only actions and decisions of the witness which occurred while he was serving in an acting supervisory capacity, would have constituted a formal discussion. In denying the agency's petition for review in the McClellan Air Force Base case, supra, the Council stated in footnote 2, in part, as follows:

"In so concluding, the Council does not construe the Assistant Secretary's decision herein as establishing a per se rule that any discussion with a prospective witness during the pendency of a grievance is a 'formal' discussion within the meaning of section 10(e) of the Order. ..." (United States Air Force, McClellan Air Force Base, California, A/SLMR No. 830, FLRC No. 77A-56, Number 136, October 4, 1977).

The facts in McClellan Air Force Base, supra, as set out in the decision of Administrative Law Judge Kramer, were as follows: The day before the arbitration hearing, grievant's representative gave the Personnel Office a list of the witnesses for the grievant; Personnel informed the attorney representing the agency late in the afternoon of October 20, the day before the hearing, of the names on the list; the names of three of the witnesses did not appear in the grievance file and had not come to the attention of the attorney in his preparation for the arbitration hearing; the attorney asked Personnel to request the three employees to come to his office at 8:00 a.m. the next morning, the arbitration hearing was to be held later in the morning; two of the employees arrived at the attorney's office at 8:00 a.m. and the third shortly thereafter; and the attorney "asked them what evidence they could give relevant to the Corrie grievance." or "what evidence they could give at the arbitration hearing about the grievance that was relevant." 3/

Under the circumstances, I am persuaded that the Assistant Secretary's decision in the McClellan Air Force Base case, supra, as it did not, as demonstrated by the Assistant Secretary's decision very soon thereafter in

3/ Two said they did not know; the third, a Union steward, said he knew he was to be a witness and also was to act as technical advisor to the grievant's representative. The three then asked the attorney what would be expected of them and the attorney replied that if they were asked to testify it would be their duty to do so.

Internal Revenue Service, supra, establish a per se rule, must be viewed as limited, as stated by the Assistant Secretary:

"... under the circumstances herein, including the fact that the witnesses interviewed were those of the grievant, the Complainant's representational responsibility, which under Section 10(e) of the Order extends to all employees in the bargaining unit, outweighed any impact its presence during the interviews might have had on Respondent's preparation of its case for arbitration." (7 A/SLMR at 352).

In extending McClellan Air Force Base, supra, beyond the particular circumstances there presented, I further conclude that there must be a balancing between the reasonable opportunity of the agency to prepare its defense and the interest of the exclusive representative in being represented at interviews of unit witnesses in connection with the processing of a pending grievance. Such conclusion is implicit in the McClellan Air Force Base decision itself; the right "to properly communicate with unit employees" was specifically noted by the Council in FLRC No. 77A-56, notwithstanding that the Council therein denied review of the Assistant Secretary's decision in McClellan Air Force Base; and was made explicit by the Assistant Secretary decision in Internal Revenue Service, supra. Indeed, the right of agency management to investigate under the Order is well established, see, for example, The Council's Statement on Major Policy Issue, FLRC No. 75P-2, 4 FLRC 710 (1976); Internal Revenue Service and National Treasury Employees Union, A/SLMR No. 897, 7 A/SLMR 783 (1977); and the right of an employer in the private sector to the reasonable opportunity to prepare his defense by interviewing employees in the immeasurably more hostile atmosphere of unfair labor practice proceedings or strongly contested representation proceedings, has consistently been recognized by the National Labor Relations Board, Johnnie's Poultry Co., 146 NLRB 770, 55 LRRM 1403 (1964), enf. denied, 344 F.2d 617 (8th Cir. 1965) and by the Courts, UAW v. NLRB, 392 F.2d 801 (D.C. Cir. 1967); Montgomery Ward & Co. v. NLRB, 377 F.2d 452 (6th Cir. 1967); NLRB v. Neuhoff Bros., Packers, Inc., 375 F.2d 272 (5th Cir. 1967), although any interrogation by the employer, to avoid the ever present danger of coercing employees in violation of their § 7 rights, must be limited in scope and manner of permissible questioning, be strictly confined to necessary trial preparation; the employer must communicate to the employee the purpose of the

questions; must advise the employee that no reprisal will take place; and must obtain the employee's voluntary participation.

In the present case, the attorney for Complainant in the arbitration case, Mr. Flig, and the attorney for Respondent in the arbitration case, Mr. Remes, each entered the arbitration case at about the same time, in early August, 1977; neither had been involved in the earlier stages of the Nance grievance; each became aware that Mr. Smith's testimony was important, perhaps pivotal, in the arbitration hearing; and each contacted Mr. Smith to arrange an interview. Although Mr. Smith testified that Mr. Flig asked him to be a witness, Mr. Smith testified that he told Group Manager Stribling only that he had had a call from Mr. Flig. In any event, Mr. Flig had not interviewed Mr. Smith and, clearly, neither Mr. Flig, nor any other representative of Complainant had advised Respondent that Complainant intended to call Mr. Smith as a witness or that Mr. Smith was a witness for the grievant. 4/ Mr. Remes interviewed Mr. Smith first, so there is no basis whatever for any inference that Mr. Smith was interrogated concerning any statement he had given to Complainant's attorney; 5/ Mr. Remes' questions were strictly confined to necessary trial preparation; Mr. Remes' interview took place a week before the arbitration hearing; Mr. Smith informed Mr. Flig that he had already talked to Mr. Remes; and the interview was devoid of coercion, 6/ a consideration which

4/ Although "the fact that the witnesses interviewed were those of the grievant", which I take to mean had formally been requested by the grievant as his witnesses, was a factor, perhaps a critical factor, in McClellan Air Force Base, supra, it is highly questionable that this is a "sacred cow". For example, a clever attorney might well list a wholly adverse witness as his witness, with no intention of calling the witness to testify, to discourage, if not thwart, discovery of the adverse testimony.

5/ It is conceivable, as Respondent suggests, that the form of questioning in McClellan probed their subjective state of mind and/or by questioning their role in the arbitration hearing exceeded permissible bounds of inquiring as to facts necessary to trial preparation.

6/ Mr. Smith testified that he did not feel coerced and that the meeting was cordial. Under other circumstances, Respondent's actions might well have been inherently coercive. The "request" to meet Respondent's attorney was made by the employee's Group Manager; present at the interview was the Chief of Personnel for the District; and the meeting was held in the office of the Group Manager. Such "command performance of employees ... to come to the company offices ... the presence of management (Continued)

is not directly in issue inasmuch as Mr. Smith did not request representation at the interview.

Respondent was entitled to question potential bargaining unit witnesses in preparation for the arbitration hearing and such interviews are not formal discussions within the meaning of Section 10(e) of the Order or within the parameters of the decision of the Assistant Secretary in McClellan Air Force Base, supra, when conducted well in advance of the hearing and prior to notification by the exclusive representative of intention to call the employees as witnesses for the grievant and the questioning is confined to necessary trial preparation. Here, Respondent interviewed Mr. Smith a week prior to the arbitration hearing; the interview was prior to any notification by Complainant that it intended to call Mr. Smith as a witness for the grievant, indeed was prior to the interview of Mr. Smith by the attorney for Complainant; and was limited to necessary trial preparation.

For all of the foregoing reasons, I find that the interview of the potential bargaining unit witness, Mr. Benjamin Smith, by Respondent's attorney was not a formal discussion within the meaning of Section 10(e) of the Act and, accordingly, that Respondent did not violate Sections 19(a)(1) and (6) of the Order when it failed to afford Complainant an opportunity to be represented during the interview of Mr. Smith on August 16, 1977.

RECOMMENDATION

Having found that Respondent has not engaged in certain conduct prohibited by Section 10(e) and 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Complaint herein be dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: October 2, 1978
Washington, D.C.

Footnote 6 continued from page 9.

representatives ...", NLRB v. Neuhoff Bros., Packers, Inc., 375 F.2d at 378, may constitute an atmosphere of coercion.

WBD/mm1

December 28, 1978

A/SLMR No. 1173

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
ANTILLES CONSOLIDATED SCHOOL SYSTEM,
FORT BUCHANAN, SAN JUAN, PUERTO RICO
A/SLMR No. 1173

DEPARTMENT OF THE NAVY, ANTILLES
CONSOLIDATED SCHOOL SYSTEM, FORT
BUCHANAN, SAN JUAN, PUERTO RICO

Respondent

and

Case No. 37-01916(CA)

ANTILLES CONSOLIDATED EDUCATION
ASSOCIATION, NEA, CEIBA, PUERTO
RICO

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the Antilles Consolidated Education Association, NEA, Ceiba, Puerto Rico, alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by declining to sign and put into effect a Teacher Evaluation Form which had been negotiated by the Superintendent of the Antilles Consolidated School System.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (6) of the Order when the Respondent's Area Coordinator failed to approve the Teacher Evaluation Form which had been negotiated by the Superintendent.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and issued an appropriate remedial order for the violation found.

On October 12, 1978, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Navy, Antilles Consolidated School System, Fort Buchanan, San Juan, Puerto Rico, shall:

1. Cease and desist from:

(a) Refusing to place in effect and be bound by the Teacher Evaluation Form provisions negotiated and agreed to on February 8, 1977, with the Antilles Consolidated Education Association, NEA, the employees' exclusive representative.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

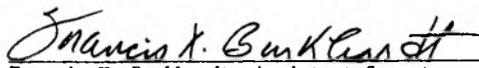
(a) Upon request, place in effect and be bound by the Teacher Evaluation Form negotiated and agreed to on February 8, 1977, with the Antilles Consolidated Education Association, NEA, the employees' exclusive representative.

(b) Upon request, utilizing the February 8, 1977, Teacher Evaluation form, reevaluate retroactive to February 8, 1977, any teacher who may have been adversely affected by the failure to consider the provisions therein.

(c) Post at its facilities at the Antilles Consolidated School System, Fort Buchanan, San Juan, Puerto Rico, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
December 28, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to place in effect and be bound by the Teacher Evaluation Form provisions negotiated and agreed to on February 8, 1977, with the Antilles Consolidated Education Association, NEA, our employees' exclusive representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, place in effect and be bound by the Teacher Evaluation Form negotiated and agreed to on February 8, 1977, with the Antilles Consolidated Education Association, NEA, our employees' exclusive representative.

WE WILL, upon request, utilizing the February 8, 1977, Teacher Evaluation form, reevaluate retroactive to February 8, 1977, any teacher who may have been adversely affected by the failure to consider the provisions therein.

(Agency or 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 its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is Room 3515 - 1515 Broadway, New York, New York 10036.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



..... :
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 In the Matter of :
 :
 DEPARTMENT OF THE NAVY, ANTILLES :
 CONSOLIDATED SCHOOL SYSTEM, :
 FT. BUCHANAN, SAN JUAN PUERTO RICO :
 :
 Respondents :
 and :
 :
 ANTILLES CONSOLIDATED EDUCATION :
 ASSOCIATION, NEA, CEIBA, PUERTO RICO :
 Complainant :

Case NO. 37-01916(CA)

Robert Savage
Box 484
Palmer, Puerto Rico 00721
For the Complainant

Elbert C. Newton
Labor Relations Advisor, Civilian Personnel
Southern Field Division Office
P. O. Box 88
Naval Air Station
Jacksonville, Florida 32212

William Wright
Personnel Management Specialist
Antilles School System
Fort Buchanan, Puerto Rico 00934
For the Respondent

Before: RHEA M. BURROW
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is an unfair labor practice proceeding in which a formal hearing of record was held on June 20, 1978 in San Juan, Puerto Rico, pursuant to Executive Order 11491, as amended, hereafter referred to as the Order.

The complaint filed on September 9, 1977 by Antilles Consolidated Education Association, hereinafter referred to as ACEA and/or Complainant alleges that Antilles Consolidated School System 1/ hereinafter referred to as ACSS and/or the Respondent, violated Section 19(a)(1) and (6) of the Order by refusing to honor a February 8, 1977 agreement between Complainant and Respondent and refusing to negotiate in good faith on a teacher evaluation form during 1977. 2/

Upon the basis of the entire record, including the evidence adduced, the briefs submitted by the parties and my observation of the witnesses and judgment of their credibility, I make the following findings, conclusions and recommendations.

1/ At the hearing Counsel for Respondent moved to correct the record to reflect the Department of the Navy as the Agency and Antilles Consolidated School System as the Activity. There was no objection and the Activity had been designated as a party with the Navy in the complaint).

2/ Specifically the ACCS area coordinator was charged with: "Having revoked the signature of his school superintendent, Carl Engebretson, thereby refusing to honor an agreement signed with Antilles Consolidated Education Association...to use an employee evaluation form negotiated and signed by ACEA and ACSS. By such unilateral revocation, Area Coordinator Flanagan exceeded his ministerial right to review the agreement for violations of law and committed ACSS to breach of good faith.

"Additionally, Area Coordinator Flanagan never honored an agreement of December 18, 1976, signed at his direction to negotiate in good faith an evaluation form.

"Beginning on or about March 21, 1977, absent negotiations to rectify the unilateral revocation of the signed agreement, and ignoring written and telephoned objections from ACEA, the principals of ACSS...., with the consent and/or direction of then school superintendent Carl Engebretson, issued evaluations of unit employees using management developed forms and procedures.

"The ACEA has since called meetings to rectify the unfair labor practices, but in those meetings the current ACSS negotiator, Jesse Williams, has refused to negotiate the destruction or removal of the disputed evaluations and/or new evaluations on a form negotiated by the parties."

Findings of Fact

1. The Complainant, Antilles Consolidated Education Association, NEA, is and was at all times material herein, the authorized collective bargaining representative to the unit consisting of teachers, substitute teachers, guidance counselors, librarians, media specialists and nurses employed by Antilles Consolidated School System at Ft. Buchanan, Ft. Allen, Roosevelt Roads Naval Station and Ramey Annex, Puerto Rico.

2. The Antilles Consolidated School System is operated by the Department of the Navy in Puerto Rico by arrangement with the U.S. Office of Education under the terms of Public Law 81-874, Section 6. The ACSS operates seven schools at four locations in Puerto Rico providing elementary and secondary education for dependents of certain federal employees stationed on the Island.

3. In addition to being Commander of U.S. Naval Forces in the Carribean, the Department of the Navy head is also the Area Coordinator. The Area Coordinator is designated by the Chief of Naval Education and Training pursuant to applicable instructions to Act as a "Board of Education" and exercise all expressed or implied powers associated with a school board. Rear Admiral W.R. Flanagan was the Area Coordinator during the period material to this complaint.

4. The negotiated agreement between the parties was made effective on April 29, 1976, and, provided among other things that:

Article 20, Section h.

"The supervisor will give the employee an annual performance rating in writing prior to March 31 unless a proposed unsatisfactory rating is pending..."

5. A Policy Manual instruction letter dated May 6, 1976 for operation of Antilles Consolidated Schools System in Puerto Rico was issued by Rear Admiral W.R. Flanagan, Commander, U.S. Naval Forces, Carribean. The Instruction contained a manual provision relating to Performance Evaluation of teachers and provided that each teacher would be evaluated by the principal by March 31 and that the Employees Performance Appraisal will be used for the written evaluation. The principal will prepare a narrative report and will justify the performance rating marked.

6. A narrative form specifying two ratings, satisfactory or unsatisfactory, was the established form used for evaluating unit employees before Admiral Flanagan promulgated the official policy Manual on May 6, 1976. Attachment 5 of this Manual was a new form for evaluating teachers replacing and canceling the previously established form. 3/ The date of submission of the performance evaluation by March 31 of each year was unchanged.

7. The Complainant expressed dissatisfaction with certain provisions expressed in the manual and a meeting was held between ACSS Superintendent C.R. Engebretson and ACEA representatives and/or teachers Wallace, Bob Savage and Jean Johnson. As a result of this and another meeting held on December 18, 1976, Robert Savage, Commander R. J. Pineseault, Schools Officer; and Linn Wallace, President, ACEA, signed a Memorandum of Understanding providing among other things that:

1. The Teacher Evaluation Form and Agency Grievance Procedure Form will be held in Abeyance without prejudice pending

(a) The January Policy Manual Review.

(b) Bilateral meetings between the Association and Management in a good faith effort to develop an evaluation form and agency procedure.

(c) Supervisors may use applicable data from the currently completed teacher evaluation forms to be held in abeyance pending the development of an Evaluation Form during the January Policy Manual Review.

8. On February 8, 1977, a Teacher Evaluation Form was approved by Linn A. Wallace, President ACEA, and C.R. Engebretson, ACCS Superintendent. The form contained the statement:

"An employee must be outstanding in a majority of areas to receive an overall outstanding. An employee must be rated unsatisfactory in a majority of areas to receive an overall unsatisfactory."

The form otherwise listed some 19 items on which the individual was appraised or evaluated. At the bottom of the form there was a statement:

3/ See Complainant Exhibits 4 and 5.

"Upon approval by the Area Coordinator, it is understood that this form will be used in evaluating all ACSS teachers during school year 1976-1977.

9. Thereafter, on March 19, 1977 ACCEA was advised by School Officer R. Pinsonneault that Area Coordinator Flanagan had not approved the February 8, 1977 negotiated agreement as to the teacher evaluation form. Written notice was also given. On March 19, 1977 negotiation on the ACSS Teacher Evaluation form was requested. The record is clear that the part of the teacher evaluation form that was not acceptable to Rear Admiral Flanagan was that relating to receipt of outstanding or unsatisfactory in a majority of items or areas evaluated to receive an overall rating of outstanding or unsatisfactory.

10. It was conceded at the hearing that Rear Admiral Flanagan did not turn down or reject the teacher evaluation form because of any violation of law, regulations or the Executive Order.

11. Negotiations on the Teacher Evaluation Form resumed after disapproval and Jesse Williams was designated the ACSS special representative to negotiate with ACEA. No satisfactory progress was made after more than 40 hours was spent on discussion of the form at meetings held on May 10, 11, 12, 13 and 19 and June 23, 1977. On July 19, 1977 Rear Admiral Flanagan advised ACEA that a record evaluation for the school year 1976-1977 was necessary in fairness to the teachers affected as well as administrative responsibilities of the school system and it was his reluctant determination to terminate further discussion and he instructed Mr. Williams to cease further negotiations on the Teacher Evaluation Form.

Discussion and Conclusions

The Policy Manual for operation of Antilles Consolidated Schools System issued on May 6, 1976 was considered and approved by the then President of ACEA and is not an issue properly raised in this proceeding. Even if it were required that I consider the issue, I would find that ACEA did not sustain its burden of showing the Manual approved by its President containing the teacher Evaluation Form was not properly issued. See United States Department of the Air Force, 15th Air Base Wing, Hickam Air Force Base, Hawaii, A/SLMR No. 1011. After issuance of the Manual, a succeeding

President of ACEA stated he first saw it in August or September 1976, and raised the question as to whether management had conferred with ACEA before its promulgation as to the Teacher Evaluation Form. Finally, as a result of a meeting on December 18, 1976, between ACEA representatives and the School Board, it was agreed that certain teacher evaluations would be held in abeyance pending development of a revised form. School Superintendent Engebretson and ACEA President Wallace agreed on a revised Teacher Evaluation Form in February 1977; one provision was not found acceptable by Rear Admiral Flanagan and he designated Jesse Williams to continue the negotiations requested by ACEA President Wallace and to come up with an acceptable form. Further meetings on May 10, 11, 12, 13 and 19 and June 23, resulted in no apparent progress and on July 19, 1977 further discussions were terminated by Flanagan and the teachers were evaluated pursuant to guidelines outlined in the Manual form.

The Teacher Evaluation Form contained in the Manual provided for the following ratings: Outstanding, Superior, Satisfactory, Needs Improvement and Unsatisfactory. It contained the statement: "Any professional employee must have at least the majority of areas in which he is rated OUTSTANDING to receive an outstanding rating. Any professional employee must have at least the majority of areas in which he is rated either OUTSTANDING or SUPERIOR to receive a superior rating."

The Teacher Evaluation Form agreed to by Wallace and Superintendent Engebretson in February 1977 provided for the following ratings: Outstanding, Good, Needs Improvement and Unsatisfactory. It also contained the following statement: "An employee must be outstanding in a majority of areas to receive an overall outstanding. An employee must be rated unsatisfactory in a majority of areas to receive an overall unsatisfactory." It also provided that: "Upon approval by the Area Coordinator, it is understood that this form will be used in evaluating all ACSS teachers during school year 1966-1977."

There was no significant issue raised as to the difference in the 5 ratings contained in the Manual form and the 4 contained in the February 1977 form negotiated between Wallace and Engebretson. Thus, for all practical purposes the difference in controversy between the two forms is that part of the February 1977 form that states: "An employee must be rated unsatisfactory in a majority of areas to receive an overall unsatisfactory."

Both the negotiated agreement and the Manual provide that an annual performance rating in writing will be given an employee by March 31 unless a proposed unsatisfactory rating is pending and that a final rating will be given prior to the end of the School year in which the notice of unsatisfactory is given.

From the foregoing, it is evident that both the Complainant and the Respondent were clearly aware of the time element to evaluate employees prior to the end of the school term. It is also clear that before implementation of the Manual Teacher Evaluation Form teacher evaluations were by agreement held in abeyance pending negotiations and development of a revised form. Thus, I conclude that Complainant was given an opportunity and in fact did bargain with the Respondent as to the Manual Teacher Evaluation Form before its implementation in 1977.

Section 19 of Executive Order 11491 relates to Unfair Labor Practices and provides in part, as follows:

(a) Agency Management shall not -

(1) interfere with, restrain, or coerce an employee in the exercise of rights assured by this Order;

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

Since the record shows that the Respondents delayed from December 1976 to July 1977 to evaluate its teachers, while awaiting completion of numerous discussions for negotiation and development of a revised teacher evaluation form before termination of such discussion, it can hardly be argued by ACEA that the Respondent refused to consult, confer and negotiate with it in good faith before implementation of the adopted Manual Teacher Evaluation Form. The urgency of evaluating teachers by the end of the school term was evident to all parties and a responsibility that was of utmost importance for the Respondent to accomplish its mission.

Having held that the Policy Manual for operation of the Antilles Consolidated Schools System promulgated in May 1976 containing a Teacher Evaluation Form approved by the then ACEA President was properly issued by Rear Admiral Flanagan, the

Area Coordinator, there was an acceptable basis for Respondent to evaluate teachers within the system for the 1976-1977 school term. However, in view of dissatisfaction expressed by Complainant as to certain agency forms, the Respondent in December 1976 agreed to hold in abeyance action on the Teacher Evaluation Forms pending: (a) the January Policy Review; (b) bilateral meetings between the Association and Management in a good faith effort to develop an evaluation form and Agency procedure; and (c) supervisors may use applicable data from the currently completed teacher evaluation forms to be held in abeyance pending the development of an Evaluation Form during the January Policy Manual Review.

The President of ACEA was unwilling to discuss the Teacher Evaluation Form at Policy Review meetings in January 1977. However, he the Respondent's designated representative did agree on a changed Teacher Evaluation Form in February 1977 which contained a statement that: "An employee must be outstanding in a majority of areas to receive an overall outstanding. An employee must be rated unsatisfactory in a majority of areas to receive an overall unsatisfactory." The form also contained the statement that: "Upon approval by the Area Coordinator, it is understood that this form will be used in evaluating all ACSS teachers during school year 1976-1977."

When the changed Teacher Evaluation Form was forwarded to Rear Admiral Flanagan in February 1977, its terms had been approved and signed by his Agent Superintendent Engebretson. Superintendent Engebretson testified at the hearing that he was of opinion that he had authority to reach an agreement on behalf of the Respondent Activity and records show that he had been the principal negotiator for Respondent on prior occasions.

I conclude on the basis of the facts and circumstances of this case that the Superintendent of the Antilles Consolidated School System Carl R. Engebretson, had the authority to enter into a negotiated agreement with the ACEA concerning a teacher evaluation form; that Rear Admiral Flanagan's signature was thereafter required as a ministerial formality once the terms of the Teacher Evaluation Form were agreed upon by ACEA and Flanagan's designated representative Engebretson. His failure to do so constituted a violation of Section 19(a)(1) and (6) of the Order.

Rear Admiral Flanagan's powers as to the Teacher Evaluation Form agreement are complicated by the fact that he served in a dual role with the Respondent Activity; on the one hand, he was the Agency's Area Coordinator responsible for Section 15 reviews negotiated with the Respondent Activity; on the other, he was Respondent Activity's "School Board" with responsibility for conducting negotiations and concluding agreements with recognized labor organizations. The latter delegated powers were specifically delegated by Flanagan to the Superintendent of Schools upon promulgation of Appendix F3.C. of the Policy Manual on May 6, 1976.

The circumstances in this case are in many respects strikingly similar to those in Defense General Supply Center and American Federation of Government Employees, Local 2047, A/SLMR No. 790, where the Assistant Secretary held that:

"...the Activity Commander's signature was required as a ministerial formality once the terms of the Agreement had been agreed upon. I am therefore in agreement with the Administrative Law Judge's finding that the Activity Commander was obligated to sign the Agreement promptly and his failure to do so constituted a violation of Section 19(a)(1) and (6) of the Order.

"Further, under the particular circumstances of this case, it is clear the Activity Commander had a dual role. Thus in addition to being responsible for approving the agreement at the local level as Activity head, he was also the official designated by the Defense Supply Agency (DSA) as responsible for approving or disapproving the agreement pursuant to Section 15 of the Order. Section 15 states, in part, that an agreement shall be approved by the Agency head or his official designee if it conforms to applicable laws, the Order, existing agency policies and regulations, and regulations of appropriate authorities, but will go into effect if not approved or disapproved within 45 days from date of execution. The Respondent argues that because the Activity Commander never 'executed' the agreement at the local level, the Activity Commander was not obligated to act pursuant to his Section 15 approval authority. It would follow, also, that because the agreement was not 'executed' it never went into effect. I cannot accept this argument. As found above, under the particular circumstances herein, the requirement for the Activity Commander's signature was

a mere formality after the initial agreement was presented to him on September 12, 1975. Thus, the agreement had already been effectively executed by his agents. In my view, if, after an agreement is fully agreed upon by his authorized agents, an activity head is permitted to repudiate the very same agreement under his Section 15 authority, the negotiating process in the Federal Sector, would be seriously undermined. For this reason, where, as here, dual roles, i.e.--to negotiate and to approve--are imposed on the same activity head, I find that the two roles are effectively merged and approval for one purpose is, in effect, approval for both. Therefore, in the particular circumstances of this case, approval as Activity Commander, rendered by his fully authorized negotiating team, was also tantamount to approval pursuant to Section 15 of the Order. Accordingly, I find that the Respondent additionally violated Section 19(a)(1) and (6) of the Order by refusing to implement the negotiated agreement."

The aforesaid principles held by the Assistant Secretary to be applicable in Defense Supply Center, A/SLMR 790, are also found to be applicable in the circumstances of the case herein. 4/ It can be added, however, that in view of the concession at the hearing that Area Coordinator Flanagan

4/ Section 15 of the Order provides:

"Approval of Agreements. An agreement with a labor organization as the exclusive representatives of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved within forty-five days from the date of its execution if it conforms to applicable laws, the Order, existing published agency policies and regulations (unless the Agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. An agreement which has not been approved or disapproved within forty-five days from the date of its execution shall go into effect without the required approval of the agency head and shall be binding on the parties subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency. A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement, or, if none, under Agency regulations.

did not turn down or reject the teacher evaluation form because of any violation of law, regulations, or the Executive Order, any Section 15 issue that may have been for consideration has been removed, the fact that there was further bargaining after reaching agreement on the form in February 1977, did not in my opinion constitute a waiver of the agreement reached and is not regarded of significant importance in determining the issues.

In view of the foregoing, it is my opinion that Carl R. Engebretson as Superintendent of ACSS, had authority to enter into a negotiated agreement with ACEA concerning a teacher evaluation form; that the Area Coordinator of ACSS did exceed his ministerial authority in failing to approve the agreement reached; and, that the failure of the Area Coordinator to approve and implement the agreement is concluded to be a violation of Section 19(a)(1) and (6) of the Order.

Recommendations

Having found that the Respondent has engaged in conduct which is violative of Section 19(a)(1) and (6) of the Order, I recommend the Assistant Secretary adopt the following Order designed to effectuate the purposes of Executive Order 11491, as amended.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for the Labor-Management Relations hereby orders that the Department of the Navy, Antilles Consolidated School System, Ft. Buchanan, San Juan, Puerto Rico, shall:

1. Cease and desist from:

- (a) Refusing to sign the February 8, 1977 Teacher Evaluation Form negotiated and agreed upon by Complainant and the Area Coordinator's designated Representative Carl R. Engebretson covering unit employees within the Antilles Consolidated School System in Puerto Rico.

- (b) Refusing to sign the negotiated Teacher Evaluation Form agreed to on February 8, 1977 with Antilles Consolidated Education, NEA, governing the unit employees in the Antilles Consolidated School System, subject to the provisions of law, the Order and the regulations of appropriate authorities outside the Agency.

- (c) In any like manner interfering with, restraining or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

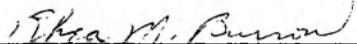
2. Take the following affirmative actions in order to effectuate the purposes and provisions of the Order:

- (a) Upon request, sign the negotiated Teacher Evaluation Form agreed to on February 8, 1977 with Antilles Consolidated Education Association, NEA covering the teacher employees within the Department of Navy Antilles Consolidated School System, Puerto Rico, retroactive to February 8, 1977 for those employees who may have been adversely affected by reason of failure to use the changed form.

- (b) Upon request place in effect and be bound by the negotiated Teacher Evaluation Form provisions agreed to on February 8, 1977 with Antilles Consolidated Education Association, NEA, covering employees within the Antilles Consolidated System, Puerto Rico, subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency.

- (c) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including bulletin boards and other places where other notices to employees are customarily posted. The Commanding Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.


RHEA M. BURROW
Administrative Law Judge

Dated: October 12, 1978
Washington, DC

Appendix

RMB:dmb

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to sign the negotiated Teacher Evaluation Form agreed to on February 8, 1977, with Antilles Consolidated Education Association, NEA, Ceiba, Puerto Rico covering employees in the Department of the Navy, Antilles Consolidated School System, San Juan, Puerto Rico.

WE WILL NOT refuse to place in effect and be bound by the negotiated Agreement as to the Teacher Evaluation Form agreed to on February 8, 1977 with Antilles Consolidated Education Association, NEA, covering the employees within the Department of Navy, Antilles School System, subject to the provisions of law, the Order and the regulations of appropriate authorities outside the Agency.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, sign the negotiated Teacher Evaluation Form as agreed to on February 8, 1977 with Antilles Consolidated Education Association, NEA, covering the employees of the Department of Navy, Antilles Consolidated School System. We will upon request utilize the February 8, 1977 negotiated Teacher Evaluation Form and reevaluate retroactive to February 8, 1977 any employee teacher who may have been adversely affected by failure to consider the provisions therein.

WE WILL, upon request, place in effect and be bound by the negotiated Teacher Evaluation Form provisions as agreed upon on February 8, 1977 with Antilles Consolidated Education

Association, NEA, covering the employees of the Antilles Consolidated School System in Puerto Rico operated by the Department of the Navy subject to the provisions of Law, the Order and regulations of appropriate authorities outside the Agency.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

(Agency or Activity)

Dated: _____ by: _____
(Signature) (Title)

GENERAL SERVICES ADMINISTRATION,
NATIONAL PERSONNEL RECORDS CENTER
A/SLMR No. 1174

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is Room 3515 - 1515 Broadway, New York, NY 10036.

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 2928 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by prohibiting an employee from acting simultaneously as a part-time Equal Employment Opportunity (EEO) counselor and as a union officer. The Respondent argued that the positions, if held concurrently, would result in a real or apparent conflict of interest within the meaning of Section 1(b) of the Order and, therefore, the employee was properly required to relinquish one of the positions.

The Administrative Law Judge concluded that the Respondent had violated Section 19(a)(1) of the Order by requiring the employee to choose between the two positions. In this regard, he found no conflict of interest under Section 1(b) of the Order because the employee's duties as union officer involved only internal management of the union and did not require her to be an adversary of management and an advocate for employees. Consequently, he concluded that the Respondent's conduct interfered with her Section 1(a) right to participate in the management of a labor organization. The Administrative Law Judge recommended dismissal of the Section 19(a)(2) allegation of the complaint as the individual's conditions of employment were unaffected by the Respondent's conduct.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations. Accordingly, he ordered the Respondent to cease and desist from the conduct found violative of Section 19(a)(1) of the Order, and to take certain affirmative actions, and ordered that the Section 19(a)(2) allegation be dismissed.

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
NATIONAL PERSONNEL RECORDS CENTER

Respondent

and

Case No. 62-5838(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2928

Complainant

DECISION AND ORDER

On October 13, 1978, Administrative Law Judge Randolph D. Mason issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in conduct which was violative of Section 19(a)(1) of the Order and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge also found that the Respondent did not violate Section 19(a)(2) of the Order and recommended that that portion of the complaint be dismissed. Thereafter, both parties filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting briefs filed by both parties, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the General Services Administration, National Personnel Records Center, St. Louis, Missouri, shall:

1. Cease and desist from:

(a) Prohibiting B. Louise Davis from simultaneously holding the positions of EEO Counselor and Assistant Secretary-Treasurer-Recorder for the American Federation of Government Employees, AFL-CIO, Local 2928.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director, National Personnel Records Center, St. Louis, Missouri, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days of the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges a violation of Section 19(a)(2) of the Order, be, and it hereby is, dismissed.

Dated, Washington, D.C.

December 29, 1978

Francis X. Burkhardt
Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX
NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended

We hereby notify our employees that:

WE WILL NOT prohibit B. Louise Davis from simultaneously holding the positions of EEO counselor and Assistant Secretary-Treasurer-Recorder for the American Federation of Government Employees, AFL-CIO, Local 2928.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

(Activity or Agency)

Dated: _____ By: _____

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200, Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of :
: GENERAL SERVICES ADMINISTRATION, :
: NATIONAL PERSONNEL RECORD CENTER :
: Respondent :
: and :
: AMERICAN FEDERATION OF GOVERNMENT :
: EMPLOYEES, AFL-CIO, LOCAL 2928 :
: Complainant :
.....

Case No. 62-5838 (CA)

Peter B. Broida, Esquire
Barbara Bruno
American Federation of Government
Employees
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005

William Martin
4830 Cattles Place
St. Louis, Missouri 63113
For the Complainant

James L. Kealing, Esquire
Regional Counsel
General Services Administration
Region 6
1500 East Bannister Road
Kansas City, Missouri 64131
For the Respondent

Before: RANDOLPH D. MASON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding was heard in St. Louis, Missouri, on August 1, 1978, and arises under Executive Order 11491, as amended. Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter called the Assistant Secretary), a Notice of Hearing on Complaint was issued on May 25, 1978, and an Order changing the time on that day was issued by the undersigned on June 23, 1978. This case was initiated by a complaint filed on February 24, 1978, by Local 2928 of the American Federation of Government Employees (hereinafter the Union). In its amended complaint dated April 24, 1978, the Union alleges that the respondent violated Sections 19(a)(1) and (2) by prohibiting an employee from acting simultaneously as an Equal Employment Opportunity (EEO) Counselor and as an officer of the Union.

At the hearing, all parties were represented and were afforded full opportunity to be heard, adduce evidence, examine and cross-examine witnesses, and argue orally. Thereafter, both parties filed briefs. Upon consideration of the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions, and recommendation.

Findings of Fact

At all times material herein, the American Federation of Government Employees, AFL-CIO, Local 2928 was the exclusive representative for certain non-supervisory employees of the National Personnel Records Center (Civilian Personnel Records) General Services Administration, in St. Louis, Missouri.

At the time of the hearing, B. Louise Davis was a clerk-typist for the respondent and had also performed the duties of a part-time EEO Counselor for about five years. During that period she handled about 10 or 12 EEO discrimination complaints in her capacity as a Counselor. Ms. Davis generally performed the counseling duties set forth in Section 713.213(a) of Title 5 of the Code of Federal Regulations. That section

provides, in part, as follows:

(a) An agency shall require that an aggrieved person who believes that he has been discriminated against because of race, color, religion, sex, or national origin consult with an Equal Employment Opportunity Counselor when he wishes to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter; to keep a record of his counseling activities so as to brief periodically, the Equal Employment Opportunity Officer on those activities; and, when advised that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person concerning the issues in the matter. The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct his final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to his attention by the aggrieved person. If the final interview is not concluded within 21 days and the matter has not previously been resolved to the satisfaction of the aggrieved person, the aggrieved person shall be informed in writing at that time of his right to file a complaint of discrimination. . . . The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint.

The role of the EEO Counselor is to serve as a bridge between employees and management and, wherever possible, to resolve EEO problems on an informal basis. The EEO Counselor must win the trust and confidence of both management and aggrieved employees, and must provide an open and sympathetic channel through which employees and applicants may raise questions, discuss problems, get answers, and on an informal basis, get resolutions of problems connected with equal job opportunity. As a part-time Counselor Ms. Davis had to be independent and impartial in arriving at the solutions which she would propose to the parties involved. The Agency was required to assure that full cooperation was provided by all employees to Ms. Davis in the performance of her EEO duties. As a Counselor, it was required that she

be "free from restraint, interference, coercion, discrimination, or reprisal in connection with the performance of [her EEO] duties". 5 CFR §713.213(b) and (c).

As an EEO Counselor, Ms. Davis had access to official personnel folders and other pertinent records when she had need for information in connection with the performance of her official counseling duties. All EEO Counselors, however, are prohibited from divulging information obtained from such personnel records.

During 1977 Ms. Davis was a member of the Union. In August of 1977 she was elected to the position of Assistant Secretary-Treasurer-Recorder. She served in that capacity until November of 1977. The duties of the office required her to record the minutes of the monthly meetings, maintain the membership rolls, and, on occasion, to assume the financial duties of the Secretary-Treasurer in the event of his absence. All of her duties concerned the internal management of the Union; she did not have any representational duties.

During 1977 the Union had 6 officers: the President, Vice President, Secretary-Treasurer, Assistant Secretary-Treasurer-Recorder, the Sergeant at Arms, and the Chief Shop Steward. The established practice within the Union was that all grievances were handled by the stewards or the Chief Shop Steward, and only on rare occasions would the Union President become involved in such matters. The other officers did not participate at all, and would always refer any grievances to the appropriate stewards. It would have been highly unusual for Ms. Davis to handle a grievance, and she had no intention of ever handling one.

In about November of 1977 Ms. Davis' supervisor told her that she could not continue to act simultaneously as an EEO Counselor and as a Union officer because management felt that a conflict of interest existed between the two positions. Ms. Davis was told that she could choose to resign from either one of the two jobs. As a result of management's action, Ms. Davis resigned from her Union office and continued as a part-time EEO Counselor.

The regulations of the Civil Service Commission do not prohibit supervisors from serving as EEO Counselors. During the past few years at least one supervisor has served in this capacity at GSA.

Conclusions

The first issue for consideration is whether respondent violated Section 19(a)(1) of the Executive Order. That section provides that agency management shall not interfere with, restrain, or coerce an employee in the exercise of the rights assured by the Order. Section 1(a) of the Order describes certain employee rights as follows:

Each employee of the Executive Branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative....

Section 1(b) of the Order places the following restrictions on the above rights:

Paragraph (a) of this section does not authorize participation in the management of a labor organization or acting as a representative of such organization...by an employee when the participation or activity would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee.

In the instant case, B. Louise Davis was told by her supervisor that she could not simultaneously hold the positions of part-time EEO Counselor for the respondent and Assistant Secretary-Treasurer-Recorder for the Union local, and that she must resign from one of these positions. Thus the issue for decision is whether she had a right to participate in the management of the Union while holding her position as an EEO Counselor. It will be necessary to decide whether holding both positions would result in a conflict or apparent conflict of interest or otherwise be incompatible under Section 1(b).

The parties are in substantial agreement that the role of the EEO Counselor is to serve as a bridge between employees and management and, wherever possible, to resolve EEO problems on an informal basis. The EEO Counselor must win the trust and confidence of both management and aggrieved employees,

and must provide an open and sympathetic channel through which employees and applicants may raise questions, discuss problems, get answers, and on an informal basis, get resolutions of problems connected with equal job opportunity. In proposing solutions to the parties, the Counselor is required to act independently and impartially. The applicable regulations provide that the Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the performance of his duties. 5 CFR §713.213(b) and (c); see also 5 CFR §713.203(k).

Respondent argues that any Union officer is essentially an adversary of management and an advocate for employees, and as such, would lack the requisite neutrality and objectivity essential to functioning effectively as an EEO Counselor.

Federal Personnel Manual Letter No. 713-29, dated September 12, 1974, is entitled "Interrelationships Between Labor Relations and Equal Employment Opportunity Programs." The letter was issued pursuant to the Commission's responsibility to regulate the Federal EEO programs and also to furnish appropriate guidance and technical assistance under Executive Order 11491. Part II(B)(5)(a)(2) of FPM Letter No. 713-29 provides, in part, as follows:

Union membership or inclusion in an exclusive bargaining unit are not valid reasons for non-selection [of EEO Counselors]. Since Counselors serve all employees (i.e. regardless of bargaining unit status) every effort should be made to have as broad a representation as possible, without limiting selections to the unit of recognition. Furthermore, since a Counselor serves as a bridge between the complainant and management in resolution of problems, rather than as a chosen or designated representative of the employee, and since a Counselor may need access to otherwise restricted information in order to function effectively, care should be taken to avoid conflicts of interest such as proscribed by Section 1(b) of Executive Order 11491, as amended.

Thus it is clear that membership in a Union would not preclude selection as an EEO Counselor. However, the FPM recognizes that conflicts of interest may arise with respect to certain EEO Counselors but does not attempt to define these situations as they might arise under Section 1(b) of the Executive Order.

I do not agree with respondent's position that the holding of any Union office, regardless of its duties, would in itself "result in a conflict or apparent conflict of interest or otherwise be incompatible with ... the official duties of" an EEO Counselor within the meaning of Section 1(b). 1/ This proposition is far too broad. For example, I do not believe that the mere election of an employee to a minor, or purely honorary, Union office necessarily makes an individual any more of an "adversary" of management than he was prior to his election. As noted previously, the FPM permits EEO Counselors to be Union members. Thus persons who are openly sympathetic with the causes of employees are not automatically prohibited from becoming EEO Counselors.

In my view the duties of the particular Union office in question must be examined to determine whether any conflict would arise under Section 1(b) of the Order if the officer simultaneously served as an EEO Counselor. In Louise Davis case, her duties as Assistant Secretary-Treasurer-Recorder involved only the internal management of the Union--primarily keeping the minutes and membership rolls. I am aware of respondent's contention that all officers in this Union had the authority to handle grievances on behalf of employees. The existing president of the Union testified that, in his opinion, if an employee demanded to be represented by a particular Union officer in a grievance proceeding, the officer would be required to represent that employee. Even if I were convinced that this was true, I would be guided by the actual policy and practice of the Union rather than any authority technically vested in the officers. The established practice was that all grievances were handled by the stewards or the Chief Shop Steward, and only on rare occasions would the Union president become involved. The other officers did not participate. In addition, Ms. Davis clearly had no intention of ever handling a grievance.

1/ Although supervisors and union officials are perceived by some as being adversaries, Civil Service Commission regulations do not prohibit supervisors from serving as EEO Counselors. Since union officers are often perceived in the same way, it seems unlikely that the Commission intended FPM Letter No. 713-29 to prohibit every union officer from serving as an EEO Counselor.

I do not think that Ms. Davis would ever have performed any sort of representational duties in her Union job. At best, the chances of her doing so would have been remote. Thus respondent has improperly portrayed Ms. Davis' position with the Union as being an adversary of management and an advocate for employees. 2/

Since Ms. Davis' position involving the internal management of the Union did not result in any conflict, or apparent conflict of interest or incompatibility within the meaning of Section 1(b), it follows that she should not have been prohibited from holding her Union office while acting as an EEO Counselor. I must conclude and hold that respondent's action interfered with her Section 1(a) right to participate in the management of the Union and constituted a violation of Section 19(a)(1) of the Order. United States Army and Air Force Exchange Service, Redstone Arsenal Exchange, Redstone Arsenal, Alabama, A/SLMR No. 491.

The only other issue remaining for decision is whether respondent violated Section 19(a)(2) by discouraging membership in the Union by "discrimination in regard to hiring, tenure, promotion or other conditions of employment." I hold that this section was not violated. In Redstone Arsenal, supra, management alleged that an employee was a supervisor and threatened to remove him from his job if he persisted in holding Union office. As a result of management's action, the employee resigned his Union position. The Assistant Secretary found that management had violated Section 19(a)(1) but that Section 19(a)(2) was not violated because the individual's employment with the agency was unaffected by management's conduct. The principle of that decision applies to the instant case because Louise Davis' employment as a part-time EEO Counselor was not affected by respondent's conduct. Redstone Arsenal Exchange, supra; Army and Air Force Exchange Service, Vandenberg Air Force Base, California, A/SLMR No. 437 (footnote 3).

2/ Having reached this conclusion, I need not decide whether a Union officer who could properly be considered a true adversary of management would be precluded by §1(b) from simultaneously serving as an EEO Counselor. It is noted, however, that the Civil Service Commission's unofficial view is that persons who normally represent employees either in discrimination cases or "for other reasons" should not simultaneously serve as EEO Counselors. Equal Employment Opportunity Counseling, A Guidebook, U.S. Civil Service Commission, Personnel Methods Series No. 19 at 4 (revised October 1975).

Recommendation

Upon the basis of the foregoing findings of fact and conclusions of law and pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Rules and Regulations, I recommend that the Assistant Secretary of Labor for Labor-Management Relations adopt the following order designed to effectuate the policies of the Order.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended and Section 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the General Services Administration, National Personnel Records Center, in St. Louis, Missouri, shall:

1. Cease and desist from:

(a) Prohibiting B. Louise Davis, an EEO Counselor, from simultaneously holding the position of Assistant Secretary-Treasurer-Recorder for the American Federation of Government Employees, AFL-CIO, Local 2928.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

(a) Post at the GSA National Personnel Records Center in St. Louis, Missouri, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the above National Personnel Records Center, and they shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.



RANDOLPH D. MASON
Administrative Law Judge

Dated: October 13, 1978
Washington, D.C.

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO

A DECISION AND ORDER OF THE
ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS
and in order to effectuate the policies of
EXECUTIVE ORDER 11491, as amended
LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT prohibit B. Louise Davis from simultaneously holding the offices of part-time EEO Counselor and Assistant Secretary-Treasurer-Recorder for the American Federation of Government Employees, AFL-CIO, Local 2928.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Executive Order 11491, as amended.

(Agency or 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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 2200 Federal Office Building, 911 Walnut Street, Kansas City, Missouri 64106.

December 29, 1978

A/SLMR No. 1175

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE NAVY,
NAVAL ADMINISTRATIVE COMMAND,
NAVAL TRAINING CENTER,
GREAT LAKES, ILLINOIS
A/SLMR No. 1175

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 2326, (Complainant) alleging that the Respondent violated Section 19(a) (1) and (6) of the Order by unilaterally changing a past practice whereby policemen in the unit would receive advance notice of their assignments.

The Administrative Law Judge concluded that the Respondent had violated Section 19(a)(1) and (6) of the Order. In this regard, he found that the Respondent changed an existing policy and past practice on a matter within the ambit of Section 11(a) of the Order without first giving the Complainant an opportunity to meet and confer on the substance of the change. However, the Administrative Law Judge further found that the impact of the rescission of the past practice on employees was minimal and that ordering a restoration of the practice was not necessary or appropriate to effectuate the policies of the Order. Therefore, the Administrative Law Judge recommended only that the Respondent meet and confer, upon request by the Complainant, on a modification of the change in policy and on the impact of that change.

The Assistant Secretary concurred with the finding of the Administrative Law Judge that the Respondent's unilateral change in an established past practice constituted a violation of the Order. However, contrary to the Administrative Law Judge, the Assistant Secretary found that the Respondent's conduct constituted more than a de minimus or technical violation of the Order, distinguishing Vandenberg Air Force Base, 4392nd Aerospace Support Group, Vandenberg Air Force Base, California 3 FLRC 491, FLRC No. 74A-77 (1975). The Assistant Secretary therefore modified the Recommended Decision and Order of the Administrative Law Judge and directed the Respondent to rescind its change in policy.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE NAVY,
NAVAL ADMINISTRATIVE COMMAND,
NAVAL TRAINING CENTER,
GREAT LAKES, ILLINOIS

Respondent

and

Case No. 50-17043(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2326

Complainant

DECISION AND ORDER

On October 27, 1978, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed a response to the Respondent's exceptions.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief, and the Complainant's response to the Respondent's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, as modified herein.

In agreement with the Administrative Law Judge, I find that Respondent's action in unilaterally altering the established past practice of providing advance notice to employees in the exclusively recognized unit of their individual assignments without first notifying the Complainant

and affording it the opportunity to bargain on such change constituted a violation of Section 19(a)(1) and (6) of the Order. 1/ However, in reaching this conclusion, the Administrative Law Judge noted that, under the circumstances of this case, ". . . although there was a technical violation of Section 19(a)(6), it approaches if it does not meet the de minimus principle 1/," citing the Federal Labor Relations Council's (Council) decision in Vandenberg Air Force Base, 4392nd Aerospace Support Group, Vandenberg Air Force Base, California, FLRC No. 74A-77, 3 FLRC 491 (1975). I disagree.

In my view, the instant case is distinguishable from Vandenberg. Unlike Vandenberg, which arose in the context of contract negotiations and concerned a dispute over a particular matter in the negotiations which was rectified the following day, the instant case concerns a unilateral change in an existing policy and the failure by the Respondent to provide the Complainant with a prior opportunity to bargain over such change. 2/ Under these circumstances, I find the violation of the Order herein to be more than a mere "technical" violation, and I shall modify the Administrative Law Judge's recommended order accordingly. 3/

ORDER

Pursuant to Section 6 (b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Defense, Department of the Navy, Naval Administrative Command, Naval Training Center, Great Lakes, Illinois, shall:

- 1/ The Administrative Law Judge inadvertently failed to find that by such conduct, the Respondent derivatively violated Section 19(a)(1) as well as Section 19(a)(6) of the Order. This inadvertence is hereby corrected. See Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, 4 A/SLMR 790, A/SLMR No. 454 (1974).
 - 2/ See Social Security Administration, Headquarters Bureau and Offices, Baltimore, Maryland, A/SLMR No. 1116 (1978).
 - 3/ Similarly, I reject the Respondent's argument, advanced in its exceptions, that the complaint should be dismissed based on the minimal impact of the Respondent's conduct, citing as dispositive Naval Communications Area, Master Station Eastpac, Honolulu, A/SLMR No. 1035 (1978); Department of Defense, Air National Guard, Texas Air National Guard, Camp Mabry, Austin, Texas, 6 A/SLMR 591, A/SLMR No. 738 (1976); and Department of the Navy, Norfolk Naval Shipyard, 7 A/SLMR 199, A/SLMR No. 805 (1977). I find the above-cited cases to be inapposite. The Texas Air National Guard case involved the issuance of a memorandum prohibiting the consumption
- (Continued)

1. Cease and desist from:

(a) Unilaterally changing the established past practice of giving the policemen in the unit exclusively represented by the American Federation of Government Employees, AFL-CIO, Local 2326, advance notice of their assignments, without first notifying the American Federation of Government Employees, AFL-CIO, Local 2326, and, upon request, bargaining with respect to such a proposed change in policy.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Order:

(a) Withdraw and rescind the memorandum issued on March 3, 1978, by the Chief of Police directing that thereafter duty assignments would be made daily prior to the beginning of the shift and would no longer be assigned in advance.

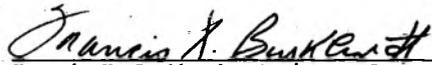
(b) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms they shall be signed by the Commander, Naval Administrative Command, Naval Training Center, Great Lakes, Illinois, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to all employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

- 3/ of alcoholic beverages on Air National Guard facilities and the Naval Communications Area case involved the use of volunteer bartenders. In my view, since both of these cases dealt with matters not traditionally associated with personnel policies, practices and general working conditions of Federal employees, they are factually distinguishable from the instant matter. Further, in the Norfolk Naval Shipyard case, which involved a change in the manner of enforcement of traffic regulations, it was found that no change had occurred in the personnel policies, practices, or general working terms and conditions of employees. Consequently, this case was clearly distinguishable from the instant situation.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.-

December 29, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, as amended,

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally change the established past practice of giving the policemen in the unit exclusively represented by the American Federation of Government Employees, AFL-CIO, Local 2326, advance notice of their assignments, without first notifying the American Federation of Government Employees, AFL-CIO, Local 2326, and, upon request, bargaining with respect to such a proposed change in policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL withdraw and rescind the memorandum issued on March 3, 1978, by the Chief of Police directing that thereafter duty assignments would be made daily prior to the beginning of the shift and would no longer be assigned in advance.

(Agency)

Dated _____ By: _____

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 1060, Federal Office Building, 230 South Dearborn Street, Chicago, Illinois, 60604.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



.....
 In the Matter of :

 DEPARTMENT OF DEFENSE, :
 DEPARTMENT OF THE NAVY, :
 NAVAL ADMINISTRATIVE COMMAND, :
 NAVAL TRAINING CENTER, :
 GREAT LAKES, ILLINOIS :
 Respondent :

 and :

 LOCAL 2326, AMERICAN FEDERATION :
 OF GOVERNMENT EMPLOYEES (AFGE) :
 AFL-CIO :
 Complainant :

Case No. 50-17043(CA)

Appearances:

MARK D. ROTH
 Staff Counsel, American Federation
 of Government Employees, AFL-CIO
 1325 Massachusetts Avenue, N.W.
 Washington, D.C. 20005
 For the Complainant

A. GENE NIRO
 Area Representative
 Northern Field Division
 Office of Civilian Personnel
 666 Summer Street, Building 113
 Boston, Massachusetts 02210
 For the Respondent

Before: MILTON KRAMER
 Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint filed May 23, 1978 alleging a violation of Sections 19(a)(1), (5), and (6) of the

Executive Order. An amended complaint was filed June 2, 1978 alleging a violation of Sections 19(a)(1) and (6). As amended, the complaint alleges that the violation consisted of the Respondent's Chief of Police on March 3, 1978 unilaterally changing a past practice of almost four years of making duty assignments of police officers three days in advance.

On June 6, 1978 the Respondent responded to the complaint denying every allegation of the complaint and making some affirmative allegations. On June 9, 1978 the Respondent moved that the complaint be dismissed. No action was taken on that motion.

On July 12, 1978 the Regional Administrator issued a Notice of Hearing for a hearing to be held on August 15, 1978 in Chicago, Illinois. A hearing was held on that day in that City. Both parties were represented by counsel. The Complainant presented witnesses who were examined and cross-examined. Both parties offered exhibits which were received in evidence, made closing arguments, and filed timely briefs.

Facts

Prior to May 18, 1976 the Guards and Policemen employed by the Great Lakes Naval Training Center (the Respondent) were represented by Local 305, International Federation of Federal Police (IFFP). On that date an amendment of certification certified Local 2326, American Federation of Government Employees (AFGE), AFL-CIO as the certified exclusive representative of that unit. Local 2326 already represented other units of Respondent's employees. No new written agreement was entered into but the parties agreed to keep in effect through July 1, 1977 as to that unit the agreement earlier entered into by IFFP Local 305. No further extensions of that agreement appear in the record but both parties assumed and continued to regard it as continued in effect thereafter and thus tacitly agreed that it should remain in effect until superseded.

The Respondent's base, for patrol purposes, is divided into five areas. The unit employees of about 30 policemen work three eight-hour shifts with ten policemen to a shift under the supervision of a Lieutenant. They work six consecutive days and have two days off. Thus there are normally seven policemen on a shift, sometimes less because of absences. When there are six policemen on duty on a shift one of them works indoors as a radio dispatcher and the other five are assigned one to a patrol car to patrol one of the five patrol areas. When seven are on duty the seventh policeman patrols the entire base in a "roving"

patrol car. In two of the areas on one or two of the shifts the patrolman would be required to leave his patrol car to direct traffic for from sixty to ninety minutes. In all of the areas on all the shifts the patrolman would be required to leave his squad car for varying periods from time to time in the performance of his police duties.

On February 16, 1974 at a regular monthly meeting of Local 305 IFFP and the Respondent, Local 305 raised the question of a policeman receiving advance notice of the assignment he would have on any day. This subject was raised by the union because a policeman might wear his thermal underwear believing he would be working outdoors and find that he was assigned to be the dispatcher that day and find it uncomfortably hot. 1/ Management agreed that advance notice should be given "subject to the need to ensure adequate response in police operations." 2/

Thereafter, and until March 1978, the Respondent gave the policemen in the unit advance notice of their assignments reserving the right, which it exercised and the Union recognized, to change any particular assignment after the policemen reported for duty. The record does not indicate how often such change occurred, but when management felt the need to do so the Union recognized its right to do so. On May 16, 1974, three months after the initiation of the "practice", at another monthly meeting it was agreed that as an alternative to the existing system some other system would be followed but that "alternative" was never implemented.

On March 3, 1978 the Respondent's Chief of Police issued a memorandum to the Watch Commanders (Lieutenants) in charge of the shifts directing that thereafter duty assignments would be made daily prior to the beginning of the shift and would not be assigned in advance. 3/ This was done without prior notice to or negotiation with the Complainant either on the making of the change or its impact. The Complainant thereupon promptly served an unfair-labor-practice charge on the Respondent without first attempting to confer informally; it regarded the March 3 Memorandum as a fait accompli with protest or attempts to negotiate futile. 4/ The memorandum of the Chief of

1/ Tr. 12.
2/ Exh. P-1, p. 2.
3/ Exh. P-4.
4/ Exh. A/S2, items 4(A), 4(C); Tr. 21.

Police was issued to the Lieutenants on March 3, 1978, the Complainant did not learn about it until two or three days later, and it served its unfair-labor-practice charge on March 10.

Despite the memorandum of March 3 the Lieutenants continued to give advance notice of the dispatcher assignments and to some extent of the other assignments. The frequency or regularity of advance notice of the other assignments is not shown in the record.

The Respondent argues that the cessation or partial cessation of advance notice was necessitated by officers taking unscheduled leave when assigned to an undesirable assignment. I cannot make such finding. There is such an allegation in its response to the original complaint, but it is only an allegation. The Respondent produced no witnesses. It attempted to develop such fact by cross-examination of Complainant's witnesses but they vigorously, and under oath, denied it. In such state of the record I cannot find that the change was necessitated by officers taking unscheduled leave when given an undesirable assignment. Such suggestion was first made in May 1974 yet the Respondent continued making the assignments in advance for four more years. The record does not show why the change was made in March 1978.

Discussion and Conclusion

Although initiated informally and never incorporated into the formal agreement, in February 1974 the Respondent started a practice of making the daily assignments of its policemen three days in advance. To be sure it was not a rigid practice. When adopted it was stated to be "subject to the need to ensure adequate response in police operations". With some undeterminable frequency the assignment would be changed after the men reported for work when the Lieutenant or Chief of Police thought it desirable to ensure adequate police response to needs, and the Complainant recognized the right of the Respondent to do so. But the assignments were made at least tentatively in advance and were not changed unless there was a reason to do so. I conclude that it became a practice, loose as it may have been, certainly after continuing for four years. I conclude further that it was a personnel practice affecting working conditions.

The only reason suggested by the Complainant for requesting advance notice in February 1974 was that if a police officer came to work wearing his thermal underwear and was assigned to work as the dispatcher, which was indoor

work, it would be uncomfortably hot and might adversely affect his health. 5/ And the only adverse impact of the change in the practice that the Complainant could ascribe to the change was that the men might not know which kind of clothing to wear.

The change then was a change, albeit a slight one, in a practice, however flexible, affecting a working condition. When a practice has developed into a working condition management may not unilaterally change it without conferring with the union. 6/

The Respondent argues, correctly, that under Section 12(b) of the Executive Order the Respondent retains the right to assign employees. But the procedures by which that right will be exercised is a negotiable subject 7/; and an established practice pertaining to a working condition, especially one adopted upon the union's request, is tantamount to an agreement, and may not unilaterally be altered or abolished.

But here the "established practice" was rather loose. Although advance notice was given, the Respondent reserved the right to change the area assigned after the men reported for work and sometimes (the record does not indicate how often) did so, and the Complainant recognized its right to do so. When the Chief of Police rescinded the "practice" the Complainant did not protest or try to meet to discuss its impact other than promptly to file an unfair-labor-practice charge. The impact of the rescission was minimal. Despite the memorandum of the Chief of Police to the Lieutenants, the officer assigned to the dispatcher's assignment, work done indoors (and some others officers) continued to receive advance notice and so presumably he did not wear thermal underwear in the wintertime. Although on two of the assignments the officers regularly had to leave the squad car to direct traffic for about an hour, all officers had to leave the squad car from time to time while patrolling to attend to their duties. The record does not indicate how many, if any, of the officers actually wore

5/ Tr. 12.

6/ Department of the Navy, Naval Weapons Station, Concord, California, A/SLMR No. 1093 and cases there cited.

7/ AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, FLRC No. 74A-48, 3 FLRC 397 at 403-4.

thermal underwear or how often. Nor does it indicate on how many days between March 1978 (when the "practice" was formally but only partially rescinded) and August 1978 (when the hearing in this case was held) thermal underwear would have been appropriate in Chicago.

In these circumstances, although there was a technical violation of Section 19(a)(6), it approaches if it does not meet the de minimis principle. I suggest that a modification of the approach taken in Vandenberg Air Force Base, 4392d Aerospace Support Group, FLRC No. 47A-77, Rpt. No. 79 and United States Department of the Treasury, Internal Revenue Service, Chicago District, A/SLMR No. 711, 6 A/SLMR 492, 6 A/SLMR Supp. 191, be taken here.

In the Vandenberg case, when the parties reached impasse on one item the Activity stated it would not continue the negotiations on the other items until the impasse was resolved. The union then stated it would file an unfair labor practice charge and the Activity's representatives left the session. The next day the Activity offered to resume negotiations and stated it would not insist on first discussing the item on which impasse had been reached. The Council held that such a slight interruption of the bargaining process was not a violation of the obligation to "negotiate" or "meet and confer".

In the Internal Revenue Service, Chicago District case the violation was even more fleeting. The union had served eighteen proposals and the Activity had taken the position that only four of them were negotiable. At the beginning of a seven-hour negotiating session the Activity stated that it would not negotiate on the four admittedly negotiable proposals unless the union first agreed that the other fourteen were non-negotiable. The union refused and the parties immediately proceeded with negotiations and even reached agreement on some items. The infraction here lasted no longer than the twinkle of the legal eye. The complaint was dismissed.

Here, it is not the duration of the violation that renders it without significance but the effect that is virtually without significance. First, the "practice" was rather loose; the officers were given notice of the area each would patrol but the Respondent reserved the right to change the assignment after the men reported for work, sometimes did so, and the Complainant recognized the right to do so. The rescission of the "practice" was not complete. The man who would be the dispatcher, the one to whom knowledge of whether he should wear his thermal underwear would

be most important, was still given advance notice. The others were still sometimes given advance notice. It is not known how many, if any, wore thermal underwear when on patrol. It is doubted that any did so between March and August, 1978, the months of the rescission of the practice and the hearing. The Complainant did nothing to initiate conference about the matter except promptly to file the charge in which it said it was ready to meet. The impact of the change was minimal if there was any at all.

I conclude that ordering a restoration of the "practice" is not necessary or appropriate to effectuate the policies of the Executive Order. All that would be appropriate would be to order the Respondent, upon request of the union, to meet and confer on a modification of the March 3, 1978 Memorandum of the Chief of Police and the impact of that memorandum or its modification.

RECOMMENDATION

I recommend that the Assistant Secretary issue an order, in the form attached hereto as Appendix A, that the Respondent, upon request of the Complainant, meet and confer with it on a modification of the March 3, 1978 memorandum of the Chief of Police and the impact of that memorandum or its modification.



MILTON KRAMER
Administrative Law Judge

Dated: October 27, 1978
Washington, D.C.

MK/mm1

ORDER

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.326(b) of the Regulations, the Assistant Secretary for Labor-Management Relations orders the Naval Administrative Command, Naval Training Center, Great Lakes, Illinois, upon request within 90 days of Local 2326, American Federation of Government Employees or any other exclusive representative of guards and policemen employed by it, to meet and confer on a modification of the March 3, 1978 memorandum of the Chief of Police to all Watch Commanders which stated that duty assignments will not be assigned in advance, and on the impact of that memorandum or its modification.

FRANCIS X. BURKHARDT
Assistant Secretary of Labor for
Labor-Management Relations

December 29, 1978

A/SLMR No. 1176

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS
A/SLMR No. 1176

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS

Respondent

and

Case No. 22-08900(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, Local 3615

Complainant

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3615, (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by virtue of its refusing to negotiate with the Complainant concerning the impact and implementation of the decision by the Respondent to change the method of recording time spent on Civil Actions Branch cases.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order. In this regard, he found that the unilateral change in the method of recording time spent on Civil Actions Branch cases had a substantial impact on the bargaining unit employees and that the Respondent's bargaining obligation in connection with such change was not fulfilled.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation and ordered the Respondent to cease and desist from the conduct found violative of the Order and to take certain affirmative actions.

DECISION AND ORDER

On November 7, 1978, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the instant case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, ^{1/} conclusions and recommendation.

^{1/} In reaching the disposition herein, I find it unnecessary to pass upon the apparent rationale of the Administrative Law Judge that in order to find a violation in this matter it would have to be reasonably foreseeable that the change involved would have a substantial impact on employee working conditions.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Social Security Administration, Bureau of Hearings and Appeals, Arlington, Virginia, shall:

1. Cease and desist from:

(a) Instituting a change in the method of filling out the "Manpower Utilization Report" with respect to employees represented exclusively by American Federation of Government Employees, AFL-CIO, Local 3615, without affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be utilized in effecting such change and on the impact the change will have on adversely affected unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

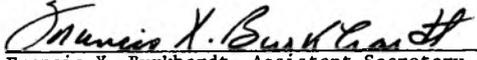
2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Upon request by American Federation of Government Employees, AFL-CIO, Local 3615, meet and confer, to the extent consonant with law and regulations, concerning the procedures to be utilized in affecting a change in the method of filling out the "Manpower Utilization Report" and the impact of the change on adversely affected unit employees.

(b) Post in the Arlington, Virginia, Office of the Bureau of Hearings and Appeals, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Bureau of Hearings and Appeals and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
December 29, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

and in order to effectuate the policies of

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT institute a change in the method of filling out the "Manpower Utilization Report" with respect to employees represented exclusively by the American Federation of Government Employees, AFL-CIO, Local 3615, without affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be utilized in effecting such change and on the impact the change will have on adversely affected unit employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Executive Order.

WE WILL, upon request by the American Federation of Government Employees, AFL-CIO, Local 3615, meet and confer, to the extent consonant with law and regulations, concerning the procedures to be utilized in effecting a change in the method of filling out the "Manpower Utilization Report" and the impact of the change on adversely affected unit employees.

(Agency or Activity)

Dated: _____ By: _____

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 Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: 14120 Gateway Building, 3535 Market St., Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036



..... :
In the Matter of :
SOCIAL SECURITY ADMINISTRATION, :
BUREAU OF HEARINGS AND APPEALS :
Respondent :
and :
AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, AFL-CIO, Local 3615 :
Complainant :
..... :

Case No. 22-08900 (CA)

JULIAN BROWNSTEIN, ESQUIRE
Social Security Administration
Bureau of Hearings and Appeals
P.O. Box 2518
Washington, D.C. 20013
For the Respondent

ALBERT B. CARROZZA, ESQUIRE
American Federation of Government
Employees, AFL-CIO, Local 3615
P.O. Box 147
Arlington, Virginia 22210
For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on March 22, 1978, under Executive Order 11491, as amended, by the American Federation of Government Employees, AFL-CIO, Local 3615, (hereinafter called the Complainant or AFGE), against the Social Security Administration, Bureau of Hearings and Appeals (hereinafter called the Agency or Respondent), a Notice of Hearing on Complaint was issued by the Regional Administrator for the Philadelphia, Pennsylvania Region on June 13, 1978.

The Complaint alleges, in substance, that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in refusing to negotiate with the AFGE concerning the impact and implementation of the decision by the Respondent to change the method of recording time spent on Civil Actions Branch cases.

A hearing was held in the captioned matter on August 3, 1978, in Washington, D.C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issue involved herein.

Upon the basis of the entire record ^{1/}, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

AFGE, Local 3615, AFL-CIO, represents a number of Hearings and Appeals Analysts assigned to Respondent's Disability Branch, Health Insurance Branch and Retirement and Survivors Branch. The aforementioned Hearings and Appeals Analysts as a general rule customarily analyze various cases which have not become the subject of civil actions in the courts. The analysis of those disability cases or decisions which have reached the court stage are generally handled by other Analysts assigned to the Civil Actions Branch (CAB). However, from time to time when the Civil Actions Branch was overloaded with work, some of the Hearings and Appeals Analysts from the other branches would be detailed for periods of 30, 60 or 90 days to handle the Civil Actions Branch cases. In recent years the amount of assignments to Civil Actions Branch cases increased to such an extent that Respondent saw fit in the latter part of 1976 to amend the job description of the Hearings and Appeals Analysts to include CAB work.

Despite the fact that the CAB work was included in the job description of the Hearings and Appeals Analysts not permanently assigned to the CAB branch, the Hearings and Appeals Analysts listed the time spent on CAB cases under the "Miscellaneous" category on the "Manpower Utilization Report" which was used to record the time spent on various projects during each Analyst's respective work day. The "Miscellaneous" category among other categories on the "Manpower Utilization

^{1/} In absence of any objection, Complainant's motion to correct the transcript is hereby granted. The corrections are set forth in Appendix A attached hereto.

Report" did not enter into the calculations used to arrive at an Analyst's "Hours Per Disposition" statistics. Thus, if a Hearings and Appeals Analyst encountered difficulty with a CAB case and spent an inordinate amount of time thereon due to the fact that he was not familiar with the case law involved, etc., such difficulty would not be reflected in his case production figures. ^{2/}

On or about January 26, 1978; Mr. Semans submitted to James Marshall, president of AFGE Local 3615, a draft memorandum for review. Citing the fact that the projected volume of CAB cases would make it necessary to use Analysts assigned to branches outside the CAB on a permanent basis, the memorandum stated in pertinent part as follows:

...the time spent on processing CAB cases will no longer be reported by the analysts under "miscellaneous" time on their manpower utilization reports nor included in "other hours" in the section and branch reports. Instead, these case action. . . will be counted just like any other Appeals Council case actions. . .and the time spent on processing these cases will be included in "hours in casework."

Pursuant to a request from Mr. Marshall dated January 30, 1978, a meeting was held between Union and Management representatives on February 6, 1978, for purposes of discussing the January 26, 1978, draft memorandum concerning the proposed change in the manner of recording the CAB work on the manpower utilization reports. During the course of the meeting Mr. Marshall made it clear that the Union was opposed to the proposed change on the ground that it would increase the workload of the affected analysts and have an adverse effect on their performance appraisals. Mr. Marshall further pointed out that it would affect the progression of the GS-12 analysts since they did not have the opportunity to be trained and/or perform the CAB work which was included in the position description of the GS-13 analysts. The Union offered no specific proposals other than a retention of the status quo. The meeting ended with Mr. Marshall requesting that he be informed of management's final decision with regard to the proposed change before it was implemented.

^{2/} According to the testimony of Mr. Semans, Assistant Bureau Director, Division of Appeals Operations, although there are no production standards or quotas, productivity is one of 13 or 14 items taken into consideration in preparing an employee's appraisal. Further, according to Mr. Semans, the time spent on CAB cases would be identified separately under the heading "miscellaneous".

On February 9, 1978, Mr. Nowicki, Jr., Branch Chief, Disability Branch, informed Mr. Marshall by telephone that the Respondent had decided to implement the change in the manner of recording the CAB work performed by analysts assigned to branches outside the CAB. On the same day, Mr. Marshall directed and sent a memorandum to Mr. Semans wherein he requested that Respondent "meet, confer, and negotiate, in good faith, regarding the impact and implementation" of its decision.

On February 14, 1978, Mr. Semans issued a memorandum in response to Mr. Marshall's February 9, 1978, request for bargaining over impact and implementation. The memorandum reads as follows:

At your request, representatives of the division met with Local 3615 on February 6, regarding the impact and implementation of the proposal to modify the recording procedures for certain casework items.

Your subject memorandum does not indicate what you now wish to negotiate nor did you raise specific matters for negotiations during the earlier meeting.

Accordingly, we are issuing instructions to implement these procedures.

Also, on February 14, 1978, Mr. Semans notified the various branch chiefs that the proposed change in the manner of reporting CAB work would be effective March 1, 1978. It appears from the record that the change was implemented without any further negotiations with the Union.

With regard to the amount of CAB work performed by the analysts involved herein, the record indicates that they were assigned approximately 1 case per month.

Discussion and Conclusions

The only questions to be determined herein is whether the Respondent was obligated to bargain with the AFGE with respect to the impact of its decision to change the method of recording CAB cases and, if so, whether it did in fact bargain.

Respondent takes the position that it was under no obligation to bargain with the AFGE since the change involved herein did not "materially affect, and have a substantial impact on personnel policies, practices and working conditions"

Alternatively, Respondent takes the position that it did in fact bargain with the AFGE on February 6, 1978, and that if the AFGE was dissatisfied with Respondent's decision, the AFGE should have submitted the matter to the Federal Services Impasses Panel.

The AFGE on the other hand takes the position that the change did have a substantial impact on the Analysts and that the Respondent, in violation of Sections 19(a)(1) and (6) of the Executive Order, refused to honor the AFGE's request for bargaining thereon.

Contrary to the contention of the Respondent, I find that the change involved herein could have a substantial impact on the working conditions of the Analysts outside the CAB. Inasmuch as the time spent on CAB cases was to be included in an analyst's case disposition statistics which were relied on in part in completing his yearly appraisal it can not be argued that there would be no impact. While it is true, on the basis of the current workload i.e., one case per month, the impact might well be slight, the fact remains that there is no guarantee that the CAB assignments will not increase in the future and have a significant impact on the case disposition statistics of the analysts. If it is reasonably foreseeable that the immediate change might in the future have a substantial impact on the working conditions of employees, then Respondent is obligated to bargain over impact. To hold otherwise would make impact bargaining in most cases a nullity since the effect or impact of many changes imposed by management do not manifest themselves until many months down the line. Fc. Dept. of the Treasury, IRS Manhattan District, A/SLMR No. 841.

With respect to the second issue, i.e., whether Respondent did in fact bargain with the AFGE concerning the impact of its decision to change the manner in reporting CAB case work, I find that the Respondent did not fulfill the obligations imposed by the Executive Order. The February 6 meeting relied upon by Respondent was specifically convened for purposes of discussing the proposed revision of the manner in which CAB work would be recorded on the manpower utilization report. While it is true that the possible impact of the change on the analysts involved was touched upon or mentioned during the meeting, the main thrust or subject of the meeting was the proposed change itself. No firm agreement was reached at the meeting wherein the AFGE vigorously argued for a retention of the status quo. In fact the meeting ended with a request from the AFGE that it be informed of the Respondent's final decision on the matter. If Respondent had acceded to the AFGE's position, then, of course, there would have been no change in working conditions and consequently no possible

impact. However, such was not the case. Accordingly, in the absence of any substantive evidence that the impact of the proposed change was fully discussed during the February 6 meeting, the AFGE was entitled to an opportunity to meet and confer thereon prior to the implementation of the change. Having denied the AFGE's request for impact bargaining, Respondent violated Sections 19(a)(1) and (6) of the Order. 3/

Recommendation

Having found that Respondent has engaged in conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the Order.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Social Security Administration, Bureau of Hearings and Appeals, Arlington, Virginia, shall

1. Cease and desist from:

(a) Instituting a change in the method of filling out the "Manpower Utilization Report" with respect to employees represented exclusively by American Federation of Government Employees, AFL-CIO, Local 3615, without affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact the change will have on employees adversely affected by such action.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended.

3/ Contrary to the contention of Respondent's agents as reflected in Mr. Semans February 14, 1978, memorandum, I find no requirement either in the Executive Order or the (continued on next page)

(a) Upon request by American Federation of Government Employees, AFL-CIO, Local 3615, meet and confer, to the extent consonant with law and regulations, concerning the impact of the change on adversely affected employees.

(b) Post in the Arlington, Virginia Office of the Bureau of Hearings and Appeals, copies of the attached notice marked Appendix "B" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Director of the Bureau of Hearings and Appeals and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notice to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.


BURTON S. STERNBURG
Administrative Law Judge

Dated: November 7, 1978
Washington, D.C.

3/ - continued

decisions of the Assistant Secretary and Federal Labor Relations Council that a Union's request for impact bargaining must set forth or include its proposals thereon.

BSS:hjc

N O T I C E T O A L L E M P L O Y E E S

P U R S U A N T T O

A D E C I S I O N A N D O R D E R O F T H E

A S S I S T A N T S E C R E T A R Y O F L A B O R F O R L A B O R - M A N A G E M E N T R E L A T I O N S

a n d i n o r d e r t o e f f e c t u a t e t h e p o l i c i e s o f

E X E C U T I V E O R D E R 1 1 4 9 1 , A S A M E N D E D

L A B O R - M A N A G E M E N T R E L A T I O N S I N T H E F E D E R A L S E R V I C E

We hereby notify our employees that:

WE WILL NOT institute a change in the method of filling out the "Manpower Utilization Report" with respect to employees represented exclusively by the American Federation of Government Employees, AFL-CIO, Local 3615, without affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact the change will have on the employees adversely affected by such action.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Executive Order.

WE WILL, upon request by the American Federation of Government Employees, AFL-CIO, Local 3615, meet and confer, to the extent consonant with law and regulations, concerning the impact of the change in the method of filling out the "Manpower Utilization Report" on adversely affected employees.

(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

December 29, 1978

A/SLMR No. 1177

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF RETIREMENT AND SURVIVORS
INSURANCE

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF RETIREMENT AND SURVIVORS
INSURANCE
A/SLMR No. 1177

Respondent

and

Case No. 22-08523(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, (Complainant) alleging that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by unilaterally implementing three new policy directives under an existing labor agreement while negotiations on a new agreement were continuing with certain issues pending before the Federal Service Impasses Panel (Panel).

The Administrative Law Judge determined that the Respondent did not violate Section 19(a)(1), (2) and (6) of the Order and recommended that the complaint be dismissed in its entirety. In this regard, he found that the three personnel policies in question were unrelated to the issues before the Panel; that with regard to the directive relating to the scheduling and use of general purpose rooms there was no change in the existing space request procedure and, furthermore, that agreement on this procedure had been reached between the local union and management in a prior publication entitled, "Our New Building"; and that with regard to the final two directives, "Overtime Policy and Practice" and "Performance Awards," drafts of these two publications were delivered to the local union president and there was no evidence to indicate that, at any time, either the Complainant or the local union requested bargaining on these matters.

Noting particularly the absence of exceptions by the Complainant, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

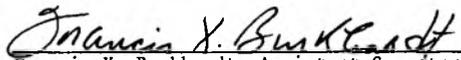
On October 31, 1978, Administrative Law Judge William A. Gershuny issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order. ^{1/}

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, including the exceptions and supporting brief filed by the Respondent, and noting particularly the absence of exceptions by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-08523(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 29, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

^{1/} The Respondent excepted to the Administrative Law Judge's finding that under the negotiated agreement it was obligated to negotiate, upon request of the local union, concerning matters relating to personnel policies, practices and working conditions at regional centers.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



on a new agreement were continuing and certain issues were pending before the Impasse Panel, in violation of Sections 19(a)(1), (2) and (6) of Executive Order 11491, as amended.

II

At a hearing conducted in Chicago, Illinois on July 31, 1978, the parties stipulated, and I find, that Complainant, through its National Council of Social Security Payment Center Locals, is the exclusive representative for a national bargaining unit consisting of all non-supervisory employees at the Activity's six regional program service centers, of which the Great Lakes Center is one; that affiliated with the Council are six local unions, of which Local 1395, Great Lakes is one; and that at all relevant times there remained in effect, by extensions, a Master Agreement effective March 15, 1974 (A/S Exh. 2; Tr. 6).

In addition, there is no dispute that contract negotiations commenced on February 7, 1977; that Complainant requested the assistance of the Impasse Panel on March 4, 1977 as to issues wholly unrelated to the subject of the three personnel policy changes in question (A/S Exh. 1; Tr. 80; Resp. Exh. J); and that no new contract has become effective.

The first publication relates to the scheduling and use of general purpose rooms in the Activity's new building. Mr. Zaltman, a local union vice-president, testified that the publication, "Guide GLPSC-BRSI-110", issued April 20, 1977, changed prior procedures by requiring that requests for space be in writing, thus resulting in delays in procuring approval. The building manager, Mr. Lara, testified that the requirement of a written request was present in the prior published procedure (Resp. Exh. D) and that the new publication was issued principally to deal with the added facilities available in the new building. I credit the latter and find that this publication resulted in no change of the space request procedure. The record evidence also is uncontroverted that agreement was reached in the Fall of 1976 concerning the wording of a publication entitled "Our New Building", which, in part, describes the available space for meetings and training and indicates the specific procedures for reserving use of the rooms would be subsequently established (Resp. Exhs. B and C, p. 27).

The second publication, GLPC-BRSI Guide 4-1, "Overtime Policy and Practice," issued March 18, 1977, adds a requirement that the overtime sign-in sheet reflect the employees'

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IN THE MATTER OF :

SOCIAL SECURITY ADMINISTRATION :
BUREAU OF RETIREMENT AND SURVIVORS :
INSURANCE, :

Activity :

and :

AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, :

Complainant :
.....

: Case No. 22-08523 (CA)

Francis X. Dippel
1220 West Highrise Building, S.S.A.
6401 Security Boulevard
Baltimore, Maryland 21235

For the Respondent

James P. Jones
Labor Relations Specialist
Contract and Appeals Division
American Federation of Government Employees
(AFL-CIO)
1325 Massachusetts Avenue, Northwest
Washington, D.C. 20005

BEFORE: WILLIAM A. GERSHUNY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The Activity, by complaint dated September 9, 1977, is charged with unilateral implementation of certain personnel policies under an existing labor agreement while negotiations

grade and step. Mr. Cunningham, Respondent's labor relations specialist, testified that on November 19, 1976, he gave copies of a preliminary draft to Local Union President Jones and requested the Union's comments by the following week, but that no response was received. (Resp. Exh. J; Tr. 75-77). Mr. Jones was not called to testify and the Executive Vice-President, Mr. Langster, conceded that he does not know if Mr. Jones had any discussions with the Activity as to any of the publications. He testified that the local's record-keeping system was maintained by volunteers and that he could find no evidence of the draft having been received in the office of the local union. I credit the testimony of Mr. Cunningham and find that the draft was delivered and the local union given an opportunity to comment.

The third publication, GLPS-BRSI Guide 5-1, "Performance Awards," issued March 15, 1977, alters the prior procedure by introducing the employee's leave record as an additional factor and establishing production standards as another factor. The Assistant Director of Management, Ms. Carothers, testified that she transmitted a draft to Mr. Jones on January 24, 1977, requesting the local's comments by February 1, but that no response was received (Resp. Exh. A; Tr. 32-35). Again Mr. Jones did not testify and Complainant's evidence was limited to testimony that a search of the files failed to reflect receipt of the document. I credit the testimony of Mrs. Carothers and find that the draft was delivered and the local union afforded an opportunity to comment.

There is no evidence to indicate that, at any time, either Complainant or the local union requested bargaining on any of these three publications.

II

The obligation of Respondent, under Article 2, Section e of the existing contract, to negotiate, on request of the local union, matters relating to personnel policies, practices and working conditions at regional centers is now established and, accordingly, there is no need for a discussion of Respondent's principal contention that its sole obligation is to "consult." Dept. of HEW, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 1101 (Aug. 16, 1978). However, there having been no such request to negotiate following notice to the local union of an intent to effect changes in performance award and overtime sign-in procedures, Respondent's publication of these changes is not violative of the Executive Order, unless it is otherwise prohibited from doing so by reason of the fact that certain unspecified, but unrelated, issues are pending before the Impasse Panel.

Citing U.S. Army, Philadelphia Corp of Engineers, A/SLMR No. 673 and Dept. of the Air Force, Kelly AFB, Texas, A/SLMR No. 540, Complainant contends that the Activity may not implement such changes either before or after impasse. Complainant's interpretation of these decisions is incorrect and its reliance on them, in any event, misplaced, for they are inapplicable to the facts of this case as established by the record evidence. First, unlike the situation in the cited cases where no contract was in existence, the parties here had agreed to extend the life of the predecessor contract and the procedural changes were being implemented in accordance with the existing contract. Second, Respondent gave notice of the proposed changes and negotiations were not requested. And finally, the procedural changes were identical with those initially proposed.

RECOMMENDATION

For the reasons stated above, it is recommended that the Complaint be dismissed.


WILLIAM A. GERSHUNY
Administrative Law Judge

Dated: October 31, 1978
Washington, D.C.

WAG:seg

December 29, 1978

A/SLMR No. 1178

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
NEW YORK AIR ROUTE TRAFFIC
CONTROL CENTER
A/SLMR No. 1178

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
NEW YORK AIR ROUTE TRAFFIC
CONTROL CENTER

Respondent

and

Case No. 30-08197(CA)

PROFESSIONAL AIR TRAFFIC
CONTROLLERS ORGANIZATION,
MEBA, AFL-CIO, LOCAL UNION 201

Complainant

DECISION AND ORDER

This case involved an unfair labor practice complaint filed by the Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, Local Union 201 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally negating an agreement between the parties when it reversed an oral decision on a grievance processed under the parties' negotiated agreement.

The Administrative Law Judge found that the Respondent did not violate Section 19(a)(1) and (6) of the Order and recommended that the complaint be dismissed in its entirety. In this regard, he found that the management official, who mistakenly relayed incorrect information to the Complainant, did not possess authority to render a binding decision on the Respondent's behalf and consequently his mistake did not bind the Respondent.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

On October 23, 1978, Administrative Law Judge Eli Nash, Jr., issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

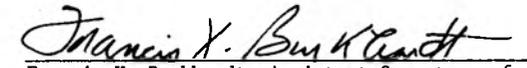
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-08197(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.

December 29, 1978


Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036



Administration, New York Air Route Traffic Control Center (hereinafter called the Respondent or Agency), a Notice of Hearing on Complaint was issued by the Regional Administrator for Labor-Management Services Administration, U.S. Department of Labor, New York Region, on May 24, 1978.

The complaint alleges, in substance, that Respondent unilaterally and without notice changed an existing working condition in derogation of the Union's right to consult, confer or negotiate about this change and its implementation and impact and thereby violated Sections 19(a)(1) and (6) of the Order.

A hearing was held in this matter before the undersigned in Ronkonkoma, New York. Both parties were represented and afforded full opportunity to be heard, adduce evidence, and to examine and cross-examine witnesses. Thereafter both parties filed briefs which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all of the testimony and the evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

The Complainant herein has exclusive recognition for a unit of employees in the Respondent's New York Air Route Traffic Control Center. On September 2, 1977, a bargaining unit employee Mr. Jack Jacobs filed a formal grievance AEA-77-104-2 NY under Article 7, Section 3, Step 2, of the parties negotiated grievance procedure.

The negotiated agreement contains provision related to the administration of matters covered by the agreement. Article 7, Disputes Settlement and Procedure relating to the grievance procedure reads as follows:

Section 1. This Article provides the procedure for the timely consideration of grievances over the interpretation or application of this agreement. This procedure does not cover any other matters for which statutory appeals procedures exist and shall be the exclusive procedure available to the Parties and the employees in the unit for

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In the Matter of

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
NEW YORK AIR ROUTE TRAFFIC CONTROL
CENTER

Agency

Case No. 30-08197(CA)

and

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, LOCAL UNION 201, MEBA,
AFL-CIO,

Complainant
.....

ROBERT FINNEGAN

Special Assistant to Eastern Regional
Vice President
1455 Veterans Memorial Highway
Hauppauge, New York 11787

For the Complainant

JOSEPH WINKLER

Labor Relations Specialist for Federal
Aviation Administration
Federal Aviation Administration - Eastern Region
Federal Building
John F. Kennedy International Airport
Jamaica, New York 11430

For the Agency

Before: ELI NASH, JR.

Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on November 1, 1977 and an amended complaint filed in March 9, 1978 under Executive Order 11491, as amended, (hereinafter called the Order) by Professional Air Traffic Controllers Organization, Local 201 against Department of Transportation, Federal Aviation

resolving grievances over the interpretation or application of this agreement. Any employee, group of employees or the Parties may file a grievance under this procedure. The Parties shall cooperate to resolve grievances informally at the earliest possible time and at the lowest possible supervisory level.

Section 2. Employees are entitled to be assisted by the Union in the presentation of grievances. Any employee or group of employees covered by this agreement may present grievances and have them adjusted, without the intervention of the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given opportunity to be present at the adjustment. This right of individual presentation does not extend beyond Step 2 of this procedure and does not include the right of taking the matter to arbitration, unless the Union agrees to do so.

Section 3. Grievances Filed by Employees.

Step 1: An aggrieved employee shall request informal resolution of his grievance from his immediate supervisor (who may be the Facility Chief) within 15 calendar days of the date of the event giving rise to the grievance or within 15 calendar days of the time the employee may have been reasonably expected to have learned of the event. The supervisor shall promptly arrange for a meeting at a mutually agreeable time, but no later than 15 calendar days following the date of the employee's request, to discuss the grievance. The employee and his representative will be given a reasonable amount of official time to present the grievance if they are otherwise in a duty status. The supervisor shall answer the grievance either orally or in writing within 10 calendar days following the meeting.

Step 2: If the employee or the Union is not satisfied with the answer, a formal grievance may be submitted to the Facility Chief within 10 calendar days following the receipt of the answer. The grievance shall be submitted in writing on a Grievance Form and shall contain the name of the grievant, the Article and Section of the agreement alleged to have been violated, the corrective action desired, the name of his Union representative and whether he wishes to make an oral presentation. If requested, the Facility Chief shall, prior to making a decision, afford the employee and/or Union representative an opportunity to present the grievance orally.

The employee and his representative will be given a reasonable amount of official time to present the grievance if they are otherwise in a duty status. The decision of the Facility Chief shall be delivered to the employee and/or Union representative within 15 calendar days following receipt of the written grievance. The decision shall be delivered personally to the employee, and/or his representative, if he is on duty. Otherwise, another appropriate method of delivery shall be used.

Step 3: If the Union is not satisfied with the decision, the Union may within 15 calendar days following receipt of the decision or the day the answer was due, advise the Chief, Labor Relations Branch, Regional headquarters, by certified mail, that it desires the matter be reviewed by the Chief, Air Traffic Division or his designee. If the Regional Vice President of the Union or his designee so requests, a meeting with the Air Traffic Division Chief or his designee will be held as promptly as possible but no later than 15 calendar days following the receipt of the request to discuss the grievance prior to the final Regional decision. The Union will be notified by certified mail within 15 calendar days of the Regional decision.

Other pertinent provisions of the agreement in this case are as follows:

Article 2 - Recognition and Union Representative and Rights.

Section 3. The union may designate facility representative at each facility. The Union may designate one representative and one designee for each team, crew, or group, as appropriate, in each facility. Normally on each tour of duty, the Union may designate one representative to deal with first and second level supervisors. At the team representative's option, he may designate an alternate to act on his behalf in dealing with first and second level supervisors. In addition, the Union shall designate in writing one principal representative and/or his designee may deal with the Facility Chief.

Section 4. During meetings between the Facility Chief and/or his designee and the principal Union representative and/or his designee, if such representative desires he may be accompanied by one other representative.

Section 7. When a Union representative is detailed to a supervisory position for more than six consecutive work days, he shall be required to name his designee to act in his place as a Union representative. When other qualified employees are available, the principal facility representative or his designee shall not be required to perform supervisory duties.

Section 8. The Union representatives specified in the above sections of this Article are the only individuals authorized to represent the Union in dealings with FAA officials at the respective levels specified in this Article.

Section 9. The principal facility representative and/or his designee shall be granted official time if otherwise in a duty status to deal with the Facility Chief and/or his designee. Such meetings shall be held at mutually agreeable times. At other meetings called by the Facility Chief and/or his designee, Union participants shall be on official time.

Section 13. Union facility representatives or their designees may be granted excused absence for short periods of time, ordinarily not to exceed 8 hours at a time, to receive information, briefings, or orientation by the Union and Employer relating to the Federal Labor Relations Program. Such meetings may be held locally, regionally, or nationally. The Union shall submit an agenda for meetings under this Article to the appropriate official. Determinations as to whether an individual can be spared from duty shall be made by the Employer, based solely on operational requirements.

Section 15. Each principal facility representative or his designee shall be granted 8 hours of excused absence to receive orientation on the meaning of the articles of the Agreement.

The grievance herein proceeded in accordance with the negotiated Agreement to Step 3 of the grievance proceeding. A Step 3 meeting was held on September 15, 1977. Complainant Union's President John Seddon represented the grievant at the formal meeting. The Respondent Agency was represented by Deputy Chief Howard Rubenstein and a Personnel Specialist, Mr. Macey. The meeting concluded without incident. However, at the conclusion of the meeting the Respondent requested an extension to answer the grievance so that Mr. Rubenstein could confer with the team supervisor involved in the grievance. Also, the lack of clerical staff to prepare

the grievance in typed or written form was cited. Seddon states that he informed Respondent that he could not give an extension and while he appreciated the problem with the clerical staff he would accept an oral decision no later than September 16 and the written decision could be filed in writing on Monday, September 19.

Subsequently, on September 16, Seddon received a telephone call from Mr. Macey. According to Seddon, he was told that the grievance was sustained in total and that he would receive the follow-up in writing on Monday.

Mr. Rubenstein states that on September 16, Mr. Macey reminded him that the decision was due on the grievance. According to Rubenstein, he informed Macey to contact Seddon and tell him that he was looking at the grievance, but that he had not decided. However, he might sustain part of the grievance. He further stated that Seddon would probably get a written decision the following Monday. Clearly, this is not the information which was relayed to Seddon on the 16th.

Thereafter, on September 20 a written decision on the grievance was issued by Mr. Pol, the Facility Chief. That decision which was not received by Seddon until September 24 denied the grievance.

II. Contentions of the Parties

The Complainant contends that the September 16 notification from Mr. Macey that the grievance was sustained should be binding on the Respondent in this matter. It therefore argues that the time limits of the Agreement for written notification were disregarded and the oral response sustaining the grievance should be honored. The Respondent, on the other hand, states that there was a misunderstanding based primarily on Mr. Macey's erroneously relaying information to Mr. Seddon which was not correct. In its view, the Complainant is merely seeking through this forum to have an unfavorable decision set aside and to circumvent the arbitration process. Finally, Respondent contends that the parties should be left to their own remedies under the terms of their collective bargaining agreement for resolving the grievance dispute.

III. Discussion, Conclusions and Recommendations

It is well established that interference with the filing or processing of grievances may be violative of Section 19(a) (1) and (6) of the Executive Order. National

Labor Relations Board, Region 17, and National Labor Relations Board, A/SLMR No. 670; Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 334; Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87.

The instant grievance was filed under a negotiated grievance procedure containing specific time limitations for responses. The Respondent contended that responses to grievances had in the past been in writing while the Complainant argues that there is no proviso in the written agreement requiring decisions on grievances to be "received" in writing. In fact, it states that alternate means may be used. Therefore, its position is that the failure to honor the oral statement that the grievance was sustained was bad faith bargaining and in violation of Section 19(a)(1) and (6). The Assistant Secretary has previously held that alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute clear, unilateral breaches of the agreement, are not deemed to be violative of the Order. Under such circumstances, the aggrieved party's remedy for such matters lies within the grievance machinery of the negotiated agreement, rather than through the unfair labor practice procedure. Department of the Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624.

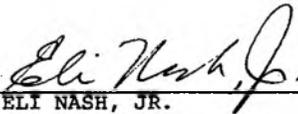
If it were established that Respondent reneged on an oral agreement to sustain the grievance herein such action would constitute a clear, unilateral breach of the negotiated agreement, and be violative of the Order. However, the only evidence of such an agreement to sustain the grievance occurred in a telephone conversation between Union President Seddon and the Respondent's personnel specialist, Mr. Macey. Contrary to the Complainant's contention, there is no evidence of record which establishes Mr. Macey's authority to bind the agency to an agreement in this matter. While Mr. Macey appeared to have been present at grievance proceedings on the agency's behalf there is no indication that he had authority to make decisions or that he exercised any such authority in these matters but, that he acted only upon decisions of the Facility Chief or Acting Chief. Mr. Rubenstein, Acting Chief of the Facility testified that Mr. Macey was not acting upon his instructions and that while he had told Mr. Macey that a part of the grievance might be sustained, his instructions to Macey were to get more time to file the written response to the grievance. Without a showing that Mr. Macey had authority to render a binding

decision on the agency's behalf, I am constrained to find that he was mistaken in his communication with Mr. Seddon and that his mistake does not bind the agency. Interestingly, Mr. Macey, who has since retired, was not called by either party to testify at the hearing. Although there is considerable conflicting evidence as to the parties intent in this matter there is no extrinsic evidence in the record that either confirms or casts doubt on the veracity of the conflicting testimony, and it cannot be fairly said that the weight of evidence on the issue favors either party. It is axiomatic that where the evidence is evenly balanced the party having the burden of proof has failed to sustain that burden. Consequently, it must be concluded that the Complainant has failed to prove by a fair preponderance of the credible evidence that Respondent agreed verbally to sustain the grievance in its entirety.

In all the circumstances of the case and considering the totality of the conduct involved it is concluded that the Respondent's conduct does not constitute a clear and unilateral breach of the agreement and it is, therefore found, not be violative of Section 19(a)(1) and (6) of the Order.

Recommendation

Having found that the Complainant has failed to prove by a preponderance of the evidence that the Respondent has engaged in certain conduct prohibited by Section 19(a)(1) and (6) of Executive Order 11491, as amended, it is recommended that the complaint be dismissed in its entirety.



ELI NASH, JR.
Administrative Law Judge

Dated: 23 OCT 1978
Washington, D.C.

EN:mjm

UNITED STATES DEPARTMENT OF LABOR
 ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
 SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
 PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL AERONAUTICS AND SPACE
 ADMINISTRATION, LEWIS RESEARCH CENTER,
 CLEVELAND, OHIO
 A/SLMR No. 1179

NATIONAL AERONAUTICS AND SPACE
 ADMINISTRATION, LEWIS RESEARCH CENTER,
 CLEVELAND, OHIO

Respondent

and

Case No. 53-10705(CA)

LEWIS ENGINEERS AND SCIENTISTS ASSOCIATION
 LOCAL 28, IFPTE, AFL-CIO/CLC

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator Kenneth M. Bazar's Order Transferring Case to the Assistant Secretary of Labor in accordance with Sections 203.5(b), 203.7(a)(4), and 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the parties' stipulation of facts, accompanying exhibits and briefs, 1/ the Assistant Secretary finds:

The complaint herein alleges that the Respondent, National Aeronautics and Space Administration, Lewis Research Center, Cleveland, Ohio, violated Section 19(a)(1) and (6) of the Order by conducting a "Secretarial/Clerical Survey" among certain bargaining unit employees "without first consulting or conferring" with the employees' exclusive representative.

The undisputed facts, as stipulated by the parties, are as follows:

The Complainant, Lewis Engineers and Scientists Association, Local 28, IFPTE, AFL-CIO/CLC, was certified on April 12, 1978, as the exclusive representative of a unit of both professional and nonprofessional employees employed by the Respondent. 2/ On May 8, 1978, Mr. Harold D. Wharton, Assistant to the Director of Administration at the Respondent,

1/ The Assistant Secretary's consideration of the record in the instant case is limited to those matters incorporated within the stipulation of facts and accompanying exhibits, and does not encompass those supplemental facts and assertions which were alleged in the parties' briefs but not contained in the parties' stipulation.

2/ There is no evidence of any negotiated agreement between the parties.

This case involved an unfair labor practice complaint filed by the Lewis Engineers and Scientists Association, Local 28, AFL-CIO/CLC (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by conducting a survey among certain bargaining unit employees without first "consulting or conferring" with the Complainant, the employees' exclusive representative.

The parties stipulated that the Respondent distributed to directorate, office and divisional secretaries a survey entitled "Secretarial/Clerical Survey" concerning work performed and time spent on particular work functions and stated that the responses to such survey were to be voluntary. Secretarial personnel are included in the Complainant's exclusively recognized unit. The Respondent's stated purpose in conducting the survey was to determine whether or not to purchase word processing equipment. Thereafter, the Complainant's President requested that secretaries not be required to sign their names to the survey and the Complainant later requested that the survey be withdrawn. Both requests were denied. The parties did not have a negotiated agreement and management did not inform the Complainant about the survey prior to its issuance. As of the time of the filing of unfair labor practice complaint, no decision had been made concerning the acquisition of the word processing equipment.

The Assistant Secretary found that the Respondent's conducting of the subject survey was not violative of the Order. In this regard, he noted that the Federal Labor Relations Council has held that information-gathering devices are permissible under certain circumstances and that in any communication between management and bargaining unit employees a determination must be made as to whether the communication constitutes an attempt to bypass the exclusive representative and deal directly with bargaining unit employees. Under the particular circumstances of the present case, the Assistant Secretary concluded that the subject survey was a permissible information-gathering device and did not reflect an intention on the part of the Respondent to bypass the Complainant and avoid such bargaining responsibility as the Respondent would have had, if, and when, it decided to change working conditions by purchasing the new equipment.

Accordingly, he found that the Respondent's conducting of the "Secretarial/Clerical Survey" was not violative of Section 19(a)(1) and (6) of the Order and he ordered that the complaint be dismissed in its entirety.

distributed to directorate, office and divisional secretaries a survey entitled "Secretarial/Clerical Survey", consisting of a number of questions concerning work performed and time spent on particular work functions. It was stated that the responses to such survey were to be voluntary. Secretarial personnel are included in the Complainant's exclusively recognized unit. The Respondent's stated purpose in conducting the survey was to determine whether or not to purchase word processing equipment. Management did not inform the Complainant about the survey prior to its issuance.

On or about May 10, 1978, Mr. Lyle Wright, the President of the Complainant, made a request to Mr. Paul Cline, the Respondent's Industrial Relations Officer, that secretaries not be required to sign their names to the survey. Wright's request was denied. On May 12, 1978, the Complainant sent a letter to the Respondent's Labor Relations Office requesting that the survey be withdrawn, which request was similarly denied. Approximately 54 percent of the Respondent's secretaries responded to the survey. As of August 25, 1978, no decision had been made concerning the acquisition of the word processing equipment.

FINDINGS AND CONCLUSIONS

I find that the Respondent's conducting of the survey involved herein, among employees exclusively represented by the Complainant, was not violative of Section 19(a)(1) and (6) of the Order. Thus, the Federal Labor Relations Council (Council) has stated that management information-gathering among unit employees is not violative of the Order:

...where management does not, in the course of information gathering: seek to make commitments or counterproposals regarding employee opinions or complaints solicited by means of such devices; indicate that the employees' comments on such matters might have an effect on the employees' status... or gather information regarding employee sentiments for the purpose of using it subsequently to persuade the union to abandon a position taken during negotiations regarding the personnel policies or practices concerned. 3/

The Council has further held, that every direct communication between management and bargaining unit employees is not per se a bypass of the exclusive representative. In the Council's view, each communication must be judged independently and a determination made as to whether that communication constitutes an attempt to bypass the exclusive representative and deal directly with bargaining unit employees. In making that determination, the Council has indicated that both the content and the surrounding circumstances must be considered. 4/

3/ National Aeronautics and Space Administration (NASA), Washington, D.C. and Lyndon B. Johnson Center (NASA), Houston, Texas, 3 FLRC 617, FLRC No. 74A-95 (1975).

4/ Department of the Navy, Naval Air Station, Fallon, Nevada, 3 FLRC 697, FLRC No. 74A-80 (1975).

Under the particular circumstances herein, I find that the Respondent was not obligated to bargain with the Complainant before conducting the voluntary survey employed in the instant case. Thus, in my view, the survey constituted a form of information-gathering sanctioned under the Council's NASA, Johnson Space Center decision, cited above. In this regard, it is noted that no decision has been made by the Respondent to procure new processing equipment and that the information sought was solely for the purpose of making a future determination of whether to purchase the equipment. 5/ Further, the circumstances herein under which the information was collected and the nature of the information sought did not reflect an intention on the part of the Respondent to bypass the Complainant and avoid bargaining responsibility as the Respondent would have had, if, the Respondent had changed working conditions by a decision to make an agreement.

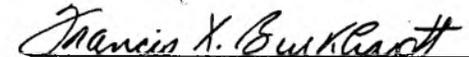
Accordingly, as the Respondent's conduct was not violative of the Order, I shall order that the complaint herein be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 53-10705(CA) and it hereby is, dismissed.

Dated, Washington, D.C.

December 29, 1978



Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

5/ Compare Veterans Administration, Wadsworth, Hospital Center, Los Angeles, California, 4 A/SLMR No. 309, A/SLMR No. 388 (1974). The use of the questionnaire found violative of Section 19(a)(1) and (6) of the Order in that case can be distinguished from the instant survey in that the questionnaire in the Wadsworth case specifically required bargaining unit employees to make a present commitment on a matter affecting employee terms and conditions of employment and upon which a decision had been reached, thus constituting an improper bypass and undermining of the status of the employee's exclusive representative.